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## EXPLICIT BIAS

*Jessica A. Clarke*

**ABSTRACT**—In recent decades, legal scholars have advanced sophisticated models for understanding prejudice and discrimination, drawing on disciplines such as psychology, sociology, and economics. These models explain how inequality is implicit in cognition and seamlessly woven into social structures. And yet, obvious, explicit, and overt forms of bias have not gone away. The law does not need empirical methods to identify bias when it is marching down the street in Nazi regalia, hurling misogynist invective, or trading in anti-Muslim stereotypes. Official acceptance of such prejudices may be uniquely harmful in normalizing discrimination. But surprisingly, many discrimination cases ignore explicit bias. Courts have refused to consider evidence of biased statements by government officials in cases alleging, for example, that facially neutral laws were enacted for the express purpose of singling out Muslims. Courts outright ignore explicit bias when they consider intentional discrimination to be justified by goals such as law enforcement. And courts have developed a “stray remarks doctrine” in employment discrimination cases to prevent juries from hearing evidence of explicit bias. This Article identifies and criticizes legal arguments against consideration of explicit bias, including concerns about the feasibility of inquiries into intent, worry about undermining otherwise legitimate policies, the desire to avoid chilling effects on free speech, and the fear that confronting explicit bias will result in backlash. It argues that discrimination law should dispense with doctrines that shield explicit bias from consideration.

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## INTRODUCTION

White supremacy<sup>1</sup> and misogyny<sup>2</sup> have once again revealed themselves as potent forces in American social life. Political scientists discuss the return of “old-fashioned racism.”<sup>3</sup> Social psychologists document the persistence of blatant racism and dehumanization of Muslims.<sup>4</sup> Economists describe the

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<sup>1</sup> See, e.g., Act of Sept. 14, 2017, Pub. L. No. 115-58, 131 Stat. 1149 (joint resolution of Congress acknowledging the “growing prevalence” of “hate groups that espouse racism, extremism, xenophobia, anti-Semitism, and White supremacy”).

<sup>2</sup> See, e.g., KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 205–06 (2018) (recounting numerous recent examples of explicit misogyny and explaining how it is excused as “locker room talk,” among other things); Corinne A. Moss-Racusin et al., *Can Evidence Impact Attitudes? Public Reactions to Evidence of Gender Bias in STEM Fields*, 39 *PSYCHOL. WOMEN Q.* 194, 197–99 (2015) (analyzing 831 internet comments in response to an article on gender bias and finding 433 negative comments, including many expressing overt sexism); Justin Wolfers, *Evidence of a Toxic Environment for Women in Economics*, *N.Y. TIMES* (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/upshot/evidence-of-a-toxic-environment-for-women-in-economics.html> [<https://perma.cc/B857-2AUJ>] (discussing Harvard doctoral candidate Alice Wu’s award-winning senior thesis documenting overt misogyny in anonymous online comments about women seeking academic jobs in economics); #MeToo, TWITTER, <https://twitter.com/hashtag/metoo> [<https://perma.cc/D65J-HFAM>] (collecting individual revelations of sexual assault and harassment).

<sup>3</sup> See, e.g., Michael Tesler, *The Return of Old-Fashioned Racism to White Americans’ Partisan Preferences in the Early Obama Era*, 75 *J. POL.* 110, 111 (2013) (describing empirical evidence that “indicate[s] that Barack Obama’s association with the Democratic Party has . . . made [old-fashioned racism] a significant factor in white Americans’ partisan preferences after decades of quiescence”); Nicholas A. Valentino et al., *The Changing Norms of Racial Political Rhetoric and the End of Racial Priming*, 80 *J. POL.* 757, 758 (2017) (discussing evidence from nationally representative surveys demonstrating that, “[w]hereas explicit racial rhetoric once seemed aversive to large swaths of American society, such messages are no longer as widely rejected”).

<sup>4</sup> See, e.g., Jordan R. Axt, *The Best Way to Measure Explicit Racial Attitudes Is to Ask About Them*, *SOC. PSYCHOL. & PERSONALITY SCI.* 1, 8 (2017) (in a nonrepresentative online sample of 800,000 people,

increasing social acceptability of racist xenophobia.<sup>5</sup> Sociologists demonstrate how overt racism and sexism continue to drive workplace inequality.<sup>6</sup> During his campaign, President Donald Trump made no secret about his plan to enact a “Muslim ban” in immigration, explaining, “I think Islam hates us.”<sup>7</sup> For those committed to antidiscrimination, explicit evidence of bias was supposed to have an upside: it would render discrimination easy to identify and address.<sup>8</sup> But this is not always so. This Article identifies and criticizes cases in which courts overlook explicit bias. It argues that explicit bias poses a unique threat to antidiscrimination norms. Doctrines that would shield evidence of explicit bias from consideration in discrimination cases should be rejected.

Over the past few decades, legal scholarship on discrimination has turned its attention away from explicit bias, focusing instead on the subtle and complicated ways that bias is expressed. Legal scholars have documented how implicit attitudes, which operate outside of conscious

28% reported explicit racial preferences in favor of white people); Patrick S. Forscher et al., *The Motivation to Express Prejudice*, 109 J. PERSONALITY & SOC. PSYCHOL. 791, 812 (2015), data at <https://osf.io/mfq35> [<https://perma.cc/RJ8A-6EUU>] (reporting that 10% of a sample of 751 undergraduates either agreed with or was neutral with respect to the statement, “Avoiding interactions with Blacks is important to my self-concept”); Nour Kteily et al., *The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization*, 65 J. PERSONALITY & SOC. PSYCHOL. 901, 906, 907 tbl.1 (2015) (reporting that U.S. online survey participants considered Arabs and Muslims less “evolved” than Americans by an average of 10 to 14 points on a scale of 1 to 100).

<sup>5</sup> See Leonardo Bursztyrn et al., *From Extreme to Mainstream: How Social Norms Unravel* 14 (Nat’l Bureau of Econ. Research, Working Paper No. 23415, 2017), <http://www.nber.org/papers/w23415> [<https://perma.cc/2W9A-CYC7>] (discussing experimental evidence that the election of President Donald Trump made online survey participants more willing to openly donate to an organization whose founder advocated “a European-American majority”).

<sup>6</sup> See, e.g., ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY, at xiii (2017) (prefacing an empirical study of employment discrimination cases with the exhortation that “[m]uch of this book is an argument that—in addition to the less visible mechanisms that produce workplace discrimination and inequality—overt racism, sexism, ableism, and ageism must remain part of the scholarly and activist agenda”); Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 229 (2012) (discussing follow-up interviews of employers after an audit study revealed they were less willing to hire black testers, in which “the plurality of employers we spoke with, when considering Black men independent of their own workplace, characterized this group according to three common tropes: as lazy or having a poor work ethic; threatening or criminal; or possessing an inappropriate style or demeanor”). Even the author of the book *Racism Without Racists* acknowledges the resurgence of “overt racism.” EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 223 (5th ed. 2018).

<sup>7</sup> *Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump* (CNN television broadcast Mar. 9, 2016) (transcript available at <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html>) [<https://perma.cc/Z4H2-NEPZ>].

<sup>8</sup> See, e.g., Valentino et al., *supra* note 3, at 760 (describing and disputing the “standard model” of racial priming, which predicts that when racial arguments are made explicitly, people will reject them and their impact will be diminished).

control, predict discrimination based on race, gender, and other group statuses.<sup>9</sup> Arguing that “smoking gun” evidence of discrimination is largely a thing of the past, scholars have described how inequality is baked into structures of interaction in workplaces, schools, housing markets, and other domains of social life.<sup>10</sup> They have offered new economic models for understanding the persistence of inequality.<sup>11</sup> They have proposed new legal rules, such as negligence and recklessness, to replace the law’s fixation with discriminatory intent.<sup>12</sup> Scholarly debates over the validity of these “second generation” models for understanding discrimination and their utility for combating inequality could fill libraries.<sup>13</sup>

By contrast, recent legal scholarship has paid little attention to overt, explicit, and blatant forms of bias.<sup>14</sup> Courts are now surprised when explicit

<sup>9</sup> See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006) (discussing research that “suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions,” and the implications of that research for discrimination law).

<sup>10</sup> See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) (“Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.”).

<sup>11</sup> See, e.g., Richard R.W. Brooks, *The Banality of Racial Inequality*, 124 YALE L.J. 2626, 2629 (2015) (reviewing DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014)) (discussing the claim that, even if racist attitudes were eliminated, black Americans would remain locked in a cycle of disadvantage because white families and social networks perpetuate racial privilege “through a set of seemingly innocuous, if not laudable, choices people take pride in making, such as referring a friend to a job or helping a child pay for college or a down payment on a home”).

<sup>12</sup> See, e.g., Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055 (2017) (proposing a recklessness standard); Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination*, 53 AM. BUS. L.J. 607, 610–11 (2016) (proposing a liability scheme modeled on the criminal law’s approach to differing standards of culpability).

<sup>13</sup> For example, a Westlaw search of the “Law Reviews & Journals” library for the term “implicit bias” yields 2765 results as of November 7, 2018. The overwhelming majority of legal scholarship embraces implicit bias research, but there are a few critics. See, e.g., JONATHAN KAHN, *RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE* 18 (2017) (arguing that scientific innovations are limited in their ability to advance racial justice); Samuel R. Bagenstos, *Implicit Bias’s Failure*, 39 BERKELEY J. EMP. & LAB. L. (forthcoming 2018) (manuscript at 1, 4–5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015031](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015031) [<https://perma.cc/VBX7-NAT2>] (arguing that implicit bias has failed in its political aims of depersonalizing and depoliticizing discrimination); Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1059 (2009) (arguing that “unconscious bias discourse . . . reinforces a misguided preoccupation with mental state” and distracts from the project of redressing material inequality); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 193 (2018) (arguing for a shift in focus to stereotyping).

<sup>14</sup> Recent work to address legal approaches to intentional discrimination has argued that the Supreme Court should adopt a more capacious understanding of discriminatory intent. See, e.g., Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1795–96 (2012) (arguing for a contextual approach to discriminatory intent); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1292 (2018) (arguing for a “return to the appropriately capacious and flexible way in which the Court initially

bias appears.<sup>15</sup> When President Trump’s executive order targeting Muslims for immigration restrictions was first challenged as discriminatory, courts described the extensive evidence of anti-Muslim animus as atypical and unique.<sup>16</sup> While the scholarship on unintentional forms of discrimination has been useful in developing a fuller picture of the causes and consequences of inequality, labels like “implicit” are misfits for the evidence of intentional discrimination cropping up in many cases.<sup>17</sup> Such terms may suggest, contrary to recent events, that old-fashioned prejudice has been eradicated.<sup>18</sup> More generally, legal scholarship has neglected the threat that the legitimation of explicit bias poses to antidiscrimination norms.<sup>19</sup> In their focus on fighting “new” forms of bias, progressives may be leaving the

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proposed to discover unconstitutional, discriminatory intent”); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 151, 155–56 (2016) (arguing that the “capacious conception of animus” employed by the Supreme Court in LGBT rights cases should be applied to race and gender); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 93 (2013) (arguing the Supreme Court should consider the “law’s meaning and impact with attention to the perspectives of the historically excluded”). These scholars have not focused on explicit bias. Compare Haney-López, *supra*, at 1795 (“The Court traditionally has eschewed direct evidence of what specific government actors thought, and for good reasons.”), with Huq, *supra*, at 1270–73 (arguing briefly in favor of consideration of official statements in constitutional cases). This Article’s main argument is that the law should consider statements of explicit bias in intentional discrimination cases. It broadens the focus beyond constitutional law and the Supreme Court to examine the full range of discrimination cases insulating explicit bias from scrutiny.

<sup>15</sup> See, e.g., Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862, 871 (2017) (remarking that evidence of “blatant racial prejudice” among jurors is “rare” in a criminal case in which a juror stated, “I think [the defendant] did it because he’s Mexican and Mexican men take whatever they want”); N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016) (finding “what comes as close to a smoking gun as we are likely to see in modern times” in that “the State’s very justification for a challenged statute hinges *explicitly* on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise”).

<sup>16</sup> See, e.g., Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 591 (4th Cir. 2017) (en banc) (noting that “[i]n the typical case, it will be difficult for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity,” but in this case, “[p]laintiffs point to ample evidence that national security is not the true reason for [the travel ban], including, among other things, then-candidate Trump’s numerous campaign statements expressing animus towards the Islamic faith . . .”), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017); Hawai’i v. Trump, 241 F. Supp. 3d 1119, 1136 (D. Haw. 2017) (“The record before this Court is unique. It includes significant and un rebutted evidence of religious animus driving the promulgation of the Executive Order . . .”), *aff’d on other grounds*, 859 F.3d 741 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

<sup>17</sup> See *supra* notes 15–16.

<sup>18</sup> Cf. Bagenstos, *supra* note 13, at 9 (“Indeed, at a moment in history when overt racism—seen in the reaction among some to the election of a black president, and in a significant part of the movement that elected Donald Trump—once again seems a major factor in our public life, the suggestion that implicit bias is the central problem may be particularly misleading.”); Banks & Ford, *supra* note 13, at 1058–59, 1072–89, 1113–21 (arguing that the “explanation for the prominence of the unconscious bias discourse relates to the comforting narrative it offers about our nation’s progress in overcoming its racist history”).

<sup>19</sup> See *infra* Section I.C.

homeland of equality law—norms against overt discrimination—undefended.

This Article draws attention to ways courts distort discrimination doctrines to overlook explicit bias. For example, the Trump Administration defended its executive order on immigration by arguing it “is not a so-called ‘Muslim ban,’ and campaign comments cannot change that basic fact.”<sup>20</sup> This argument echoes a discarded line of reasoning from equal protection doctrine that insulated facially neutral rules from scrutiny despite explicit evidence that those rules were motivated by bias.<sup>21</sup> In upholding the executive order, the Supreme Court suggested that it was applying a lower standard of review because the plaintiffs had asked it “to probe the sincerity of the stated justifications for the policy by reference to [the President’s] extrinsic statements—many of which were made before [he] took the oath of office.”<sup>22</sup>

This phenomenon goes beyond the Trump Administration. In other equal protection cases, courts turn a blind eye to the obvious use of racial and religious stereotypes if those stereotypes serve other interests, such as national security or law enforcement.<sup>23</sup> And in the employment discrimination context, federal courts have devised a doctrine—called “stray remarks”—to prevent juries from hearing evidence that employers made explicitly discriminatory comments.<sup>24</sup> For example, one court dismissed a case brought by a female investment banker whose supervisor routinely called her “such epithets as ‘bitch,’ ‘cunt,’ ‘whore,’ ‘slut’ and ‘tart,’” reasoning that these remarks were irrelevant to the question of whether she was paid less money in bonuses than her male subordinates because of sex discrimination.<sup>25</sup> These cases deserve attention not only because they deny justice to individual victims of discrimination but also because the failure to confront explicit forms of discrimination may normalize prejudice.<sup>26</sup>

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<sup>20</sup> Petition for a Writ of Certiorari at 26, *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (No. 16-1436), 2017 WL 2391562 [hereinafter *Trump Cert. Pet.*].

<sup>21</sup> See *infra* Section II.A.1 (discussing *Palmer v. Thompson*, 403 U.S. 217 (1971)).

<sup>22</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (offering this reason as one of several bases for distinguishing the travel ban case from “the conventional Establishment Clause claim”).

<sup>23</sup> See *infra* Section II.A.2 (discussing the extension of the doctrine of *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979), to cases involving explicit evidence of intentional discrimination).

<sup>24</sup> See *infra* Section II.B.

<sup>25</sup> *Ferrand v. Credit Lyonnais*, No. 02 CIV.5191(VM), 2003 WL 22251313, at \*10 (S.D.N.Y. Sept. 30, 2003) (granting summary judgment for the employer and disregarding “these ‘stray remarks in the workplace’” because they were “not alleged to have been made as part of any adverse discriminatory employment action taken against” the plaintiff), *aff’d*, 110 F. App’x 160 (2d Cir. 2004).

<sup>26</sup> See *infra* Section I.C.

Courts, advocates, and scholars have advanced a number of legal arguments against considering evidence of explicit bias in discrimination cases. This Article demonstrates these arguments are without merit. One argument maintains that unofficial remarks are not reliable evidence of official intentions.<sup>27</sup> While this concern goes to the weight a court might give an explicit remark, it is not a reason to conclude that all unofficial remarks are irrelevant. Unofficial remarks may be more reliable evidence of intent than official statements crafted for purposes of evading legal liability. Another concern is fear of judicial overreach in invalidating decisions due to the taint of bias, when those decisions would otherwise be sound. But under existing law, the remedy for explicit discrimination will not necessarily be overturning legislation, reinstating the employment discrimination plaintiff, or letting the criminal defendant go free.<sup>28</sup> Discrimination doctrines account for the possibility that an action may be justified on nondiscriminatory grounds, preserving government and employer discretion.<sup>29</sup> Nonetheless, it is important for courts to straightforwardly recognize bias rather than turning a blind eye to it or accepting excuses.

Yet another concern is that using explicit bias as evidence of discrimination will result in repressive forms of censorship by employers and counterproductive forms of self-censorship by politicians.<sup>30</sup> These arguments rest on dubious empirical premises. But ultimately, the threat to free expression must be weighed against the countervailing interests in enforcing equality law. And a final concern is that directly confronting bias will result in backlash against the antidiscrimination project and undermine the

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<sup>27</sup> See, e.g., *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 373–74 (4th Cir. 2018) (en banc) (Niemeyer, J., dissenting) (arguing that courts should not consider a government official's "campaign statements and similar evidence," such as "musings or tweets," when assessing whether a facially nondiscriminatory policy was motivated by invidious intent).

<sup>28</sup> See, e.g., 42 U.S.C. § 2000e-5(g)(2)(B) (2012) (where an employee shows discrimination was a motivating factor for her termination, but her employer demonstrates it would have made the same decision even absent discrimination, reinstatement is not allowed as a remedy); *Foster v. Chatman*, 136 S. Ct. 1737, 1744, 1755 (2016) (reversing the Georgia Supreme Court for failing to consider explicit racial bias on the part of prosecutors in striking potential jurors, and remanding for a new trial); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (holding that, if discrimination was a motivating factor for legislation, the burden shifts to the government, and "[o]nce the burden shifts, a court must carefully scrutinize a state's non-racial motivations to determine whether they alone can explain enactment of the challenged law"). *But see* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) (reversing, but not remanding, a case in which a member of an adjudicatory body made comments suggesting hostility toward a party's sincere religious beliefs).

<sup>29</sup> See *infra* Section III.B.1.

<sup>30</sup> See, e.g., *Int'l Refugee Assistance Project*, 883 F.3d at 374 (Niemeyer, J., dissenting) ("It is hard to imagine a greater or more direct burden on campaign speech than the knowledge that any statement made might be used later to support the inference of some nefarious intent when official actions are inevitably subjected to legal challenges.").



legitimacy of judicial processes.<sup>31</sup> However, it may be impossible to pursue any antidiscrimination policy without backlash. The risk of backlash should also be assessed against the harms of condoning explicit bias.

This Article focuses on Title VII of the Civil Rights Act of 1964 and constitutional cases<sup>32</sup> dealing with discrimination based on race, sex, and religion. It examines when explicit bias is ignored as evidence of discriminatory mistreatment.<sup>33</sup> Comparison of statutory and constitutional contexts is useful because these fields cross-pollinate.<sup>34</sup> While there are important differences—the Constitution applies to public actors, while Title VII applies to many public and private employers—the problem of how to identify intentional discrimination is common to both.<sup>35</sup> Although Title VII scholars have criticized the stray remarks doctrine, they have not given full consideration to the underlying arguments in its favor,<sup>36</sup> perhaps because those arguments are rarely fleshed out in Title VII doctrine. In defending President Trump’s travel ban against constitutional challenge, the government has fully articulated those arguments so they might be challenged with lessons for both contexts.<sup>37</sup> And although constitutional law scholars are beginning to criticize the Trump Administration’s arguments in the travel ban cases, they have not considered the path of Title VII law as a cautionary tale.<sup>38</sup> Courts and advocates should take care not to make arguments that might lead to the adoption of the Title VII stray remarks doctrine in the constitutional context. Moreover, the fact that arguments

<sup>31</sup> See *infra* Section III.D.

<sup>32</sup> While most discrimination claims are brought under the Equal Protection Clause, the First Amendment’s religion clauses also prohibit discrimination against particular religious groups. Establishment Clause cases challenging religious symbols and displays are beyond the scope of this Article, although they are relevant insofar as courts cite them in cases involving discrimination against religious groups.

<sup>33</sup> Harassment qualifies as discriminatory mistreatment because courts conceptualize it as creating unequal workplace conditions. See *infra* note 46. Debates over hate speech regulation entail issues that are beyond the scope of this Article.

<sup>34</sup> See, e.g., William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1013 (1989) (describing how constitutional principles have a “gravitational pull” on statutory interpretation); Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 204–05 (2014) (discussing convergence and divergence in Supreme Court interpretations of race discrimination in constitutional and statutory contexts).

<sup>35</sup> See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2327 (2018) (equal protection case citing Title VII precedent for its holding on discriminatory intent); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248–49 (1989) (plurality opinion) (foundational Title VII case citing equal protection and First Amendment precedents for its holding on how to manage problems of mixed motives).

<sup>36</sup> See, e.g., Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 180 (2012).

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See, e.g., Shawn E. Fields, *Is It Bad Law to Believe A Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273, 277 (2018); Huq, *supra* note 14, at 1270–73.

against consideration of explicit bias arise in the mundane area of Title VII litigation suggests the problem may be judicial resistance to claims of discrimination, not abstract questions of constitutional theory.

Part I of this Article describes the particular harms of explicit discrimination in undermining antidiscrimination norms. Part II exposes how courts insulate explicit biases from scrutiny and redress in discrimination cases. Part III collects and criticizes the legal arguments for altogether ignoring explicit bias. Finally, Part IV argues courts should consider the relevance of biased remarks on a case-by-case basis, alongside other evidence of discriminatory intent.

## I. HARMS OF EXPLICIT BIAS

There are unique dangers when employers or government entities offer explicitly discriminatory rationales for harmful decisions. The failure to recognize this type of overt discrimination may legitimize further discrimination. This may be stating the obvious. And yet, this obvious point bears fleshing out in light of the continued persistence of explicit bias and the curious lack of legal attention to the phenomenon.

### A. Definitions and Scope

Before proceeding, some definitions and caveats are necessary. This Article focuses on discrimination based on race, sex, and religion; other categories are beyond its scope.<sup>39</sup> For purposes of this Article, I define “explicit bias” broadly. By “explicit,” I simply mean expressed, whether spoken aloud, written, or otherwise conveyed to some audience by words or symbols. By “bias,” I mean what a reasonable listener could consider to be views about the attributes of a particular group or the attributes of particular individuals due to group membership.

By “explicit,” I do not mean obvious; bias is often expressed through “coded” language or can be deduced through inference.<sup>40</sup> Close cases might be debated, but a more precise definition is not required for my purposes. This Article criticizes cases in which courts foreclosed inquiry into whether statements were indicative of bias at all by imposing quasi-evidentiary rules or using procedural maneuvers such as summary judgment.

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<sup>39</sup> Sexual orientation has received unique legal treatment and cannot be covered in adequate detail here. *See, e.g.,* Robinson, *supra* note 14, at 151. Age, too, is treated as an exceptional category in discrimination law. *See, e.g.,* Taylor v. Va. Union Univ., 193 F.3d 219, 252 (4th Cir. 1999) (Motz, J., dissenting) (asserting that age discrimination is not the same sort of problem as discrimination based on race and sex).

<sup>40</sup> *See* BONILLA-SILVA, *supra* note 6, at 80 (“Because post-civil rights racial norms disallow the open expression of racial views, whites have developed a concealed way of voicing them.”).

By “bias,” I do not mean just animus. Animus is “simple dislike of a particular group.”<sup>41</sup> Discrimination law is not limited to animus or any other particular emotion; it asks simply whether a person was mistreated due to race, sex, or religion.<sup>42</sup> Thus, my definition does not turn on the speaker’s reasons for expressing bias, which may include simple dislike, in-group preferences, disgust, discomfort, fear, ignorance, false stereotypes, statistically accurate generalizations, paternalism, views about proper behavior or relationships for group members, a desire to achieve status or fit in with an in-group, or any number of other motives.<sup>43</sup> The question is, Did the remark reflect views about race, sex, or religion? The question is not, Did the remark reflect some particular set of views or feelings about those group-based characteristics?

I do not argue that there is anything inherently immoral about biased attitudes or expressions. Whether explicit bias is of moral concern depends on context. For example, there is nothing wrong with the statement: “African Americans have long received inferior educations in the U.S. school system.” What is wrong is to refuse to hire a particular African American on the basis of that generalization.<sup>44</sup> This Article is only concerned with cases in which explicit bias may be evidence of discriminatory mistreatment.

While some of the arguments discussed below may also apply to untargeted hate speech, this Article’s topic is not discrimination “in the air.”<sup>45</sup> Rather, it is focused on “discrimination brought to ground and visited upon” a person or people who allege they suffered harm or lost a material benefit or opportunity on account of that discrimination.<sup>46</sup> My conclusions about

<sup>41</sup> WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 2 (2017).

<sup>42</sup> A few equal protection cases have treated animus according to special doctrinal rules. *Id.* at 3. But these are only a subset of equal protection cases; they are exceptions to the normal approach of analyzing discrimination based on tiers of scrutiny. *Id.* at 3–4. Title VII and other federal civil rights statutes do not limit prohibited motives to animus.

<sup>43</sup> For discussion of some of these motives and how they drive discrimination, see, for example, Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Towards None and Charity for Some—Ingroup Favoritism Enables Discrimination*, 69 *AM. PSYCHOLOGIST* 669, 670 (2014) (in-group favoritism); Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 *N.Y.U. L. REV.* 1464 (2009) (paternalism); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 107–15 (2004) (disgust); and FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 150 (2003) (rational and irrational stereotypes).

<sup>44</sup> *Cf.* SCHAUER, *supra* note 43, at 196 (discussing why it may be morally impermissible to use race as a consideration even when race is a “nonspurious indicator” of some relevant factor).

<sup>45</sup> *Cf.* *Palsgraf v. Long Island R.R.*, 162 *N.E.* 99, 99 (N.Y. 1928) (Cardozo, C.J.) (“Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. ‘Proof of negligence in the air, so to speak, will not do.’”).

<sup>46</sup> *Price Waterhouse v. Hopkins*, 490 *U.S.* 228, 251 (1989) (plurality opinion) (“This is not, as Price Waterhouse suggests, ‘discrimination in the air’; rather, it is, as Hopkins puts it, ‘discrimination brought

explicit bias are limited to contexts in which it may be evidence of intentional discrimination.

Moreover, it is not my argument that discrimination is never morally or legally justified. There may be persuasive reasons to discriminate. But this is a separate question. One question is whether discrimination occurred; another is whether it is justified by, for example, some compelling governmental interest or business imperative. This Article criticizes cases that muddle the two questions, rendering inconsequential the fact of discrimination and its harms.

Whether discrimination law should carve out exceptions for certain official policies of discrimination with remedial motives, such as affirmative action, is also beyond the scope of this Article.<sup>47</sup> There are special doctrinal frameworks for evaluating whether discrimination is justified in such instances.<sup>48</sup> I note, however, that courts are quick to see explicit remarks as evidence of “reverse” discrimination in Title VII cases.<sup>49</sup> And the Supreme Court’s equal protection doctrine does not give a free pass to facially neutral policies where there is evidence that a legislature sought to advantage minorities.<sup>50</sup> The Court has recently given decisive weight to explicit

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to ground and visited upon’ an employee.”). This includes discriminatory workplace harassment that is so “severe or pervasive” that it subjects victims to disadvantageous terms and conditions of employment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (explaining how discriminatory harassment is a violation of Title VII because it “detract[s] from employees’ job performance, discourage[s] employees from remaining on the job, or keep[s] them from advancing in their careers”).

<sup>47</sup> So, too, are discussions of minority group solidarity. *See, e.g.*, TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* 23 (2005).

<sup>48</sup> *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207–08 (2016) (discussing standards for permissible race-conscious affirmative action programs by public universities under the Equal Protection Clause); *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (establishing a framework for analyzing when intentional discrimination is justified to avoid a disparate impact under Title VII); *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987) (expounding on the standards for permissible affirmative action plans under Title VII).

<sup>49</sup> *See, e.g.*, *Ricci*, 557 U.S. at 579 (concluding—based, *inter alia*, on statements by city officials—that a city discarded a promotional exam out of concern that it disadvantaged minority candidates in violation of Title VII); *Lenart v. Coach Inc.*, 131 F. Supp. 3d 61, 70 (S.D.N.Y. 2015) (denying an employer’s motion for summary judgment in an employment discrimination case brought by a male tax lawyer whose evidence of discrimination was that (a) his job duties were taken over by a woman after his position was terminated in a departmental restructuring and (b) a supervisor who was not alleged to have been involved in the decision to fire him had “commented on ‘numerous occasions’ that she would ‘like to have a staff of all women’ . . . and stated after [the] termination that she had created a ‘girl power’ team in New York”).

<sup>50</sup> Consider *Fisher*, an equal protection case that upheld the explicit consideration of race as a factor in admissions to the University of Texas. *Fisher*, 136 S. Ct. at 2207. In that case, opponents of the law argued that the University had a race-neutral alternative: expanding its “Top Ten Percent Law [that] guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class.” *Id.* at 2205. But the Court did not agree that the Top Ten Percent Law was race-neutral,

statements of bias denigrating a member of the Christian majority.<sup>51</sup> This Article's topic is when explicit bias against disadvantaged groups is not even recognized as such.

### B. *Expressive and Material Harms*

When discrimination is explicit, it has material and expressive harms that are intertwined.

The basic injury of discrimination is to suffer disadvantage on account of a forbidden ground such as race, sex, or religion.<sup>52</sup> There are many reasons, grounded in our national commitments to liberty and equality, for forbidding discrimination in both public policy and employment.<sup>53</sup> These reasons include, but are not limited to, the principle that individuals be judged by their own merits, an abhorrence for caste systems and subordination, the right to equal opportunity, freedom from the constraints of repressive group-based stereotypes, a universal commitment to human flourishing, an insistence that every person be treated with equal respect and concern, and fears about the instability and illegitimacy of inequitable governments and institutions. Discrimination on certain grounds, such as race, sex, and religion, requires legal intervention because inequality on those bases is, or has been, a systemic and pervasive problem.<sup>54</sup> Harms to minorities are compounded when discriminatory mistreatment follows them across multiple social domains, as is the case with systems of racial, religious, and gender subordination that span employment and housing markets, educational and criminal justice systems, and public and private interactions.<sup>55</sup>

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noting, "petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment." *Id.* at 2213.

<sup>51</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (upholding a free exercise challenge where an adjudicator disparaged a party's Christian religious beliefs by stating, among other things, that "one of the most despicable pieces of rhetoric that people can use [is] to—to use their religion to hurt others"). Arguably, this plaintiff's particular religious belief—that marriage is between a man and a woman—places him in the minority. Whether the adjudicator's remarks disparaged him because he is a majority-group member, a minority-group member, or a person with his own idiosyncratic faith is immaterial to my argument: courts should give the same attention to explicitly biased remarks when they are directed at women, Muslims, and people of color.

<sup>52</sup> *See, e.g.*, Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1358 (2017) (explaining how the injury of discrimination occurs when race, sex, or another such trait causes disadvantage, apart from the question of blame or institutional liability).

<sup>53</sup> *See, e.g.*, Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 141–61 (2017) (discussing various theories of the harm of discrimination).

<sup>54</sup> *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 93 (2015). The law may also forbid discrimination on certain grounds because it values particular social groups or regards certain traits as irrelevant to one's social standing and employment prospects. *Id.*

<sup>55</sup> *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 139 (2014).

From the victim's perspective, the reasons for prohibiting discrimination apply whether the form that discrimination takes is overt or covert, simple or complex, intentional or mistaken. Legal scholars have long criticized the "perpetrator perspective" of discrimination law that *only* examines the mental state of the discriminator.<sup>56</sup> And they are right. But they are wrong to suggest that the perpetrator's stated intentions are *irrelevant*.<sup>57</sup> Evidence of a perpetrator's discriminatory intent is one way to prove that a victim was denied equal opportunity and suffered material harm because of race, sex, or religion.

Moreover, explicit forms of discrimination can create unique harms. Some of these harms might be categorized as expressive, sending the message that certain people are less worthy of "equal concern and respect."<sup>58</sup> A large body of medical research has linked self-reported discrimination to numerous adverse mental and physical health outcomes.<sup>59</sup> But putting someone in a second-class position "is wrong in itself, regardless of the psychological or economic consequences."<sup>60</sup> This Article does not take a position on whether the core problem of discrimination is in what it expresses

<sup>56</sup> See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978) ("The perpetrator perspective sees racial discrimination not as conditions, but as actions . . . . The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.")

<sup>57</sup> See, e.g., Haney-López, *supra* note 14, at 1795 ("The Court traditionally has eschewed direct evidence of what specific government actors thought, and for good reasons.")

<sup>58</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977). On an expressive theory of the harm of discrimination, the question is when discrimination demeans. In other words, "When does drawing distinctions among people fail to treat those affected as persons of equal moral worth?" DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 7 (2008); see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–45 (2000) (discussing equal protection doctrine).

<sup>59</sup> See, e.g., Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE, Sept. 23, 2015, at 1 (discussing the "growing body of epidemiological evidence . . . documenting the health impacts of racism" and reviewing 293 studies); Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCHOL. BULLETIN 531, 531 (2009) (meta-analysis of 134 studies discussing how perceived discrimination creates adverse health outcomes by triggering the body's stress responses, increasing vulnerability to problems such as cardiovascular disease, and diminishing a person's self-control resources, leading to unhealthy behaviors). This is not to discount the harms of covert forms of bias, which may be damaging because victims blame themselves for their misfortunes. See Kimberly T. Schneider et al., *An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts*, 85 J. APPLIED PSYCHOL. 3, 10–11 (2000) (study of 575 Hispanic workers finding not only negative psychological outcomes from verbal harassment but also that those who reported high levels of exclusion and low levels of verbal harassment experienced even more detrimental effects, perhaps because of the stress of the "ambiguity").

<sup>60</sup> ACKERMAN, *supra* note 55, at 139. Even if a group targeted for indignities was resilient and able to succeed despite its second-class status, that would not justify the treatment of the group as second class. Anderson & Pildes, *supra* note 58, at 1543 ("[T]he State is not justified in heaping indignities on people just because they can 'take it.'").

or in its material consequences.<sup>61</sup> The two types of harm are entangled when discriminatory actions that materially disadvantage a plaintiff are justified by explicit bias.<sup>62</sup>

### C. *Undermining Antidiscrimination Norms*

The failure to confront explicit bias may legitimize discrimination in a number of ways. Most obviously, if the law fails to even acknowledge the most explicit forms of discrimination, it cannot hope to deter discrimination. To the extent that a discriminator can get away with explicitly biased decision-making in one instance, that person is more likely to discriminate in the future.<sup>63</sup> Another way that explicit bias is uniquely harmful is in its effects on bystanders. In some contexts, explicitly biased remarks may persuade an audience that the targets of discrimination are inferior or deserving of mistreatment.<sup>64</sup> A more likely effect is that explicit bias will disable potential allies by causing them to fear that they too will be subjected to abuse if they assist the targets of discrimination.<sup>65</sup> But explicit bias may also operate in more complex ways to legitimize prejudice by undermining antidiscrimination norms.

To understand how discrimination can become normalized, it is helpful to consider research from social psychology. While most recent social psychology has focused on implicit bias, some researchers have attempted to explain overt prejudice.<sup>66</sup> Based on decades of empirical studies, Christian

<sup>61</sup> Nor does this Article take a position on whether intentional discrimination is wrong even when it is not expressed and when it fails to accomplish the material harm that was intended. Compare HELLMAN, *supra* note 58, at 138–68 (arguing discriminatory motives are not what make an action wrong), with Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, in NOMOS LXI: POLITICAL LEGITIMACY (forthcoming) (manuscript at 19), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3159393](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3159393) [<https://perma.cc/MZY7-X34S>] (arguing that a person “may act impermissibly on the basis of prejudicial intentions without expressing those intentions publicly,” even when the action has no effect).

<sup>62</sup> When an explicitly biased action did not cause material harm to a plaintiff, because it was independently justified on some nondiscriminatory ground, there may still be expressive harms. But in such cases, discrimination law eliminates or severely curtails legal liability. See *infra* Sections III.A.3, III.B.1.

<sup>63</sup> See, e.g., Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 519 n.116 (2006) (“It is a fundamental principle of psychology that each time a person engages in an act and suffers no negative consequences, he becomes more likely to engage in that act in the future.”).

<sup>64</sup> Ishani Maitra, *Subordinating Speech*, in SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 94, 97 (Ishani Maitra & Mary Kate McGowan eds., 2012) (explaining how hate speech may persuade its audience “that members of a particular racial group are inferior and so deserving of persecution”).

<sup>65</sup> *Id.* at 97 (“Even those who object to hate speech may feel relieved that they belong to the dominant group (relative to the targets), and thus don’t have to be subjected to similar abuse.”).

<sup>66</sup> Forscher et al., *supra* note 4, at 792 (discussing “the contemporary focus on unintentional bias” despite the persistence of “overt discrimination”).

Crandall and Amy Eshleman developed a model to explain overt prejudice called “justification-suppression.”<sup>67</sup> In this model, everyone experiences “genuine prejudices”—feelings about particular social groups—in some form or another.<sup>68</sup> Rather than openly expressing these prejudices, people usually suppress them. They do this to maintain their own self-conceptions as egalitarian and to avoid violating social norms.<sup>69</sup> But sometimes the desire to suppress one’s prejudices is overcome by justifications: beliefs that “allow otherwise inhibited prejudices to be expressed, free of guilt and social punishment.”<sup>70</sup>

There are any number of justifications for prejudice.<sup>71</sup> Common justifications include arguments that minorities have failed to make progress because they hold different values than the majority,<sup>72</sup> that male dominance in political and economic life is explained by women’s lack of interest in and aptitude for leadership,<sup>73</sup> that victims are to blame for their own misfortunes,<sup>74</sup> and that outsiders are threats.<sup>75</sup> Some people justify prejudice with ideologies like Social Darwinism.<sup>76</sup>

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<sup>67</sup> Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414, 414, 425 (2003) (developing a model to explain “the best known and empirically supported theories [of prejudice], incorporating many of their common elements”).

<sup>68</sup> *Id.* at 416–17; see also Cara A. Talaska et al., *Legitimizing Racial Discrimination: Emotions, Not Beliefs, Best Predict Discrimination in a Meta-Analysis*, 21 SOC. JUST. RES. 263, 263, 285 (2008) (meta-analysis of fifty-seven studies finding “[e]motional prejudices are twice[] as closely related to racial discrimination as stereotypes and beliefs are” and concluding “[t]he central role of emotions and the diminished role of beliefs suggest that people may recruit beliefs as a post-hoc justification for their own emotion-driven behavior”).

<sup>69</sup> Crandall & Eshleman, *supra* note 67, at 420.

<sup>70</sup> Mark H. White II & Christian S. Crandall, *Freedom of Racist Speech: Ego and Expressive Threats*, 113 J. PERSONALITY & SOC. PSYCHOL. 413, 414 (2017). These dynamics are not sequential or independent of one another; justifications may increase feelings of genuine prejudice in a “feedback loop.” Crandall & Eshleman, *supra* note 67, at 433. Crandall and Eshleman acknowledge that “there is little empirical evidence that can be used to sort out whether the justification is a releaser or a cause of genuine prejudice.” *Id.* at 425.

<sup>71</sup> Crandall & Eshleman, *supra* note 67, at 425–32.

<sup>72</sup> *Id.* at 430 (discussing Monica Biernat et al., *Violating American Values: A “Value Congruence” Approach to Understanding Outgroup Attitudes*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 387 (1996)); see also David O. Sears & P. J. Henry, *The Origins of Symbolic Racism*, 85 J. PERSONALITY & SOC. PSYCHOL. 259, 260 (2003) (discussing “symbolic racism” entailing the view that “Blacks’ failure to progress results from their unwillingness to work hard enough”).

<sup>73</sup> See Crandall & Eshleman, *supra* note 67, at 430 (discussing stereotypes as justifications).

<sup>74</sup> *Id.* at 428 (concluding that “a perception of responsibility for a negative fate leads to a negative evaluation of a person or group,” which is then used to justify mistreatment because, as the explanation goes, “bad people deserve bad treatment”).

<sup>75</sup> *Id.* at 431.

<sup>76</sup> *Id.* at 426.



Other justifications work by appealing to cherished American values—such as meritocracy and free speech—to provide cover for racism and sexism. People may argue their prejudices are inconsequential because American systems of advancement and punishment are fundamentally fair.<sup>77</sup> Research suggests the 2008 election of President Barack Obama may have increased popular beliefs that American society is colorblind.<sup>78</sup> White Americans may justify prejudice with the argument that they are now losing ground relative to minority groups.<sup>79</sup> Others may invoke free speech principles.<sup>80</sup> For example, under threat of boycott, one Minneapolis bar owner explained his donation to the Senate campaign of white supremacist David Duke as “just basically free speech.”<sup>81</sup> Free speech justifications characterize anti-racist norms as illegitimate political correctness.<sup>82</sup> One set of studies found that measures of “anti-Black prejudice predicted how likely people were to claim that punishing someone for anti-Black prejudice violated their rights to freedom of speech.”<sup>83</sup> Survey participants high in prejudice were less likely to voice First Amendment objections when the threatened speech was race-neutral, suggesting their free speech concerns were more about the freedom to express racist prejudice than free speech in general.<sup>84</sup> This may partly explain the appeal of President Donald Trump’s rhetorical strategy of assailing “political correctness.”<sup>85</sup>

Unlike theories of implicit bias, which assume people are unaware of their prejudices and would prefer to suppress them, the justification-suppression model suggests many people are aware of their biases and would

<sup>77</sup> See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278–79, 1305–06 (2012).

<sup>78</sup> See, e.g., Cheryl R. Kaiser et al., *The Ironic Consequences of Obama’s Election: Decreased Support for Social Justice*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 556, 556 (2009).

<sup>79</sup> See Robb Willer et al., *Threats to Racial Status Promote Tea Party Support Among White Americans 2* (May 4, 2016) (unpublished manuscript), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2770186](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770186) [<https://perma.cc/2PBW-Q8X3>].

<sup>80</sup> White & Crandall, *supra* note 70, at 414. This is not to say that there are no valid free speech concerns. See *infra* Section III.C (assessing free speech arguments).

<sup>81</sup> Nicole Darrah, *Minneapolis Bar Closes After Employees Learn Owner Donated to White Supremacist David Duke*, FOXNEWS.COM (Sept. 4, 2017), <http://www.foxnews.com/us/2017/09/04/minneapolis-bar-closes-after-employees-learn-owner-donated-to-white-supremacist-david-duke.html> [<https://perma.cc/ST7V-WHAX>].

<sup>82</sup> White & Crandall, *supra* note 70, at 414.

<sup>83</sup> *Id.* at 424 (discussing seven internet surveys with 1078 participants).

<sup>84</sup> *Id.* One study assessed responses to speech that was anti-black versus speech that was anti-police. *Id.* at 417.

<sup>85</sup> See, e.g., *The Economist/YouGov Poll*, YOUGOV 107 (Mar. 10–12, 2016), [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/055qdf83nv/econTabReport.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/055qdf83nv/econTabReport.pdf) [<https://perma.cc/3A36-8PKM>] (reporting that 39% of 201 survey respondents who were likely to vote for Trump in the 2016 primary election thought the main reason people supported Trump’s campaign was that he was “not politically correct”).

prefer to express them.<sup>86</sup> Self-censorship drains mental energy, and the release of prejudice can be a relief.<sup>87</sup> Justifications allow an individual to reconcile her prejudices with social norms.<sup>88</sup> People who express justifications may be attempting to legitimize their prejudices to an audience—justifying discrimination against black people by their supposed lack of work ethic,<sup>89</sup> against women by the fact that “women get pregnant” and leave the workplace,<sup>90</sup> or against Muslims by the threat of terrorism.<sup>91</sup> People may use justifications to legitimize their prejudices to themselves,<sup>92</sup> or they may use them to justify the prejudices of others they sympathize with.<sup>93</sup> When justifications become acceptable writ large, particular forms of discrimination are not seen as morally problematic.<sup>94</sup>

Social norms can constrain people from acting on their prejudices.<sup>95</sup> In experimental research, people prove more likely to act on prejudice when they believe it is socially acceptable, and more likely to condemn bias when

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<sup>86</sup> Crandall & Eshleman, *supra* note 67, at 416 (“Some models of prejudice imply that if people could simply figure out that they were prejudiced, they would quickly take steps to suppress it. Instead, we suggest that people are often highly motivated to seek out justifications that allow the unsanctioned expression of their prejudices.”). There is evidence that people are aware of but underreport their explicit biases. Studies known as “bogus pipeline” experiments, in which people are told that researchers have a sort of polygraph machine that will identify their true feelings, result in more self-reports of explicit bias than those studies in which people are simply asked their attitudes. *See, e.g.*, Jason A. Nier, *How Dissociated Are Implicit and Explicit Racial Attitudes? A Bogus Pipeline Approach*, 8 *GROUP PROCESSES & INTERGROUP REL.* 39, 39 (2005); E. Ashby Plant et al., *The Bogus Pipeline and Motivations to Respond Without Prejudice: Revisiting the Fading and Faking of Racial Prejudice*, 6 *GROUP PROCESSES & INTERGROUP REL.* 187, 188 (2003).

<sup>87</sup> Crandall & Eshleman, *supra* note 67, at 422–23 (discussing research demonstrating that suppression of negative emotions causes both fatigue and anxiety, and impairs performance on tasks).

<sup>88</sup> *Id.* at 420–23.

<sup>89</sup> *See, e.g.*, Pager & Western, *supra* note 6, at 229 (discussing employers’ characterizations of black men “as lazy or having a poor work ethic”).

<sup>90</sup> *See, e.g.*, Moss-Racusin et al., *supra* note 2, at 198 (quoting one online comment: “Women get pregnant. . . . So given the same qualifications, I would rationally go for the man”).

<sup>91</sup> *See, e.g.*, *Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump*, *supra* note 7 (“I think Islam hates us. . . . We have to be very careful. And we can’t allow people coming into this country who have this hatred of the United States.”).

<sup>92</sup> Crandall & Eshleman, *supra* note 67, at 421.

<sup>93</sup> White & Crandall, *supra* note 70, at 414 (“This can be motivated by self-justification, sympathy and concern, or consistency and balance, among many reasons.” (citations omitted)).

<sup>94</sup> Crandall & Eshleman, *supra* note 67, at 417 (“[A]dequately justified prejudices are not even labeled as prejudices (e.g., prejudice toward rapists, child abusers, enemy soldiers.”). The question addressed by social psychology is not whether prejudices are morally justified but how they are socially justified. It takes a moral theory to explain the harms of discrimination and to identify the traits that should be protected. *See supra* Section I.B.

<sup>95</sup> *See, e.g.*, Christian S. Crandall et al., *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 359, 359, 366 (2002).

they believe it is not.<sup>96</sup> For example, in one study, white students were given statistics about whether other students at their university either had or did not have racist beliefs.<sup>97</sup> They were then asked to sit out in the hallway with black students. Those who already had racist beliefs and had received information indicating their beliefs were typical sat farther away from the black students.<sup>98</sup> In another study, people who already held hostile sexist beliefs were more likely to express tolerance for sexism after hearing sexist jokes.<sup>99</sup> And in yet another study, after the election of President Trump, online survey participants were more willing to openly donate to an anti-immigration group whose founder had advocated “a European-American majority, and a clear one at that.”<sup>100</sup> To the extent that the law,<sup>101</sup> elected leaders,<sup>102</sup> and social groups<sup>103</sup> endorse justifications for prejudice, discriminators may be less likely to suppress their prejudices. The legitimization of explicitly biased

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<sup>96</sup> See, e.g., *id.* at 359 (conducting seven studies of 1504 participants and finding that “[t]he public expression of prejudice toward 105 social groups was very highly correlated with social approval of that expression. Participants closely adhere to social norms when expressing prejudice, evaluating scenarios of discrimination, and reacting to hostile jokes”); Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993, 993 (1994) (study demonstrating that cues from other people that racial discrimination is permissible or impermissible affect whether a person will condemn a racist remark); Katie M. Duchschere & John F. Dovidio, *When Memes Are Mean: Appraisals of and Objections to Stereotypic Memes*, 2 TRANSLATIONAL ISSUES PSYCHOL. SCI. 335, 341 (2016) (conducting an online experiment involving memes about Asian stereotypes in which “seeing another person object to the meme increased the likelihood that White participants would object . . . but only when the race of the person was unstated, and not when the person was Asian”).

<sup>97</sup> Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645, 647 (2001).

<sup>98</sup> *Id.* at 648.

<sup>99</sup> See Thomas E. Ford et al., *More Than ‘Just a Joke’: The Prejudice-Releasing Function of Sexist Humor*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 159, 159 (2008) (experiment showing that “for sexist men, exposure to sexist humor can promote the behavioral release of prejudice against women”); see also Thomas E. Ford, *Effects of Sexist Humor on Tolerance of Sexist Events*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1094 (2000) (similar).

<sup>100</sup> Bursztyn et al., *supra* note 5, at 14, 16, 28 (reporting that, prior to the election, 34% of people would donate when their anonymity was not assured, compared with 54% when anonymity was assured, while that gap virtually disappeared after the election).

<sup>101</sup> See, e.g., Cass R. Sunstein, *Unleashed*, 85 SOC. RES. 73, 74 (2018) (discussing how law can change social norms through a “signaling effect” in “offering people information about what other people think, or about what it is appropriate to think”). For a historical example, see MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY* 217–20 (1983), which discusses how events of the 1970s and 1980s, such as the high-profile exoneration of KKK members in a murder trial, gave “green lights” to racial violence and discrimination during the Reagan era.

<sup>102</sup> See Bursztyn et al., *supra* note 5, at 2.

<sup>103</sup> See Crandall et al., *supra* note 95, at 374 (reporting on studies showing “[t]he acceptability of discriminatory acts and expressions of hostility . . . closely follow social norms,” a conclusion that follows the “common sense” that “[p]eople reflect the social milieu in which they live”).

attitudes may therefore increase the prevalence of discrimination and further entrench inequality.

Stereotypes and victim-blaming narratives are an especially pernicious set of ideas to legitimize, especially those that are “true,” in the sense that they have some basis in fact.<sup>104</sup> Not only do these narratives justify discrimination to perpetrators, they may also justify it to targets. Discriminatory beliefs then become self-fulfilling prophecies. As targets of discrimination come to understand their opportunities to be constrained, they lower their sights and do not make investments in their own human capital.<sup>105</sup> Thus, a girl who sees the technology field as hostile to women is unlikely to pursue studies in computer science. As a result, fewer women end up qualified for jobs in technology, and the industry points to the lack of qualified women as the justification for the dominance of men in the industry.<sup>106</sup> Certainly, implicit signals and structures can have this result. But blatant forms of discrimination make the message of unwelcomeness all the more clear to minority group members.<sup>107</sup> These dynamics are likely to increase social divisions and foster intergroup hostility.<sup>108</sup>

## II. HOW COURTS OVERLOOK EXPLICIT BIAS

Despite the harms of discrimination motivated by explicit bias, many courts have categorically excused, erased, or ignored evidence of biased remarks rather than considering their relevance on a case-by-case basis. This Part will describe constitutional discrimination cases that disregard evidence that laws were enacted for explicitly discriminatory purposes because those laws are facially neutral, or because government officials intended to achieve some nondiscriminatory end, such as law enforcement or national security. It will then discuss the Title VII “stray remarks doctrine” that allows courts

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<sup>104</sup> See, e.g., SCHAUER, *supra* note 43, at 139–41.

<sup>105</sup> See, e.g., David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 64–66, 78–85 (1998).

<sup>106</sup> See, e.g., *id.* at 64–65 (“[S]tatistical stereotypes may act as self-fulfilling prophecies. Because the individual is judged on the basis of her membership in a group rather than her individual merit, discrimination reduces incentives for its victims to acquire human capital.”).

<sup>107</sup> Cf. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1643 (1991) (“In the usual case of discrimination, the assumption is that a minority employee will perceive that there is discrimination in society and will respond by underinvesting in human capital. There is a chance, however, that the minority employee may not be well attuned to the level of discrimination in society as a whole and therefore may not respond in this way.”).

<sup>108</sup> See, e.g., Valentino et al., *supra* note 3, at 769 (“As the public discourse around issues of social welfare, immigration, national security, and a whole host of other issues becomes highly racialized and explicitly hostile, the potential for open racial conflict may rise.”).

to cast aside explicitly biased remarks in considering whether an employee was a victim of discrimination. In both these contexts, while explicitly biased remarks may constitute relevant evidence of intentional discrimination, courts have summarily refused to consider them.

The purpose of this Part is to identify dysfunctional patterns rather than to describe authoritative rules. This Article is focused on contexts in which established doctrine requires rather than forecloses consideration of explicit bias.<sup>109</sup> One of its main arguments is that these cases run contrary to the best interpretations of binding Supreme Court precedent. But the Trump Administration is advancing legal arguments for ignoring explicit bias.<sup>110</sup> It is therefore urgent that these arguments be critically analyzed, lest they become binding doctrine. Moreover, law is not made only by the Supreme Court.<sup>111</sup> Appellate courts cannot and do not correct every erroneous lower court decision.

The purpose of this Part is not necessarily to take issue with the outcomes of any of the cases it describes. Just because a decision was partly motivated by bias does not mean a court should overturn that decision. As will be discussed in Part III, sometimes a law or employment decision can be justified independently on nondiscriminatory grounds.<sup>112</sup> This Part highlights discrimination cases in which explicit bias was wrongly excluded from consideration altogether.

#### A. *Constitutional Law*

In constitutional cases, courts may disregard evidence that laws were enacted for explicitly discriminatory purposes based on two misguided premises: (1) that all that matters is that the law is facially neutral, and (2)

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<sup>109</sup> This Article does not analyze contexts in which courts ignore evidence of explicit bias because they are required to do so by bright-line rules, such as in Fourth Amendment cases. *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that “[s]ubjective intentions,” including racially discriminatory animus, “play no role in ordinary, probable-cause Fourth Amendment analysis”). Also excluded from this Article’s analysis are doctrines that limit an entity’s liability for the acts of its constituents, such as the limitation of municipal liability for civil rights violations committed by policymakers under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), or the limitations on employer liability for sexual harassment by supervisors under *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761–62 (1998). While such doctrines deserve scholarly criticism, they raise issues beyond the scope of this Article.

<sup>110</sup> *See infra* Part III.

<sup>111</sup> *See, e.g.,* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1185 (2017) (providing evidence of dialectical processes in Supreme Court and lower federal court decision-making in constitutional cases); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (because the Supreme Court decides relatively few cases, “constitutional law cannot be fully understood by looking only at the Supreme Court and its decisions”).

<sup>112</sup> *See infra* Section III.B.

that all that matters is that government officials intended to achieve another end, such as law enforcement or national security.

### 1. *Facial Neutrality*

A strain of argument in constitutional discrimination cases posits that courts should not strike down policies motivated by explicit bias if those policies are facially neutral. While this strain has lain dormant for some time, it is now at risk of revival by the Trump Administration.

An infamous example of this argument is the Civil Rights Era case *Palmer v. Thompson*.<sup>113</sup> In 1962, a district court ordered that the City of Jackson, Mississippi desegregate its parks and recreational facilities, including its swimming pools.<sup>114</sup> Rather than comply with that order, the City opted to close all the pools.<sup>115</sup> The mayor had told the local newspaper that “neither agitators nor President Kennedy will change the determination of Jackson to retain segregation.”<sup>116</sup> He had received commendation from Mississippi’s governor “for his pledge to maintain Jackson’s present separation of the races.”<sup>117</sup> The City’s official justification for closing the pools was its concern that integrated swimming pools could not be operated safely or economically—based on the unstated premise that white people would not be willing to swim with black people.<sup>118</sup>

In 1971, the Supreme Court ruled that the pool closure did not violate the Equal Protection Clause. The policy was race-neutral because “the city has closed the public pools to black and white alike.”<sup>119</sup> The Court noted that it had never held a law “violate[d] equal protection solely because of the motivations of the men who voted for it.”<sup>120</sup> This argument drew on a long history of judicial skepticism of intent-based inquiries.<sup>121</sup> In dissent, Justice Byron White argued the pool closure was not race-neutral. Considered in context, the pool closure was “an expression of official policy that Negroes are unfit to associate with whites.”<sup>122</sup> The dissent explained:

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<sup>113</sup> 403 U.S. 217 (1971).

<sup>114</sup> *Id.* at 219.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 250 (White, J., dissenting).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 260.

<sup>119</sup> *Id.* at 225–26 (majority opinion). Yet racial discrimination often harms both black and white people. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 10–11 (1967) (striking down a ban on interracial marriage even though it applied equally to white and black people).

<sup>120</sup> *Palmer*, 403 U.S. at 224.

<sup>121</sup> *See, e.g.,* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 8–10 (2016) (discussing skepticism of intent-based arguments in constitutional law cases during the era of *Plessy v. Ferguson*, 163 U.S. 537 (1896), from 1876 through 1954).

<sup>122</sup> *Palmer*, 403 U.S. at 240–41 (White, J., dissenting).

Whites feel nothing but disappointment and perhaps anger at the loss of the facilities. Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority.<sup>123</sup>

*Palmer* was never expressly overruled. But in later equal protection cases, the Supreme Court walked back on its doctrine, clarifying that just because a law is neutral on its face does not mean it survives equal protection scrutiny.<sup>124</sup> Scholars regard the 1970s as a turning point for equal protection jurisprudence, when the Court rejected effects-based analysis in favor of a nearly exclusive focus on intent.<sup>125</sup> The turn away from *Palmer* has been so complete that it is now “generally taken for granted” that facially neutral actions are invalid if motivated by discriminatory intent.<sup>126</sup> Nor does the facial neutrality of a law enacted to discriminate against a religious minority save it from an Establishment Clause challenge.<sup>127</sup>

Nonetheless, President Trump’s defense of his 2017 executive orders barring travel to the United States by nationals of certain predominantly Muslim countries<sup>128</sup> echoed the reasoning of *Palmer v. Thompson*.<sup>129</sup> During the 2016 presidential campaign, Trump made a number of statements of his anti-Muslim views and his plan to ban Muslim immigration once elected.<sup>130</sup> In March 2016, Trump gave a televised interview in which he stated, “I think Islam hates us,” and “[W]e can’t allow people coming into this country who

<sup>123</sup> *Id.* at 268.

<sup>124</sup> *See, e.g.,* *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (striking down a racially neutral felon disenfranchisement law enacted by the Alabama Constitutional Convention in 1901 because the law had been motivated by a “zeal for white supremacy”); *Washington v. Davis*, 426 U.S. 229, 243 (1976) (interpreting *Palmer* as turning on the City’s legitimate purposes of preserving the peace and the public fisc, and rejecting “the proposition that the operative effect of the law rather than its purpose is the paramount factor”).

<sup>125</sup> Eyer, *supra* note 121, at 34–35.

<sup>126</sup> *Id.* at 4.

<sup>127</sup> *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.”).

<sup>128</sup> *See* Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), *revoked by* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The third iteration of the travel ban barred or limited immigration of citizens from six nations that are predominantly Muslim (Iran, Libya, Syria, Yemen, Somalia, and Chad) and two that are not (North Korea and Venezuela). Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>129</sup> Reply Brief for the Petitioners at 9, *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (No. 16-1436), 2017 WL 2610075 [hereinafter *Trump Reply*] (“Respondents do not point to any case that supports impugning an Executive Order that is neutral on its face and in operation based on a candidate’s campaign-trail comments.”).

<sup>130</sup> *See, e.g.,* Faiza Patel & Rachel Levinson-Waldman, *The Islamophobic Administration*, BRENNAN CTR. FOR JUST. 2 (Apr. 19, 2017), [https://www.brennancenter.org/sites/default/files/publications/BCJ\\_Islamophobic\\_Administration.pdf](https://www.brennancenter.org/sites/default/files/publications/BCJ_Islamophobic_Administration.pdf) [<https://perma.cc/8BKH-2R28>] (listing remarks).

have this hatred of the United States.”<sup>131</sup> In later interviews, he candidly acknowledged that he planned a “Muslim ban” on immigration, although he could not call it that because “[p]eople were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim.”<sup>132</sup> In January 2017, Rudolph Giuliani stated on television that President Trump had asked for his advice on how to implement a “Muslim ban,” saying, “Put a commission together. Show me the right way to do it legally.”<sup>133</sup> In granting a temporary restraining order to stop enforcement of the travel ban, one district court held that “[t]hese statements, which include explicit, direct statements of President Trump’s animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump’s promised Muslim ban.”<sup>134</sup>

But not all federal judges agreed. In analyzing an Establishment Clause challenge to the first version of the travel ban, one district court accepted the Trump Administration’s argument, asking only whether the face of the order itself was “neutral with respect to religion.”<sup>135</sup> The plaintiffs had argued religious discrimination was apparent from a provision of the order directing that “the Secretary of State . . . ‘prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.’”<sup>136</sup> President Trump had explained in a televised interview that this provision was intended to benefit Christians.<sup>137</sup> But the court held the

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<sup>131</sup> *Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump*, *supra* note 7.

<sup>132</sup> *Meet the Press* (NBC television broadcast July 24, 2016) (transcript available at <https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706> [<https://perma.cc/SWF5-7VUR>]).

<sup>133</sup> Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says — and Ordered a Commission to Do It ‘Legally,’* WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally> [<https://perma.cc/7LC4-5YQ3>].

<sup>134</sup> *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 558–59 (D. Md. 2017), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>135</sup> *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 34–35, 38 (D. Mass. 2017) (denying a motion for a temporary restraining order and concluding that the plaintiffs were not likely to succeed on their Establishment Clause claim).

<sup>136</sup> *Id.* at 34 (emphasis omitted).

<sup>137</sup> See David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, CBN NEWS (Jan. 27, 2017), <https://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees> [<https://perma.cc/3QTM-L5W8>] (“If you were a Muslim you could come in [from Syria], but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was



provision was not discriminatory because it “could be invoked to give preferred refugee status to a Muslim individual in a country that is predominately Christian.”<sup>138</sup>

The second iteration of the travel ban omitted the provision with respect to minority religions, but retained the bar on travel by nationals of six majority-Muslim nations.<sup>139</sup> The Fourth Circuit concluded that it was likely that the new version still violated the Establishment Clause.<sup>140</sup> But three judges dissented, arguing that the President’s explicitly biased remarks were categorically irrelevant, a position that had previously been advanced in a dissent by five Ninth Circuit judges.<sup>141</sup>

In September 2017, the Trump Administration issued a third iteration of its travel ban, this time limiting travel from six majority-Muslim nations, Venezuela, and North Korea.<sup>142</sup> The proclamation announcing the ban stated that these countries were selected because they had inadequate procedures for sharing information about whether their nationals presented security threats to the United States.<sup>143</sup> The Supreme Court upheld this version of the ban against an Establishment Clause challenge.<sup>144</sup> In the opinion, the Court declined to adopt a rule insulating all facially neutral policies regarding the entry of noncitizens from judicial scrutiny.<sup>145</sup> Rather, it assumed, without deciding, “that we may look behind the face of the Proclamation to the extent

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persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.”)

<sup>138</sup> *Louhghalam*, 230 F. Supp. 3d at 35. The court did consider the President’s statements with respect to the plaintiffs’ Equal Protection Clause claim but concluded that it had to defer to the President’s “delicate policy judgment” in the immigration domain. *Id.* at 33–34.

<sup>139</sup> See *supra* note 128 and accompanying text.

<sup>140</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 620 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>141</sup> *Id.* at 649–51 (Niemeyer, J., dissenting) (discussing *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc)).

<sup>142</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2405 (2018).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 2423 (concluding the plaintiffs were not likely to succeed on the merits of their Establishment Clause claim and reversing the grant of a preliminary injunction).

<sup>145</sup> *Id.* at 2420 (“[O]ur inquiry into matters of entry and national security is highly constrained. We need not define the precise contours of that inquiry in this case.”).

of applying rational basis review.”<sup>146</sup> The Court also refused to hold that the President’s statements regarding Muslims were categorically irrelevant.<sup>147</sup>

But the Court’s analysis gave short shrift to these statements, which it characterized as “extrinsic evidence,” and heavy weight to the policy’s facial neutrality.<sup>148</sup> Four times the Court repeated that the travel ban was facially neutral.<sup>149</sup> As for the President’s statements, “many . . . were made before the President took the oath of office.”<sup>150</sup> In any event, the Court reasoned that “the issue before us is not whether to denounce the statements.”<sup>151</sup> It saw the statements as extrinsic to the question in the case: whether the travel ban’s stated justification—preventing foreigners who had not been adequately vetted from entering the United States—had a rational basis. In answering that question, the Court made no reference to the President’s statements.<sup>152</sup> It was as though the Court were analyzing a hypothetical situation in which the biased statements had never been made.<sup>153</sup> It noted that “[t]he entry suspension is an act that is well within executive authority and could have been taken by any other President.”<sup>154</sup> In dissent, Justice Sonia Sotomayor agreed that the issue was not “whether to denounce” the President’s statements.<sup>155</sup> The issue, rather, was whether those statements, along with the other available evidence, suggested that “the primary purpose of the

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<sup>146</sup> *Id.* The Court’s “starting point” was the test set forth by *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), which asks “only whether the policy is facially legitimate and bona fide,” a standard the travel ban would meet. *Trump*, 138 S. Ct. at 2420. But the Court did not stop there, due to the Solicitor General’s concession at oral argument that *Mandel* would not end the analysis of a hypothetical situation in which an avowedly anti-Semitic President asked his cabinet to formulate a neutral policy in accord with his anti-Semitic views, and the policy that emerged was a ban on travel from Israel. Transcript of Oral Argument at 16–17, *Trump*, 138 S. Ct. 2392, (No. 17-965). The Solicitor General argued that the travel ban was distinguishable from this hypothetical situation because the travel ban was supported by a “cabinet-level recommendation” of national security risk. *Id.* at 19.

<sup>147</sup> *Trump*, 138 S. Ct. at 2420 (“[W]e may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”).

<sup>148</sup> *See id.* at 2420–23.

<sup>149</sup> *Id.* at 2418 (“[T]he issue before us is . . . the significance of [the President’s] statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”); *id.* (“The Proclamation, moreover, is facially neutral toward religion.”); *id.* at 2421 (“The text says nothing about religion.”); *id.* at 2423 (distinguishing the Japanese internment case, *Korematsu v. United States*, 323 U.S. 214 (1944), on several grounds, including the fact that the travel ban is “a facially neutral policy”).

<sup>150</sup> *Id.* at 2418.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 2420–23.

<sup>153</sup> *See id.* at 2421 (“[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”).

<sup>154</sup> *Id.* at 2423.

<sup>155</sup> *Id.* at 2438 (Sotomayor, J., dissenting).

Proclamation is to disfavor Islam and its adherents by excluding them from the country.”<sup>156</sup> She concluded that “[t]he answer is unquestionably yes.”<sup>157</sup>

Whatever the lessons of *Trump v. Hawaii* might be, they are limited to challenges to immigration policies involving the entry of noncitizens, and likely only those policies implicating national security.<sup>158</sup> Just one Term prior to *Trump v. Hawaii*, the Supreme Court considered the public statements of legislators as evidence of a racial gerrymander.<sup>159</sup> Nonetheless, the Trump Administration has attempted to advance the facial neutrality argument in other contexts. It argued that the President’s biased statements were irrelevant in an equal protection case challenging the rescission of the Deferred Action for Childhood Arrivals (DACA) program on the ground that the President’s remarks about Mexicans demonstrate he was motivated by racial animus.<sup>160</sup>

Thus, the Trump Administration may be attempting to give new life to *Palmer*’s argument that courts should ignore evidence that explicit bias inspired a facially neutral rule. Moves in this direction will further eviscerate the potential for equal protection doctrine to protect minorities. Contemporary equal protection doctrine is fixated on intent, eschewing any test based on effects.<sup>161</sup> If a plaintiff cannot argue that discriminatory intent violates the Equal Protection Clause, and she cannot argue that discriminatory effects violate the Equal Protection Clause, then she is only able to challenge official policies of explicit segregation, which are all but gone. This would render the Equal Protection Clause’s guarantee of racial nondiscrimination useful only to invalidate affirmative action programs.<sup>162</sup>

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2419–20 (majority opinion) (explaining that a more deferential standard of review applies with respect to immigration policy, and that “our inquiry into matters of entry and national security is highly constrained”); see also *id.* at 2420 n.5 (“[A] circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals.”); *id.* at 2423 (distinguishing *Korematsu* on several grounds, including the fact that the case involved “forcible relocation of U.S. citizens”).

<sup>159</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1475–78 (2017). And in the same Term as *Trump v. Hawaii*, the Supreme Court affirmed the relevance of explicit statements of anti-religious bias in a Free Exercise Clause challenge to an adjudication by a Colorado Commission. See *supra* note 51 (discussing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018)).

<sup>160</sup> *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276–77 (E.D.N.Y. 2018) (“Defendants do not defend the President’s comments but argue instead that the court should simply ignore them.”). In that case, the district judge held that the plaintiffs’ allegations of racial animus were sufficient to survive a Rule 12(b)(6) motion to dismiss. *Id.* at 277.

<sup>161</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (“[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose . . . . This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute.”).

<sup>162</sup> Cf. *Haney-López*, *supra* note 14, at 1781–84.

## 2. Rationalized Bias

In other constitutional cases in which courts refuse to consider explicit bias, the underlying assumption may be that discrimination is permissible if it is intended to achieve some nondiscriminatory end, such as protecting national security, controlling crime, or winning trials or elections.

This is a distortion of the logic of a 1979 equal protection precedent, *Personnel Administrator of Massachusetts v. Feeney*.<sup>163</sup> *Feeney* was a sex discrimination lawsuit challenging a Massachusetts statute giving absolute employment preferences to veterans.<sup>164</sup> At the time, women were restricted from pursuing most aspects of military service.<sup>165</sup> As a result, the veterans' preference "operate[d] overwhelmingly to the advantage of males."<sup>166</sup> The plaintiff argued that the severe impact on women's opportunities was "too inevitable to have been unintended."<sup>167</sup> But the Supreme Court saw no discrimination. It understood the veterans' preference law not as expressing women's inferiority, but, rather, as expressing the honor and value of military sacrifice.<sup>168</sup> *Feeney* set forth a rule: that discriminatory purpose means "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>169</sup> Courts have invoked this rule to justify a wide array of practices with dramatic and devastating discriminatory impacts.<sup>170</sup>

In a sleight of hand, courts also invoke *Feeney* to foreclose inquiry into discriminatory intent. *Ashcroft v. Iqbal* took *Feeney*'s "in spite of" logic a step further, eliminating the very possibility of discovering evidence of explicit bias due to the exigencies of the War on Terror.<sup>171</sup> Shortly after the

<sup>163</sup> 442 U.S. 256 (1979).

<sup>164</sup> *Id.* at 259–65. *Feeney*'s claim rested on an equal protection theory because Title VII includes an exception for veterans' preferences. See 42 U.S.C. § 2000e–11 (2012).

<sup>165</sup> *Feeney*, 442 U.S. at 283–84 n.1 (Marshall, J., dissenting).

<sup>166</sup> *Id.* at 259, 270 (majority opinion) ("When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female.").

<sup>167</sup> *Id.* at 276.

<sup>168</sup> *Id.* at 265 ("The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service . . ."). The majority refused to inquire into the obvious and explicit history of sex discrimination in the military or the gendered premises of the state's valorization of military service. *Id.* at 278 ("[T]he history of discrimination against women in the military is not on trial in this case.").

<sup>169</sup> *Id.* at 279. This rule has a philosophical pedigree: the doctrine of "double effect," under which "it may be permissible to perform an act with both a good effect and a bad effect, provided that the bad effect is a mere side effect; if it is either your goal or a means to your goal, the act is forbidden." Siegel, *supra* note 14, at 47 n.230 (quoting SHELLY KAGAN, *NORMATIVE ETHICS* 103 (1998)); *id.* at 47 (critiquing the doctrine of double effect in *Feeney* for forestalling any interrogation of the "proportionality of the government's ends and means").

<sup>170</sup> Siegel, *supra* note 14, at 50 (listing examples).

<sup>171</sup> 556 U.S. 662, 676–77 (2009).

World Trade Center attacks on September 11, 2001, plaintiff Javaid Iqbal and approximately 700 other noncitizens, almost all from South Asia, the Middle East, or North Africa, were rounded up and detained for immigration violations and related infractions.<sup>172</sup> Many of them were arrested after members of the public, suspicious of their Muslim, Middle Eastern, and South Asian neighbors, called in anonymous tips to the FBI.<sup>173</sup> While investigators may initially have had reasons to suspect some of the detainees had been involved with the September 11 attacks,<sup>174</sup> most would never have aroused any suspicion were it not for their race and religion.<sup>175</sup>

Iqbal and the other detainees all ended up on an FBI list of people connected to the September 11 investigation.<sup>176</sup> However, the government never came forward with any evidence linking Iqbal to September 11.<sup>177</sup> Indeed, none of the over 700 detainees were ever convicted of any terrorism-related offenses.<sup>178</sup> A report by the Department of Justice's Office of the Inspector General concluded that labels related to the September 11 investigation "were applied to many aliens who had no connection to terrorism."<sup>179</sup> While waiting to be cleared, some of these detainees were imprisoned for months in a special unit of New York's Metropolitan Detention Center,<sup>180</sup> where they were confined to cells except for one hour a

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<sup>172</sup> Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 414 (2017); see also OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2, 21, 41–42 (2003), <https://oig.justice.gov/special/0306/full.pdf> [<https://perma.cc/7G2E-HHK7>] [hereinafter OIG REPORT].

<sup>173</sup> OIG REPORT, *supra* note 172, at 15–16. For example, one tipster expressed concern that there were "numerous Middle Eastern men" working at all hours at a nearby grocery store. *Id.* at 17.

<sup>174</sup> Sinnar, *supra* note 172, at 420 ("Although none of the detainees were ultimately implicated in the attacks, the initial information in [some] cases included facts that would likely have created an investigative interest independent of racial or religious affiliation. In many other cases, however, no such individualized factual basis for suspicion appears to have existed." (footnote omitted)).

<sup>175</sup> This is not to say law enforcement can never consider a particular suspect's appearance or background in deciding who to investigate. This practice may be narrowly tailored to meet law enforcement needs. But in *Iqbal*, the defendants imprisoned the plaintiffs for months because of race and religion without any apparent law enforcement justification.

<sup>176</sup> OIG REPORT, *supra* note 172, at 2.

<sup>177</sup> Sinnar, *supra* note 172, at 413 ("[D]uring the five years in which [Iqbal] pursued the case, the government never publicly indicated that it had had a credible basis for suspecting him of terrorism, although it presumably had every incentive to share such information.").

<sup>178</sup> *Id.* at 423–24. Three detainees were charged but "acquitted, and the government repudiated its case against them and investigated the prosecutors who brought the case for ethical violations." *Id.* at 423. Zacarias Moussaoui, who pleaded guilty to involvement in the September 11 attacks, was not one of these detainees; he was arrested *before* September 11. *Id.* at 424 n.348.

<sup>179</sup> OIG REPORT, *supra* note 172, at 70.

<sup>180</sup> *Id.* at 51–52, 182.

day, suffered physical and verbal abuse, and were denied contact with the outside world.<sup>181</sup>

After they were eventually released, the detainees brought suit against government officials, including Attorney General John Ashcroft, alleging intentional discrimination based on race, religion, and national origin.<sup>182</sup> The defendants moved to dismiss, arguing that the claims of discriminatory intent were not plausible, and the Supreme Court agreed.<sup>183</sup> In applying the substantive law, the only equal protection precedent the Court discussed was *Feeney*.<sup>184</sup> Analyzing the case under *Feeney*, the Court asked whether government officials had acted “‘because of,’ not merely ‘in spite of,’” a discriminatory impact.<sup>185</sup> The Court concluded it was implausible that high-level law enforcement officers would act with discriminatory intent.<sup>186</sup> Because “[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers,” the Court reasoned that “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”<sup>187</sup> The Court concluded that all the complaint “plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”<sup>188</sup> This “obvious alternative explanation”—protecting homeland security—ruled out discriminatory intent.<sup>189</sup>

Because the complaint was dismissed at the pleading stage, *Iqbal* never had a chance to engage in discovery to uncover evidence of discriminatory intent on the part of government officials.<sup>190</sup> Other detainees in a related

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<sup>181</sup> *Id.* at 152 (discussing the recreation policy allowing “one hour of recreation a day, five days a week”); *id.* at 142 (stating “the evidence indicates a pattern of physical and verbal abuse against some September 11 detainees”); *id.* at 113 (describing the “communications blackout”).

<sup>182</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 676–77.

<sup>185</sup> *Id.* at 676 (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>186</sup> *Iqbal*, 556 U.S. at 682.

<sup>187</sup> *Id.* *Iqbal* was Pakistani, not Arab. Out of the 762 detainees, 254 were from Pakistan. *Sinnar*, *supra* note 172, at 417. *Sinnar* explains that the groups “Arab” and “Muslim” became conflated in “the post-9/11 period, when race and religion merged in social constructions of the enemy.” *Id.* at 418.

<sup>188</sup> *Iqbal*, 556 U.S. at 683.

<sup>189</sup> *Id.* at 682.

<sup>190</sup> This is a general criticism of *Iqbal*’s holding. *See, e.g.*, *Sinnar*, *supra* note 172, at 428 (“Legal scholars noted that the information needed to plead discriminatory intent, such as facts regarding the

lawsuit<sup>191</sup> alleged that Ashcroft had expressed anti-Muslim animus, reportedly saying, “Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.”<sup>192</sup> This statement “identif[ies] Christianity by its central theological tenet, but Islam, in contrast, by the views of a small group of extremists.”<sup>193</sup> After September 11, Ashcroft had also announced: “Let the terrorists among us be warned. If you overstay your visa even by one day, we will arrest you. If you violate a local law we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible.”<sup>194</sup> This sounds suspiciously like what happened, not to terrorists, but to South Asian and Middle Eastern immigrants with no involvement in terrorism.<sup>195</sup>

If the plaintiffs had been permitted to depose government officials, they may have uncovered additional evidence. Journalist Steven Brill reported, based on a composite of sources, that

Ashcroft told [FBI Director] Mueller that any male from eighteen to forty years old from Middle Eastern or North African countries whom the FBI simply learned about was to be questioned and questioned hard. And anyone from these countries whose immigration papers were out of order—anyone—was to be turned over to the INS.<sup>196</sup>

According to Brill’s sources, when Mueller expressed qualms about a “dragnet” that would entangle suspects “simply because they were Muslim

defendant’s state of mind or the internal development of government policies, would frequently be within the defendant’s sole possession.”)

<sup>191</sup> This lawsuit suffered its own defeat in the Supreme Court in 2017. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017) (holding that the plaintiffs had no implied right of action to bring suit for most of the alleged constitutional violations and that federal officers had a qualified immunity defense against the plaintiffs’ statutory claims). In the interest of full disclosure, I was a part of the team that represented the plaintiffs in the *Ziglar* litigation, then-captioned *Turkmen v. Ashcroft*, from 2007 to 2008.

<sup>192</sup> Fourth Amended Complaint and Demand for Jury Trial ¶ 60(d), *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307) [hereinafter *Turkmen Complaint*]. Ashcroft’s office issued a repudiation of the statement, saying the remarks “do not accurately reflect the attorney general’s views.” Dan Eggen, *Ashcroft Disputes Report on Islam Views*, WASH. POST (Feb. 12, 2002), <https://www.washingtonpost.com/archive/politics/2002/02/12/ashcroft-disputes-report-on-islam-views/2656a726-3a34-46ce-8e1b-8db36cc15982> [<https://perma.cc/NCJ8-Y3H2>].

<sup>193</sup> *Turkmen Complaint*, *supra* note 192, ¶ 60(d).

<sup>194</sup> *Id.* ¶ 60(e).

<sup>195</sup> *Id.* In the *Turkmen* litigation, the Second Circuit found the allegations of discriminatory intent sufficient even without considering these remarks. *Turkmen v. Hasty*, 789 F.3d 218, 254 (2d Cir. 2015) (“[I]t is reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement.”), *rev’d in part, vacated in part sub nom. Ziglar*, 137 S. Ct. 1843.

<sup>196</sup> STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* 38 (2003).

men,” Ashcroft insisted the only way to prevent terrorism “was to round up anyone who fit the profile.”<sup>197</sup>

But perhaps such facts, even if proven, would not have mattered to the result in *Iqbal*. As Professor Shirin Sinnar suggests, one explanation of the case’s holding is the unstated premise “that even if law enforcement officials *did* take into account ethnicity and religion in their investigation, such considerations were legitimate because of the ethnic and religious composition of the hijackers and al Qaeda.”<sup>198</sup> This would explain why the Court described the mass detentions as “unsurprising.”<sup>199</sup> The Court ought to have been surprised to see “mass detentions of any kind in the United States.”<sup>200</sup> But the Court “treated the mass detentions as banal—as if it were entirely natural that horrific violence committed by nineteen men should generate suspicion of thousands of others who shared (or appeared to share) their broadly defined racial or religious identity.”<sup>201</sup>

*Iqbal*, however, sets no precedent on the substantive law of discrimination. *Iqbal*’s rule is procedural—it affirms that specificity is required in factual pleading before a plaintiff is allowed discovery.<sup>202</sup> Apart from the allegations of discriminatory purpose, *Iqbal* had also alleged a facially discriminatory policy—that the government had explicitly classified the detainees based on race and religion.<sup>203</sup> When a plaintiff challenges a facial classification, the Court does not ask whether the classification was made “because of” or “in spite of” a desire to discriminate.<sup>204</sup> But the Court dismissed *Iqbal*’s allegation of a facially discriminatory policy as “conclusory,” in other words, as a “bare assertion” not supported by factual allegations.<sup>205</sup> *Iqbal* thus foreclosed discovery into discriminatory intent and

<sup>197</sup> *Id.* at 149.

<sup>198</sup> Sinnar, *supra* note 172, at 389–90.

<sup>199</sup> See *supra* text accompanying note 187.

<sup>200</sup> Sinnar, *supra* note 172, at 429 (“The sheer scope of the alleged detentions in this case—thousands of individuals in a matter of months—might be expected to raise questions, even in the wake of a devastating terrorist attack.”).

<sup>201</sup> *Id.*

<sup>202</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (discussing the principle that the Federal Rules of Civil Procedure on pleading do “not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

<sup>203</sup> *Id.* at 680.

<sup>204</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (striking down an affirmative action program on the ground that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”).

<sup>205</sup> *Iqbal*, 556 U.S. at 681 (“It is the conclusory nature of respondent’s allegations [of a discriminatory policy], rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”).



classifications under certain conditions; it did not hold that discriminatory intent or classifications are irrelevant.

And yet, *Iqbal's* normative undercurrents are troubling. As Professor Sinnar demonstrates, *Iqbal's* reasoning has been used to justify racial profiling in a number of contested decisions.<sup>206</sup> For example, consider the controversy over *Floyd v. City of New York*, a class action lawsuit alleging that the NYPD's stop and frisk policy of temporarily detaining, questioning, and searching people on the street targeted black and Hispanic people.<sup>207</sup> In that case, the district court recognized explicit evidence of discriminatory intent on the part of law enforcement officials.<sup>208</sup> For example, "the highest ranking uniformed member of the NYPD . . . was especially frank about the NYPD's policy of targeting racially defined groups for stops, provided that reasonable suspicion is also present."<sup>209</sup> The New York police commissioner stated "that he focused on young blacks and Hispanics 'because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.'"<sup>210</sup> The judge concluded, "The Equal Protection Clause does not permit the police to target a racially defined group as a whole because of the misdeeds of some of its members."<sup>211</sup> The case generated intense political attention and, unusually, a panel of the Second Circuit expressed doubt about the merits of the ruling while adjudicating a

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<sup>206</sup> Sinnar, *supra* note 172, at 430–35; see *Monroe v. City of Charlottesville*, 579 F.3d 380, 388–89 (4th Cir. 2009) (citing *Iqbal* in support of dismissal of an equal protection challenge to a police department's DNA testing of 190 young black men over the course of several years of investigating a serial rapist who had been described as a young black man); *Hassan v. City of New York*, No. 12-cv-3401, 2014 WL 654604, at \*7 (D.N.J. Feb. 20, 2014) (dismissing an equal protection challenge to an NYPD surveillance program of mosques, Muslim student organizations, and Muslim-owned businesses, on the ground that "[t]he more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies"), *rev'd*, 804 F.3d 277 (3d Cir. 2015).

<sup>207</sup> 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (bench trial).

<sup>208</sup> *Id.* at 665.

<sup>209</sup> *Id.* at 603; *id.* at 604 (characterizing a colloquy at trial and quoting the witness as admitting that many street stops are not based on specific complaints from the public, but rather are "based on the totality of, okay, who is committing the—who is getting shot in a certain area? . . . Well who is doing those shootings? Well, it's young men of color in their late teens, early 20s").

<sup>210</sup> *Id.* at 606 (quoting the senator who reported the comment as testifying "that he was 'amazed' that Commissioner Kelly was 'comfortable enough to say that in the setting'" of a meeting at the Governor's office in July 2010); *id.* at 606 n.297 (noting that "Defendants did not object to this out of court statement").

<sup>211</sup> *Id.* at 563; see also Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2456 (2017) (arguing that stop and frisk policies are "indeed explicitly defended on the basis of a generalization—a stereotype about racial minorities that is not merely derogatory, but that has historically been a keystone of discriminatory legal architectures. And its advocates make no bones that the price of public safety will be borne disproportionately by only some, and only because of the color of their skin").

preliminary motion.<sup>212</sup> Before the Second Circuit could reverse the district court's decision, New York City decided to settle the case, to adopt most of the district court's recommendations, and to drop its appeal.<sup>213</sup>

The extension of *Feeney's* "in spite of" logic helps to explain other instances in which evidence of explicit bias is surprisingly controversial. For example, the Supreme Court has held repeatedly that legislatures cannot use race as a proxy for partisan affiliation in redrawing the boundaries of voting districts.<sup>214</sup> But lower federal courts do not always follow this reasoning.<sup>215</sup> Perhaps this is because legislators who use race as a proxy for partisan affiliation could be said to be acting "in spite of" the racially disproportionate effects of new election laws.<sup>216</sup> Their ultimate goal is to stay in office; reducing the influence of African American voters is just a side effect. Three Supreme Court Justices may be sympathetic to this side-effect argument.<sup>217</sup>

Or consider the widespread lack of compliance with *Batson v. Kentucky*.<sup>218</sup> *Batson* is a 1986 Supreme Court case holding that it is unconstitutional for prosecutors to strike prospective jurors based on race.<sup>219</sup> *Batson* doctrine is often criticized for ignoring all forms of bias except the most explicit, but it comes close to ignoring explicit bias as well. In an

<sup>212</sup> See Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043, 1046 (2014) (describing how a Second Circuit panel recused district court Judge Shira Scheindlin from the case and, "after expressing deep skepticism over the merits of Judge Scheindlin's decisions during oral argument, the three judges, who had been assigned the case only to adjudicate preliminary motions, grabbed jurisdiction for themselves to decide the merits of the appeal, rather than leaving the merits to be randomly assigned to another Second Circuit panel").

<sup>213</sup> *Id.* at 1045.

<sup>214</sup> See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 1464 n.1 (2017) ("A plaintiff succeeds . . . even if . . . a legislature elevated race to the predominant criterion in order to advance other goals, including political ones.").

<sup>215</sup> N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016) (reversing a district court for overlooking evidence that reforms to North Carolina election law were explicitly motivated by race, and concluding that "[w]hen a legislature dominated by one party has dismantled barriers to African American access to the franchise, even if done to gain votes, 'politics as usual' does not allow a legislature dominated by the other party to re-erect those barriers").

<sup>216</sup> See N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 488, 502–03 (M.D.N.C. 2016) (citing *Pers. Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), to conclude the election bill was enacted in spite of its obvious disparate impact on African American voters), *rev'd and remanded*, 831 F.3d 204 (4th Cir. 2016).

<sup>217</sup> See *Cooper*, 137 S. Ct. at 1490 (Alito, J., concurring in the judgment in part and dissenting in part).

<sup>218</sup> See, e.g., Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) ("[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.").

<sup>219</sup> *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

infamous 1987 training video on *Batson* compliance, a Philadelphia district attorney instructed:

[L]et's face it, . . . the blacks from the low-income areas are less likely to convict. . . . There is a resentment for law enforcement, there's a resentment for authority and, as a result, you don't want those people on your jury. And it may appear as if you're being racist or whatnot, but, again, you are just being realistic. You're just trying to win the case.<sup>220</sup>

It took thirteen years for the Supreme Court of Pennsylvania to hold this video was evidence of race discrimination.<sup>221</sup> A lower court had excluded the tape as irrelevant.<sup>222</sup> The district attorney's logic—that acting on racial stereotypes is not wrongful discrimination if the real objective is winning trials—may have been persuasive to the lower court. In another *Batson* case, the prosecutor's files included a document with the names of all the black jurors highlighted in green to “represent[] Blacks,” and notes such as, “If it comes down to having to pick one of the black jurors, [this one] might be okay.”<sup>223</sup> Nonetheless, a Georgia state court denied habeas review, and the Georgia Supreme Court summarily denied the petitioner's application for appeal.<sup>224</sup> The U.S. Supreme Court ultimately reversed,<sup>225</sup> but the state courts' refusal to consider even the most explicit evidence of racial discrimination is remarkable.

Thus, some courts may rely on the idea that there is a safe harbor for actions taken with some ostensibly nondiscriminatory purpose to overlook explicit discrimination. The implicit reasoning may be that the Constitution should only prohibit animus, in other words, the “bare . . . desire to harm a politically unpopular group.”<sup>226</sup> On this view, discrimination law does not prohibit the intent to harm a politically unpopular group as a means to accomplishing some other end. But discriminatory emotions are not limited to animus.<sup>227</sup> Moreover, this logic conflates the question of whether intentional discrimination occurred with the question of whether that

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<sup>220</sup> *Commonwealth v. Basemore*, 744 A.2d 717, 730 (Pa. 2000). The tape goes on like that. *Id.* (“[I]n my experience, black women, young black women, are very bad. . . . I guess maybe because they're downtrodden on two respects . . .”).

<sup>221</sup> *Id.* at 731–32.

<sup>222</sup> *Id.* at 732.

<sup>223</sup> *Foster v. Chatman*, 136 S. Ct. 1737, 1744 (2016).

<sup>224</sup> *Foster v. Humphrey*, No. S14E0771 (Ga. Nov. 3, 2014), reprinted in 1 Joint Appendix at 246, *Foster*, 136 S. Ct. 1737 (No. 14-8349), 2015 WL 4550238.

<sup>225</sup> *Foster*, 136 S. Ct. at 1755.

<sup>226</sup> *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis added). *Moreno* is often described as expounding a special rule for the treatment of animus in equal protection law. See ARAIZA, *supra* note 41, at 29–36.

<sup>227</sup> See *supra* notes 41–44 and accompanying text.

discrimination was justified. And it assumes discrimination was justified without giving the government's justification any degree of scrutiny and without giving any weight to the harms suffered by the victims.

Another reason judges refuse to acknowledge explicit bias unless it is naked animus is out of concern for those accused of discrimination. Accusations of bias are understood as referenda on the goodness or evil of those charged with discrimination.<sup>228</sup> Courts regard these inquiries as "unseemly."<sup>229</sup> Judges are wary of accusing discriminators of bigotry.<sup>230</sup> Perhaps because accusations of prejudice are such grave indictments, courts have erected barriers to recognizing explicit bias.<sup>231</sup> By contrast, courts have little trouble understanding explicit statements as evidence of "reverse discrimination."<sup>232</sup> This may reflect judicial empathy for insiders accused of discrimination<sup>233</sup> and lack of empathy for outsiders who are victims of discrimination.<sup>234</sup> But the question in a discrimination case is not whether any particular person should face moral condemnation as a bigot.<sup>235</sup> The

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<sup>228</sup> Cf. Bagenstos, *supra* note 13, at 7 ("To be accused of racism, in the United States after the Civil Rights Era, is to be accused of a heinous act or disposition.").

<sup>229</sup> Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164 (1978).

<sup>230</sup> See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (2017) (Alito, J., concurring in the judgment in part and dissenting in part) ("When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of 'offensive and demeaning' conduct. . . . That is a grave accusation. . . ." (quoting *Miller v. Johnson*, 515 U.S. 900, 912 (1995))).

<sup>231</sup> Consider the argument by one judge in the travel ban litigation that the problem with the district court's preliminary findings of discrimination was its failure to clarify "when, if ever, the President could free himself from the *stigma of bias*." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 659 n.8 (4th Cir. 2017) (en banc) (Shedd, J., dissenting) (emphasis added), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017) (emphasis added). Judge Shedd's "'ironic repurposing' of the term 'stigma'" might be read as a deliberate effort to "sideline[]" the stigmatizing harms of anti-Muslim discrimination. Aziz Huq, *The Lingering "Stigma" of the Fourth Circuit's Travel Ban Ruling*, JUST SECURITY (May 27, 2017), <https://www.justsecurity.org/41462/lingering-stigma-fourth-circuits-travel-ban-ruling> [<https://perma.cc/2J8B-TS97>].

<sup>232</sup> See *supra* notes 49–51 and accompanying text.

<sup>233</sup> See, e.g., Karst, *supra* note 229, at 1164–65 (arguing that, in cases involving discriminatory motive, "the ultimate issue will be posed in terms of the goodness or the evil of the officials' hearts" and "that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect").

<sup>234</sup> See, e.g., Sinnar, *supra* note 172, at 430 (arguing that the *Iqbal* decision's "dismissive attitude . . . toward the communities affected by law enforcement policies" signals a lack of empathy). On the role of empathy in discrimination cases generally, see Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 324–27 (2012).

<sup>235</sup> See *supra* notes 52–56 and accompanying text. Entities like governments and employers, not individuals, are generally liable for discrimination.

doctrinal architecture does not and should not account for this harm.<sup>236</sup> The question is whether discrimination caused harm to the plaintiff and whether the government is liable for it.<sup>237</sup>

### B. Title VII Doctrine

Another example of judicial disregard for explicit bias is the so-called “stray remarks doctrine” from Title VII. The basic idea behind this doctrine is that “alleged discriminatory remarks that happen in a casual setting outside discussions regarding the dismissal decision do not support an inference of discrimination.”<sup>238</sup> As in other discrimination cases, the central issue in most Title VII cases is causation—whether an employer took action against an employee because of race, sex, or some other forbidden ground. It is true, of course, that biased comments alone may not be sufficient to show causation. But the stray remarks doctrine is not applied in a nuanced manner. Rather, it is often used to altogether exclude evidence of explicit bias from consideration.<sup>239</sup> The doctrine is now invoked, as a matter of course, by district courts whenever a plaintiff alleges evidence of explicitly biased comments.<sup>240</sup> This development cannot be explained away as a mere product of busy district judges’ efforts to clear their dockets and avoid time-consuming trials because it is regularly endorsed by circuit courts as well.<sup>241</sup>

The stray remarks doctrine finds no support in any employment discrimination statute.<sup>242</sup> Nor is it consistent with Supreme Court precedent. The doctrine was inspired by Justice Sandra Day O’Connor’s concurring opinion in a 1989 case, *Price Waterhouse v. Hopkins*.<sup>243</sup> That case dealt with how a plaintiff can prove discrimination where an employer may have had

<sup>236</sup> Cf. Mary Anne Franks, *Injury Inequality*, in *INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS* 231–32 (Anne Bloom et al. eds., 2018) (explaining how “outsized solicitude for elite injuries [can] create[] indifference to marginalized injury” and even “promote[] marginalized injury as a sacrifice necessary to preserve the interests of the powerful”).

<sup>237</sup> See *supra* notes 52–53 and accompanying text.

<sup>238</sup> *Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 11 CV 2450, 2014 WL 4413768, at \*13 (N.D. Ill. Sept. 5, 2014), *aff’d*, 811 F.3d 866 (7th Cir. 2016).

<sup>239</sup> See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 59–66, 88–89 (2017); Stone, *supra* note 36, at 180.

<sup>240</sup> A search of the Westlaw federal cases database on July 13, 2018 for “‘stray remarks’ and ‘Title VII’” yielded 2943 results.

<sup>241</sup> The discussion that follows describes dismissals affirmed by circuit courts. It focuses on race and sex discrimination to demonstrate that the stray remarks doctrine is not motivated solely by skepticism of age discrimination claims.

<sup>242</sup> SPERINO & THOMAS, *supra* note 239, at 61 (“The stray remark doctrine is not required by the text of any of the discrimination statutes. Instead, courts have created it.”).

<sup>243</sup> Stone, *supra* note 36, at 151 (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring), and noting that lower court cases began using the “stray remarks” terminology following that opinion).

both discriminatory and nondiscriminatory reasons for denying a promotion. Justice O'Connor proposed that a plaintiff be required to come forward with "direct evidence" that discriminatory motive "was a substantial factor" in an employer's decision, at which point the burden of proof would shift to the employer to prove "that the decision would have been the same absent consideration of the illegitimate factor."<sup>244</sup> She added: "[S]tray remarks in the workplace," such as the mere reference to a worker as "a lady candidate," could not justify this shift in burden.<sup>245</sup> "Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."<sup>246</sup>

Justice O'Connor did not say that a reference to "a lady candidate" could never be evidence that could contribute to a finding that gender played a role in a decision. Such a rule would defy common sense and empirical research.<sup>247</sup> In *Price Waterhouse*, the partners who wanted to deny Hopkins' promotion had stated that she "overcompensated for being a woman," that her swearing was objectionable "because it's a lady using foul language," and that if she wanted to make partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>248</sup> A majority of Justices agreed the remarks about plaintiff Ann Hopkins were consequential.<sup>249</sup>

Just two years later, Congress amended Title VII to reject Justice O'Connor's proposed legal standard and her heightened evidentiary requirements for proof of discriminatory motive.<sup>250</sup> Under the Civil Rights Act of 1991, a plaintiff need only persuade a jury "by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"<sup>251</sup> "Direct evidence" is not required;

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<sup>244</sup> *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

<sup>245</sup> *Id.* at 277.

<sup>246</sup> *Id.*

<sup>247</sup> It ought to depend on context. Compare Elizabeth L. Cralley & Janet B. Ruscher, *Lady, Girl, Female, or Woman: Sexism and Cognitive Busyness Predict Use of Gender-Biased Nouns*, 24 J. LANGUAGE & SOC. PSYCHOL. 300, 301 (2005) (study finding sexism correlates with the use of gender-based terms like "lady" and "girl" in inappropriate contexts, and hypothesizing that "[w]hether individuals follow the norm to avoid less inclusive or potentially gender-biased terms probably depends upon the extent to which they hold egalitarian attitudes toward women"), with Ann Friedman, *Hey "Ladies": The Unlikely Revival of a Fusty Old Label*, NEW REPUBLIC (Jan. 26, 2013), <https://newrepublic.com/article/112188/how-word-lady-has-evolved> [<https://perma.cc/F68D-ZUDT>] (discussing ironic millennial reappropriation of the term "ladies").

<sup>248</sup> *Price Waterhouse*, 490 U.S. at 235 (plurality opinion).

<sup>249</sup> *Id.* at 251; *id.* at 272–73 (O'Connor, J., concurring).

<sup>250</sup> 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2012).

<sup>251</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

normal rules of evidence apply.<sup>252</sup> At that point, the burden shifts to the defendant to show it would have made the same decision even absent discrimination.<sup>253</sup> Nonetheless, Justice O'Connor's aside about "stray remarks" has been formalized into legal doctrine and spread from cases invoking the "motivating factor" framework to cases using the *McDonnell Douglas* method of circumstantial proof of discrimination.<sup>254</sup> The Supreme Court has twice corrected lower courts for categorically refusing to consider evidence of explicit bias.<sup>255</sup>

Yet the stray remarks doctrine continues to spread like a cancer through lower court opinions in a number of procedural contexts.<sup>256</sup> Judges use the doctrine not only to reject the sufficiency of evidence of discrimination at the summary judgment stage or to reverse jury verdicts but also to rule remarks inadmissible, as a matter of evidence, excluding them from jury consideration altogether.<sup>257</sup> The stray remarks doctrine screens out remarks based on context (how close in time or related was the remark to the employment decision?), speaker (was it the decision-maker?), and content (how biased was the remark?).<sup>258</sup> Any one of these factors can result in a court writing off a remark.<sup>259</sup>

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<sup>252</sup> *Id.* at 100–01. Under the Federal Rules of Evidence, a statement is inadmissible if "its probative value is substantially outweighed by [the] danger of . . . prejudice . . ." FED. R. EVID. 403. With respect to the hearsay rule, biased remarks may be admissible because they are not offered for the truth of the matter asserted, *see id.* 801(c)(2), are statements against interest, *see id.* 804(b)(3), are party admissions, *see id.* 801(d)(2), or are "statement[s] of the declarant's then-existing state of mind (such as motive, intent, or plan)," *id.* 803(3), among other potential arguments and exceptions.

<sup>253</sup> This is a defense to most forms of damages, but even if an employer can make out this defense, it is still liable for attorney's fees and costs, as well as certain forms of declaratory and injunctive relief. 42 U.S.C. § 2000e-5(g)(2)(B).

<sup>254</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>255</sup> *See Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (overturning a decision where the court had refused to consider evidence that a supervisor had referred to an adult African American male as "boy"); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (overturning a decision disregarding a supervisor's remarks that the plaintiff "was so old [he] must have come over on the Mayflower" and "was too damn old to do [his] job" (alterations in original)).

<sup>256</sup> SPERINO & THOMAS, *supra* note 239, at 62–63.

<sup>257</sup> *See, e.g., Taylor v. Va. Union Univ.*, 193 F.3d 219, 251 (4th Cir. 1999) (Motz, J., dissenting) (arguing that the district court erred in excluding evidence that a police chief had "commented that he 'bet' a woman 'ha[d] good pussy,'" and criticizing the defendant's argument that "'this is [a] kind of man talk situation. When men get together and talk they say certain things'" (alterations in original)).

<sup>258</sup> *See, e.g., Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010). These are the most typical questions, although federal courts differ in their formulations of the doctrine. *Reid v. Google, Inc.*, 235 P.3d 988, 1008–11 (Cal. 2010) (describing inconsistent holdings and "widely divergent views" on the scope of the stray remarks doctrine among federal courts).

<sup>259</sup> *But see Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 116 (2d Cir. 2007) ("We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category.").

Sometimes courts screen out statements of explicit bias because those statements were not made in the context of the particular employment decision<sup>260</sup> or about the particular plaintiff.<sup>261</sup> In one such case, a court disregarded a litany of sexist comments, including: a reference to women in the pharmaceuticals industry as “Barbie dolls,” a request to a plaintiff during a group activity to “let the pretty girls go first,” the suggestion that a plaintiff “discuss her career and commitment to her current position with her husband,” and an instruction to another plaintiff “that she could not attend a meeting with an important doctor because it was a ‘guys [sic] meeting.’”<sup>262</sup> In another case, a court granted summary judgment for an investment bank, despite the fact that the female plaintiff’s supervisor “frequently used such epithets as ‘bitch,’ ‘cunt,’ ‘whore,’ ‘slut’ and ‘tart’ when referring to her.”<sup>263</sup> The plaintiff had alleged this supervisor was behind the decision to cut her bonus from \$750,000 to \$50,000, while paying larger bonuses to her male subordinates.<sup>264</sup> The district judge reasoned that the supervisor’s “crude” “epithets” “do not necessarily indicate that [the supervisor] had a misogynist attitude which can be deflected to illuminate an intent behind any adverse employment action taken by Credit Lyonnais against a particular woman.”<sup>265</sup>

In other cases, courts screen out explicit bias because the remarks were not made by the immediate decision-maker.<sup>266</sup> For example, in one case, a

<sup>260</sup> See, e.g., *Wilson v. Chipotle Mexican Grill, Inc.*, 580 F. App’x 395, 399 (6th Cir. 2014) (supervisor called plaintiff a “black dyke bitch” but “[b]y the time of the comment, the predicates for firing [plaintiff] had already taken place”); *Harris v. Cobra Constr.*, 273 F. App’x 193, 194–95 (3d Cir. 2008) (evidence that company owner had pointed a gun at the plaintiffs and yelled, “What are you two black mf---ers looking at? Now get back to work”); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 693, 695 (7th Cir. 2006) (supervisor told plaintiff “you’re old, you’re Polish, and you’re stupid” and “that she would be better suited as a cleaning lady”); *Trotter v. BPB Am., Inc.*, 106 F. App’x 272, 275–76 (5th Cir. 2004) (“straw boss” and “the n-word”); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096, 1098 (7th Cir. 2001) (where a supervisor said the area where the female worked was “not a woman’s area,” explaining, “Women can play in the NFL but do you see them on the field?”); *Rubinstein v. Adm’rs. of Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000) (“Russian Yankee,” “Jews are thrifty,” and the comment, “if ‘the Russian Jew’ could obtain tenure, then anyone could”); *Perez v. St. John Med. Ctr.*, No. 08-CV-0533-CVE-FHM, 2009 WL 3254926, at \*3 (N.D. Okla. Oct. 6, 2009) (supervisor repeatedly called plaintiff a “wetback”), *aff’d*, 409 F. App’x 213 (10th Cir. 2010).

<sup>261</sup> See, e.g., *Perry v. City of Avon Park*, 662 F. App’x 831, 837 (11th Cir. 2016) (“[A] woman’s place is in the home taking care of children and not being in the work place.”).

<sup>262</sup> *Tourtellotte v. Eli Lilly & Co.*, 636 F. App’x 831, 835–38 (3d Cir. 2016) (alteration in original).

<sup>263</sup> *Ferrand v. Credit Lyonnais*, No. 02 CIV.5191(VM), 2003 WL 22251313, at \*10 (S.D.N.Y. Sept. 30, 2003), *aff’d*, 110 F. App’x 160 (2d Cir. 2004).

<sup>264</sup> *Id.* at \*1–2, \*5.

<sup>265</sup> *Id.* at \*11. The supervisor had also said, “Credit Lyonnais shouldn’t be giving that bitch any fucking options,” but the court reasoned this remark was about stock options, not bonus compensation or any other adverse action taken against the plaintiff. *Id.* The argument that such insults are meaningless or indiscriminate is addressed *infra* Section III.A.2.

<sup>266</sup> See, e.g., *Nelson v. United Parcel Serv., Inc.*, 337 F. App’x 561, 563 (7th Cir. 2009) (holding that a comment by plaintiff’s manager that she was going to “fire that nigger” could not be considered direct



plaintiff alleged his supervisor called him a “‘black motherfucker’ and ‘an ugly black man,’” and said that black people “can be a lot of trouble.”<sup>267</sup> The court concluded that the remarks were stray because it was not just that supervisor, but also two other employees who had been involved in the decision to deny a promotion to the plaintiff.<sup>268</sup> In another case, a female doctor of Indian origin—the only woman in her surgical residency program—alleged she had been unfairly terminated.<sup>269</sup> One of the doctors evaluating her had repeatedly described her deficiencies as “cultural.”<sup>270</sup> He testified that his “impression of women in the Indian culture [was] that they, in general, are in an environment in which they are not as assertive as their American counterparts . . . .”<sup>271</sup> Another doctor “testified that he had concerns about why women would put themselves through a surgical residency, especially if they are planning on having children.”<sup>272</sup> The doctor explained: “[T]hey’re constantly tired, and they don’t have time to put on their makeup and put on clothes and do a lot of the things girls need to do, and [it’s] difficult.”<sup>273</sup> The court concluded these remarks were irrelevant to the question of whether discrimination motivated the plaintiff’s termination because there were no specific allegations of bias against “most” of the doctors who gave her poor reviews.<sup>274</sup>

In other cases, courts screen out explicit bias because they regard remarks as too ambiguous to be interpreted as evidence of bias. For example, in one case, a court concluded that calling the plaintiff “mom” was not evidence of age discrimination, because “motherhood and advanced age—plainly are not synonymous.”<sup>275</sup> In context, a reasonable jury could

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evidence because the decision to terminate plaintiff was made by someone else); *Hampton v. City of South Miami*, 186 F. App’x 967, 970 n.3 (11th Cir. 2006) (disregarding a supervisor’s use of a slur because that supervisor was not the decision-maker and the decision-maker “did not rely solely on [the supervisor’s] ‘biased recommendations’”); *Mondero v. Salt River Project*, 400 F.3d 1207, 1211–12 (9th Cir. 2005) (describing where two employees who had input in a decision, but were not the final decision-makers, had complained, “They bring a woman to do a man’s job?”).

<sup>267</sup> Brief of Appellant at 4, *McNeal v. Montgomery County*, 307 F. App’x 766 (4th Cir. 2009) (No. 07-1323), 2007 WL 2195566.

<sup>268</sup> *McNeal*, 307 F. App’x at 774.

<sup>269</sup> *Sreeram v. La. State Univ. Med. Ctr.-Shreveport*, 188 F.3d 314, 319 n.1 (5th Cir. 1999).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 318. Title VII does not require that a doctor remain in a residency program if she was terminated on account of her lack of qualifications. But where discrimination was also a motivating factor, as it plainly was here, she is entitled to her attorney’s fees and injunctive and declaratory relief. *See supra* notes 248–53 and accompanying text.

<sup>275</sup> *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 70 (1st Cir. 2002). That the insult also had gendered dimensions should not be exculpatory, because sex is also a prohibited basis for discrimination. It seems

understand that the insult “mom” works by implying the plaintiff was old enough to be her coworker’s mother.<sup>276</sup> In another case, the court disregarded as ambiguous two remarks by a company owner: (1) that the only African American woman she employed “was not black, but a woman who happen[s] to be black,” and (2) “that if a federal contract required [her company] to hire a certain number of minorities, she would close her shop.”<sup>277</sup> The comment distinguishing between “black people” and “women who happen to be black” is reasonably interpreted as the employer’s insistence that workers downplay their racial identities, particularly in the context of the case, in which the plaintiff, who was then one of two African American women at the company, was fired for no apparent reason other than her “attitude.”<sup>278</sup>

In another case, supervisors fired an African American plaintiff after instructing her to behave like an “Uncle Tom.”<sup>279</sup> The supervisors had said: “[I]ntelligence and outspokenness in black employees is not welcomed’ and that ‘qualities that would make a Caucasian a golden child, being aggressive and intelligent and outspoken and a go-getter, would do exactly the reverse to a person of color.’”<sup>280</sup> Accordingly, they “advised her to develop a deferential persona, as ‘a good black’ that ‘would be accepted by the Caucasians at Wells Fargo.’”<sup>281</sup> The court reasoned that these supervisors were trying to *help* the plaintiff, not hurt her.<sup>282</sup>

The stray remarks doctrine is inconsistent with procedural rules<sup>283</sup> that require that inferences be drawn in favor of the non-movant and that courts

unlikely that this comment’s message was that the plaintiff was parental in some gender-neutral way, but the question is best left for a jury.

<sup>276</sup> *Id.* at 66. The plaintiff alleged that this same person, the director of human resources, had told the plaintiff that she had “manias de vieja” (an “old person’s ways”), compared her haircut to octogenarian Phyllis Diller’s, and told her “she should have retired and gone to live with her grandchildren in Florida long ago,” among other age-related comments. *Id.*

<sup>277</sup> *Diamond v. Bea Maurer, Inc.*, 128 F. App’x 968, 972 (4th Cir. 2005).

<sup>278</sup> *Id.* at 970. The plaintiff was reprimanded for attempting to get a flu shot, while a white coworker was not, and after that incident, the company’s president became outraged about the plaintiff’s “attitude,” eventually firing her for “chew[ing] gum” and “singing,” behaviors that white employees engaged in without comment. *Id.* at 970, 972.

<sup>279</sup> *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 931 (8th Cir. 2006).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 934. (“[The] alleged ‘Uncle Tom’ statements, while racially offensive and misguided, were apparently made in the context of attempting to preserve and promote Twymon’s career at Wells Fargo, not in relation to deciding to terminate Twymon.”).

<sup>283</sup> The Supreme Court has instructed that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

refrain from weighing the evidence.<sup>284</sup> The dysfunctions of the stray remarks doctrine are compounded by the general problem of overly formalistic analysis in Title VII cases.<sup>285</sup> Courts “slice and dice” discrimination claims into various theories, which they call: (1) direct evidence of discrimination, (2) circumstantial evidence considered via the *McDonnell Douglas* framework, and (3) harassment.<sup>286</sup> The motivating-factor framework set out by Congress in the Civil Rights Act of 1991 is largely ignored.<sup>287</sup> This slicing and dicing allows courts to avoid contextual analysis of explicitly biased remarks. Courts count biased remarks as falling into the direct evidence category, where they consider whether, standing alone, those remarks are sufficient to prove discrimination caused an employment decision.<sup>288</sup> After dismissing the remarks as direct evidence, courts refuse to consider those remarks alongside circumstantial evidence, such as evidence that male or white workers received preferential treatment.<sup>289</sup> This is notwithstanding the fact that the combined weight of the evidence might support a finding of discrimination.<sup>290</sup> Harassment claims are considered on an entirely separate

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<sup>284</sup> *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) (quoting *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000)) (expressing the concern that the stray remarks doctrine “is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined”); *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 335 (D. Mass. 2011) (“[W]hether a given remark is ‘ambiguous’—whether it connotes discriminatory animus or it does not—is precisely what a jury should resolve, considering all of the facts in context. What may be ambiguous to me, the judge, may not be to the plaintiff or to her peers.”).

<sup>285</sup> See generally SPERINO & THOMAS, *supra* note 239.

<sup>286</sup> See Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL’Y 177, 177 (2001); see also Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001).

<sup>287</sup> See, e.g., *Ponce v. Billington*, 679 F.3d 840, 845 (D.C. Cir. 2012) (discussing how plaintiffs’ lawyers fear that if they raise the motivating factor theory, the jury will “split the baby” and find that the defendant has proven its defense).

<sup>288</sup> See, e.g., *Curry v. Menard, Inc.*, 270 F.3d 473, 475–77 (7th Cir. 2001) (concluding that evidence that the black plaintiff’s supervisor “had a practice of calling the store’s department managers and security personnel to warn them when black or Hispanic customers came into the store” and had said that “‘blacks don’t like to work as much as Mexicans’ and that ‘Mexicans will work for little or nothing’” was insufficient as direct evidence of discriminatory motive).

<sup>289</sup> *Id.* at 481 (Rovner, J., concurring) (“[A]lthough I agree with the majority that Curry’s testimony regarding Horvath’s racial remarks was not *direct* proof of discrimination, that should not prevent Curry from introducing the same evidence to prove *pretext* should Menard renew its motion for summary judgment.”); see also *Traylor v. Brown*, 295 F.3d 783, 788 n.3 (7th Cir. 2002) (refusing to consider whether comments by coworkers and supervisors that plaintiff was a “black girl” and a “token” were circumstantial evidence of discrimination based on the formalistic logic that such comments could only be direct evidence of discrimination or evidence of harassment).

<sup>290</sup> This is one reason the California Supreme Court refused to adopt a stray remarks doctrine. *Reid v. Google, Inc.*, 235 P.3d 988, 1008 (Cal. 2010) (noting that “[a]lthough stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence”).

track, in which courts often find discriminatory remarks insufficiently “severe or pervasive” to amount to a claim.<sup>291</sup>

Thus, the stray remarks doctrine enables courts to altogether exclude explicit bias from consideration in employment discrimination cases. In both the Title VII and constitutional law contexts, courts distort discrimination law to ignore explicit bias. This phenomenon may be underwritten by a set of legal arguments common to both contexts. The next Part will address those arguments.

### III. LEGAL ARGUMENTS FOR DISREGARDING EXPLICIT BIAS

Court decisions and legal briefs offer arguments in favor of categorically refusing to account for explicit bias. This Part attempts to construct the best versions of these legal arguments and then to criticize them. One set of arguments relates to the evidentiary value of explicit bias: that a person’s statements are not a reliable guide to her true intentions, assuming intentions could even be determined by the law. A second set of concerns is about remedies: for example, the concern that if certain courses of action are forever tainted by the illicit motives that first inspired them, then institutions will be precluded from ever enacting those policies, even if later motives are honorable. A third concern is about competing First Amendment rights: that introducing evidence of explicit bias will chill free speech, thought, and expression. And a final concern has to do with political consequences: the fear that recognition of explicit bias will spur backlash, undermining antidiscrimination projects and judicial legitimacy. None of these concerns holds up to scrutiny.

#### A. Interpretive Difficulties

One set of reasons legal actors give for ignoring explicit bias is related to the difficulty of ascertaining intentions. These concerns may take a number of forms. One is the “mindreading” objection: that an actor’s subjective intent is always unknowable, and therefore, the law should rest only on evidence of official purposes. Or the argument might be that certain types of statements—such as campaign rhetoric, commentary on social media, or casual conversations—are not reliable indicators of a person’s true attitudes. Another variation on this argument is that multi-member bodies, like legislatures and corporations, do not have discernable purposes or intentions apart from their official enactments. These concerns amount to the

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<sup>291</sup> See, e.g., Stone, *supra* note 36, at 170 (discussing the extension of the stray remarks doctrine to harassment cases).

claim that explicit bias does not aid courts in their truth-seeking function and should therefore be excluded, like other misleading forms of evidence.

### 1. *Mindreading*

One version of this argument is that, because determining a defendant's true intentions would require "mindreading," courts should defer to official statements of purpose.<sup>292</sup> Although courts use the language of subjective intentions in conducting inquiries into purpose, strictly speaking, it is not just "the thought that counts."<sup>293</sup> Courts have proven themselves capable of interpreting statements of explicit bias, among other objective facts, as indicia of discriminatory purpose. Because an important part of the harm of discrimination is the message of inferiority it expresses, this inquiry is appropriate.<sup>294</sup>

The mindreading objection is an old one.<sup>295</sup> In *Palmer v. Thompson*, the Court deferred to the city's ostensibly race-neutral cost and safety reasons for closing the pools and refused to consider the mayor's public statements about his intent to maintain segregation because it was too difficult to determine subjective motives.<sup>296</sup> In the travel ban cases, the government's briefs quoted *McCreary County v. ACLU of Kentucky*, an Establishment Clause case that directed courts to come to "an understanding of official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts."<sup>297</sup> The government argued that President Trump's public statements about Muslims were not "readily discoverable fact[s]."<sup>298</sup> While the government admitted "it is readily discoverable that the statements occurred," the question is "what candidate Trump and his aides *meant* by them."<sup>299</sup> On this theory, meaning is elusive because campaign statements contradict official rationales, and judges are

<sup>292</sup> I use the terms motive, purpose, and intent synonymously here, following the common practice of courts. *But see* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1122 (2018) (discussing distinctions among these concepts in the scholarship). This Article is interested in intent in the sense of whether someone meant to discriminate, not their motives or reasons for discriminating. *See supra* notes 41–43 and accompanying text.

<sup>293</sup> *Cf.* HELLMAN, *supra* note 58, at 138–39.

<sup>294</sup> *See supra* Section I.B (discussing the interrelationships of material and expressive dynamics of discrimination).

<sup>295</sup> *See, e.g.,* *Soon Hing v. Crowley*, 113 U.S. 703, 711 (1885) ("The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.").

<sup>296</sup> *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971).

<sup>297</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (invalidating a county's decision to post the Ten Commandments in a courthouse).

<sup>298</sup> *Trump Cert. Pet.*, *supra* note 20, at 27 (alteration in original).

<sup>299</sup> *Id.*

left with no way to determine which are the true reasons.<sup>300</sup> Variations on this reasoning can be heard in cases invoking the stray remarks doctrine, in which courts express perplexity at the meaning of comments about race and gender, and opt to defer instead to the employer’s proffered reasons.<sup>301</sup>

The argument that courts can never assess the weight of conflicting statements amounts to a sort of interpretive nihilism. In *McCreary County*, the Court rejected this precise argument.<sup>302</sup> It considered the assertion that judges cannot discern purpose “as seismic as . . . [it is] unconvincing.”<sup>303</sup> It was “seismic” because inquiries into purpose are mundane modalities of statutory interpretation.<sup>304</sup> In fact, judicial determinations of motive are commonplace, required not just by discrimination law, but by an array of constitutional, criminal, tort, and other doctrines.<sup>305</sup> Courts consider statements of intent “evidence that is competent to convict a defendant of murder—and thereby render the defendant eligible for our society’s most serious punishment.”<sup>306</sup> It would be anomalous in the extreme if such statements could not be evidence of discrimination.

Courts can and do determine intent by assessing objective evidence such as explicit statements.<sup>307</sup> Rather than prying into the minds of officials,

<sup>300</sup> Compare *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc) (“If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all (‘just kidding!’) and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official’s ‘heart of hearts’ to divine whether he really changed his mind . . . ?”), with *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 627 (D. Md. 2017) (“Particularly where, in August 2017, President Trump tweeted a statement that a method hostile to Islam—shooting Muslims with bullets dipped in pig’s blood—should be used to deter future terrorism, there is no record of public statements showing any change in the President’s intentions relating to a Muslim ban.”).

<sup>301</sup> See *supra* notes 273–278 and accompanying text.

<sup>302</sup> *McCreary County*, 545 U.S. at 863 (“declining the invitation to abandon concern with purpose wholesale”); *id.* at 861 (explicitly rejecting the argument that “true ‘purpose’ is unknowable and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent”).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* (“Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . .”).

<sup>305</sup> See, e.g., *Verstein, supra* note 292, at 1111, app. B at 1170 (cataloguing legal doctrines that turn on motives in areas including “legal ethics, constitutional law (voter districting, school desegregation, jury selection, free speech and censorship, takings), labor law, landlord-tenant law, intentional torts, vicarious liability, evidence, property, health law, contract law, corporate law, employment discrimination, securities enforcement, taxation, bankruptcy, and more”).

<sup>306</sup> *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 344 (4th Cir. 2018) (en banc) (Wynn, J., concurring).

<sup>307</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 600–01 (4th Cir. 2017) (en banc) (“We . . . see nothing ‘intractable’ about evaluating a statement’s probative value based on the identity of the speaker and how specifically the statement relates to the challenged government action, for this is

courts searching for discriminatory intent often ask about the meaning a reasonable observer would attribute to a particular policy.<sup>308</sup> This inquiry “unfolds in two steps: first, an ascription to a statute of an expressive meaning and, second, an imputation of an ‘objective’ legislative intent to communicate that meaning.”<sup>309</sup> Explicit statements are relevant to this inquiry. As Professor Richard Fallon explains, “In imputing intentions to people whom we know, we often rely on a mix of contextual factors, biographical information, and explicit statements. We can do the same with legislators.”<sup>310</sup> The Supreme Court expressed no qualms about undertaking this interpretive task in *Masterpiece Cakeshop*, where it held the remarks of a Colorado commissioner reflected anti-religious animus.<sup>311</sup>

A similar inquiry takes place in employment discrimination cases in which courts examine evidence of explicit bias rather than excluding it based on the stray remarks doctrine. By necessity, judgments about intent require inferential reasoning. Judges cannot go back in time and demand candor from decision-makers.<sup>312</sup> But just as they can discern intent in criminal, tort, and other cases, judges can do so in employment discrimination cases.<sup>313</sup> In Title VII cases, the Court has repeatedly affirmed the relevance of remarks that might be interpreted as evincing bias.<sup>314</sup> For example, in *Ash v. Tyson Foods, Inc.*, two African American men alleged they were denied promotions that went to white men instead.<sup>315</sup> The plant manager, who had made the decision, had referred to each of the adult male plaintiffs as “boy,”

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surely a routine part of constitutional analysis.”), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>308</sup> Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 549 (2016) (discussing cases in which “courts invoke a conception of legislative intent derived from statutes’ expressive meanings. That conception involves, as a first approximation, the communicative significance that a competent, informed participant in a society would attach to a statute as an indicator of prevailing societal values”).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 580.

<sup>311</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018) (carefully parsing statements suggesting explicit bias and interpreting ambiguous statements that became clearer in light of later statements and a pattern of decisions).

<sup>312</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 190–91 (2009) (Breyer, J., dissenting) (“Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual’s thoughts and other circumstances present at the time of decision.”).

<sup>313</sup> See *supra* note 303 and accompanying text.

<sup>314</sup> See *supra* note 255. In *Price Waterhouse v. Hopkins*, Justice O’Connor characterized the proof presented as demonstrating the following: “It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership.” 490 U.S. 228, 272–73 (1989) (O’Connor, J., concurring).

<sup>315</sup> *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 455 (2006).

which the plaintiffs claimed was evidence of racial animus.<sup>316</sup> The Court of Appeals reasoned: “While the use of ‘boy’ when modified by a racial classification like ‘black’ or ‘white’ is evidence of discriminatory intent, the use of ‘boy’ alone is not evidence of discrimination.”<sup>317</sup> The Supreme Court disagreed, holding, “Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign.”<sup>318</sup> The Court required an inquiry that was sensitive to “various factors including context, inflection, tone of voice, local custom, and historical usage.”<sup>319</sup>

Thus, courts can ascribe discriminatory intent by examining context, including explicitly biased remarks. This interpretive inquiry directly identifies when a policy expresses discriminatory meaning, and is the closest possible proxy for identifying when discriminatory motives caused harm.

## 2. Cheap Talk and Pandering

Another variation on this argument is that all remarks apart from formal declarations of purpose are throwaway comments, not serious statements of intent.<sup>320</sup> While the context in which a comment was made is relevant to the weight a court affords a particular piece of evidence, there is no basis for automatically excluding all such evidence.

In the travel ban litigation, the government argued that campaign “statements are irrelevant because only an ‘official objective’ regarding religion can violate the Establishment Clause.”<sup>321</sup> This point must have been persuasive to the Supreme Court, because the Court made reference to the fact that some of the President’s statements were made on the campaign trail in its characterization of those statements as “extrinsic.”<sup>322</sup> The government made three arguments against reliance on campaign statements. First, they are made before a candidate has taken the oath of office and agreed to uphold the Constitution.<sup>323</sup> Second, “[t]hey often are made without the benefit of

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<sup>316</sup> *Id.* at 456.

<sup>317</sup> *Id.* (quoting *Ash v. Tyson Foods, Inc.*, 129 F. App’x 529, 533 (11th Cir. 2005)).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> See *Washington v. Trump*, 858 F.3d 1168, 1173, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc) (cautioning against reliance on “unguarded declarations” by a politician during a campaign, which “are often contradictory or inflammatory”).

<sup>321</sup> *Trump Reply*, *supra* note 129, at 9.

<sup>322</sup> See *supra* note 22 and accompanying text.

<sup>323</sup> *Trump Cert. Pet.*, *supra* note 20, at 28 (“Taking that oath marks a profound transition from private life to the Nation’s highest public office, and manifests the singular responsibility and independent authority to protect the welfare of the Nation that the Constitution reposes in the President.”). *But see* *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 630 (4th Cir. 2017) (en banc) (Thacker, J., concurring) (accepting the government’s argument that campaign statements are irrelevant but still



advice from an as-yet-unformed Administration.”<sup>324</sup> And third, campaign statements are like rough drafts, which “cannot bind elected officials who later conclude that a different course is warranted.”<sup>325</sup>

These arguments resonate with the reasons for requiring formality in contracting.<sup>326</sup> If the law makes clear precisely how and when promises will be legally effective, people will have fair warning about when their statements will be taken seriously, and courts will have ready evidence of what commitments were made.<sup>327</sup> Such considerations make sense when a person will later be bound to some course of action by their promises and others will rely on those guarantees to structure their affairs.<sup>328</sup> As Professor Katherine Shaw has argued, in saying what the law is, courts may have good reasons not to consider “presidential statements offered in the spirit of advocacy, persuasion, or pure politics, where those statements do not reflect considered legal positions.”<sup>329</sup> Accordingly, the argument that no one should rely on unofficial statements has force in situations in which courts are called upon to determine the scope of a law or policy, or to interpret how it applies to a particular situation. For example, if the President announces a new policy barring transgender servicemembers via social media, military officials will wait for an official directive before carrying out that policy.<sup>330</sup>

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finding evidence of an Establishment Clause violation “based solely on remarks made or sentiments expressed” after President Trump’s inauguration), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>324</sup> Trump Cert. Pet., *supra* note 20, at 28.

<sup>325</sup> *Id.* The government’s brief quoted a Fourth Circuit dissent that argued: “‘Because of their nature, campaign statements are unbounded resources by which to find intend of various kinds . . . [t]hey are often short-hand for larger ideas’ and ‘are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise.’” *Id.* (quoting *Int’l Refugee Assistance Project*, 857 F.3d at 650 (Niemeyer, J., dissenting)).

<sup>326</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801–02 (1941). The Supreme Court’s use of the term “extrinsic evidence” calls to mind contract-law doctrines that limit consideration of evidence outside the text of an agreement. See, e.g., Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 273 (1985) (“If the writing appeared to be a complete (integrated) expression of the parties’ intent, the common law parol evidence rule barred introduction of extrinsic evidence to contradict or supplement the written terms.”).

<sup>327</sup> See Fuller, *supra* note 326, at 800–01 (describing these as the “evidentiary,” “cautionary,” and “[c]hanneling” functions of legal formalities).

<sup>328</sup> *Id.*

<sup>329</sup> Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 129 (2017).

<sup>330</sup> Cf. Note, *Recent Social Media Posts: Executive Power—Presidential Directives—In Tweets, President Purports to Ban Transgender Military Servicemembers*, 131 HARV. L. REV. 934, 934, 936 (2018) (discussing the argument that social media announcements of a new policy to exclude transgender servicemembers “upset the reasonable expectations” of those who would have been excluded by that policy).

But this argument is misplaced when the law is asking a different question—Was this law a result of discrimination? This inquiry is not attempting to pin down the positive effect of the law or clarify its scope. Therefore, no reliance interests are at stake. When the question is whether discriminatory purpose motivated executive action, “statements by executive branch officials supply the most relevant evidence of intent.”<sup>331</sup> While not every statement will be probative, courts can evaluate statements on a “case-by-case basis.”<sup>332</sup> Statements such as those in the travel ban case provide easy evidence “probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action.”<sup>333</sup> To the extent that the law is concerned about whether an official action expresses a discriminatory meaning to the public, an official’s statements are all the more important. The public is more likely to be familiar with the President’s pronouncements than with statements of purpose in an executive order or briefs filed in litigation.<sup>334</sup>

Precisely because they are crafted with the benefit of advice and caution, formal statements of purpose may be pretextual. A politician’s own statements will often be the more reliable guide to meaning.<sup>335</sup> This includes campaign statements. Perhaps the ceremony of the oath of office could persuade a politician of the gravitas of his duties, transforming his purposes from unconstitutional to constitutional.<sup>336</sup> But to assume this occurs automatically is magical thinking. At the very least, a politician’s statements should not be categorically excluded from judicial consideration.

A different variation on this argument—one not made expressly—might be that politicians make explicitly biased remarks to pander to the base emotions of voters, and so these remarks cannot be taken as genuine indications of discriminatory intent. But the question is not whether the

<sup>331</sup> Shaw, *supra* note 329, at 138.

<sup>332</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 574 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>333</sup> *Id.* at 599. While this might be true of the President’s comments regarding the travel ban, appellate courts should be wary of including such language in constitutional discrimination cases. The lesson from the “stray remarks” cases is that lower courts may formalize these descriptions into tests used to arbitrarily screen out evidence of explicit bias. *See supra* Section II.B.

<sup>334</sup> Shaw, *supra* note 329, at 139.

<sup>335</sup> *Id.* (“When it comes to the President’s purpose, other executive branch submissions could not possibly overcome the President’s own words. Accordingly, presidential statements should clearly control in such cases.”).

<sup>336</sup> *See, e.g.*, Transcript of Oral Argument at 28–29, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965). When posed with Justice Anthony Kennedy’s hypothetical question, “[S]uppose you have a local mayor and, as a candidate, he makes vituperative . . . hateful statements, he’s elected, and on day two, he takes acts that are consistent with those hateful statements. . . . whatever he said in the campaign is irrelevant?” Solicitor General Noel Francisco responded, “[Y]es, because we do think that oath marks a fundamental transformation.” *Id.*

official is a bigot. If an official takes action to harm minority groups not because he is a bigot, but because his supporters are, it is no less discriminatory.<sup>337</sup> The cause of the harm to the plaintiffs was the discriminatory views of a group of constituents, passed through the politician as a conduit.<sup>338</sup> Moreover, this objection fails to account for how the harms of discrimination are both material and expressive.<sup>339</sup> If a politician campaigns on a promise of discrimination and, once elected, takes an action that harms minority-group members, that action may very well express that minorities are not full members of the community. This is so regardless of the official's true feelings.

Courts may imagine that slurs and insults are just jokes that do not reflect a speaker's true attitudes and have no bearing on serious decisions.<sup>340</sup> Judge Alex Kozinski put the point vividly: "We'll quest aimlessly for true intentions across a sea of insults and hyperbole."<sup>341</sup> This argument resonates with a certain understanding of rhetoric in the internet age. Online commentary does not always mean what it says. Some comments are just "trolling": attempting to elicit offense for the sake of offense, or pushing the bounds of transgression for the sake of transgression.<sup>342</sup> Or they are just "locker room talk": insignificant male banter.<sup>343</sup> Similar views may explain the stray remarks doctrine.<sup>344</sup> Yet social science evidence is to the contrary.<sup>345</sup>

<sup>337</sup> See Heidi Kitrosser, *Is Speech from the Campaign Trail Relevant to Religious Discrimination Claims?*, ACSBLOG (Mar. 20, 2017), <https://www.acslaw.org/acsblog/should-elected-officials-be-held-accountable-in-court-for-campaign-speech> [<https://perma.cc/RQN7-KQD5>] ("A presidential action that is taken to appeal to a constituency's perceived bigotry is no less discriminatory in purpose than is an action that manifests the president's personal biases.").

<sup>338</sup> In the Title VII context, courts have long rejected the "customer preference" defense to discrimination for this reason. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981).

<sup>339</sup> See *supra* Section I.B.

<sup>340</sup> Cf. Joan P. Emerson, *Negotiating the Serious Import of Humor*, 32 *SOCIOMETRY* 169, 169 (1969) (discussing how "humor officially does not 'count'" and "[n]ormally a person is not held responsible for what he does in jest to the same degree that he would be for a serious gesture"); A. Michael Johnson, *The "Only Joking" Defense: Attribution Bias or Impression Management?*, 67 *PSYCHOL. REP.* 1051, 1054 (1990) (presenting survey research that "suggests that people believe that their own jokes do not usually reflect their attitudes even when other people are offended").

<sup>341</sup> *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc).

<sup>342</sup> See, e.g., WHITNEY PHILLIPS, *THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE* 1, 2 (2015) (discussing "trolling" that attempts "to disrupt and upset as many people as possible").

<sup>343</sup> See, e.g., MANNE, *supra* note 2, at 206–07 (discussing the difficulty "of giving a close reading of some of the least literate remarks in human history," such as the phrase "I moved on her like a bitch").

<sup>344</sup> See, e.g., *supra* note 265 and accompanying text.

<sup>345</sup> Research suggests the unsurprising finding that prejudice correlates with favorable reactions to humor that disparages outgroups. See Gordon Hodson et al., *A Joke Is Just a Joke (Except When It Isn't): Cavalier Humor Beliefs Facilitate the Expression of Group Dominance Motives*, 99 *J. PERSONALITY &*

Some empirical research even supports the commonsense idea that sexist language is correlated with sexist beliefs or lack of concern about sexism.<sup>346</sup>

Another variation on this argument may be that some people are indiscriminately vulgar. For example, in Title VII cases in which supervisors insulted women in gendered terms, courts may imagine that those supervisors would have been equally vulgar had the plaintiffs been men, referring to the plaintiffs instead with those crude epithets generally reserved for men.<sup>347</sup> If this were true, surely there would be evidence that men were also subjected to gender-based insults, but such evidence is absent in the stray remarks cases.<sup>348</sup>

In employment discrimination cases, courts should consider discriminatory remarks in context, rather than excluding them based on the formalistic application of special rules. While “a slur, in and of itself, does not prove actionable discrimination,” combined with other evidence, “an otherwise stray remark may create an ‘ensemble [that] is sufficient to defeat summary judgment.’”<sup>349</sup> The fact that the statement was not made in the context of a particular employment decision goes to the weight a jury should give that statement; it is not a reason to rule it out categorically. Refusing to consider such evidence is inconsistent with the everyday practice of determining a person’s purpose from their statements.<sup>350</sup> As one court put it, “[M]anagement’s consideration of an impermissible factor in one context may support the inference that the impermissible factor entered into the decisionmaking process in another context.”<sup>351</sup> And there are reasons casual

SOC. PSYCHOL. 660, 662 (2010) (citing studies demonstrating that “[m]en who are hostile toward women . . . appreciate sexist humor”); *id.* at 672 (reporting the results of studies demonstrating “that those higher in personal biases . . . consider [jokes] disparaging Mexicans . . . favorably”).

<sup>346</sup> This is even for “subtle” sexist language. See Janet K. Swim et al., *Understanding Subtle Sexism: Detection and Use of Sexist Language*, 51 SEX ROLES 117, 117 (2004).

<sup>347</sup> While this argument is not made explicitly in stray remarks cases, it is the stated assumption behind the “equal-opportunity harasser” response to a sexual harassment claim. See Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 540–41 (2013) (discussing the argument).

<sup>348</sup> In harassment cases, some courts do ask whether harassers who abuse both men and women treated men or women in a way that was qualitatively or quantitatively different. *Id.* at 540, 540 n.61. In any event, discrimination law does not include a loophole for employers who penalize both men and women for failing to conform with sex stereotypes. See, e.g., *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 348–49 (7th Cir. 2017) (en banc) (discussing the analogy to discriminatory anti-miscegenation laws that penalize both black and white people).

<sup>349</sup> *Reid v. Google, Inc.*, 235 P.3d 988, 1008 (Cal. 2010) (alteration in original) (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990)) (rejecting the stray remarks doctrine).

<sup>350</sup> *Taylor v. Va. Union Univ.*, 193 F.3d 219, 251 (4th Cir. 1999) (Motz, J., dissenting) (“If a supervisor’s own words reflect the illegal bias he is accused of harboring, those words generally constitute strong, direct evidence of that animus, admissible in an employment discrimination action brought against him.”).

<sup>351</sup> *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 356 (6th Cir. 1998).

remarks may be *more* probative than an employer's official statements. On the advice of management lawyers, corporations are not likely to include any statements regarding prohibited grounds for discrimination in official documentation, and they may even "sanitize" records to eliminate evidence of explicit bias.<sup>352</sup>

Thus, informal statements, rather than being disregarded, should often be considered telling evidence of purpose.

### 3. *Groups and Mixed Motives*

A final variation on this argument is that, while the intentions of individuals may be discernable, group intentions are not.<sup>353</sup> The motives of groups are mixed.<sup>354</sup> This argument carries over from debates over statutory interpretation, and, notably, Justice Antonin Scalia's general skepticism of the probative value of legislative history.<sup>355</sup> Concerns about discerning collective intent have also cropped up in employment discrimination cases,<sup>356</sup> and may underscore the judicial preoccupation with identifying "decision-makers" in cases applying the stray remarks doctrine.<sup>357</sup> But in constitutional and Title VII cases, the Supreme Court has established workable standards

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<sup>352</sup> See, e.g., LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 163–64 (2016) (reviewing "management lawyers' webinar and other materials" and concluding they "show[] that management attorneys continue to advise employers to sanitize their personnel files and to proactively create a record that will obscure discrimination"); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 993 (1999) (discussing advice from a management lawyer to "[m]aintain well-kept 'clean' personnel files; [and] eliminate unnecessary references to sex, age, etc." (alterations in original) (quoting Douglas L. Williams, *Handling the EEOC Investigation*, in 2 ALI-ABA RESOURCE MATERIALS: EMPLOYMENT & LABOR LAW 1121, 1145 (Peter M. Panken ed., 7th ed. 1995))).

<sup>353</sup> This was a prominent objection in equal protection litigation up until *Washington v. Davis*, 426 U.S. 229 (1976). Haney-López, *supra* note 14, at 1789, 1793–96 (tracing this argument through Supreme Court cases in the Civil Rights Era).

<sup>354</sup> Cf. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

<sup>355</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting); see also Fallon, *supra* note 308, at 527 ("In statutory interpretation cases, a growing panoply of commentators—with apparently increasing influence on the Justices—has disparaged and indeed ridiculed inquiries into subjective legislative intent as a gauge of statutory meaning.").

<sup>356</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 273 (1989) (O'Connor, J., concurring) (reflecting on the dilemma of determining intent "in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria").

<sup>357</sup> See *supra* notes 246, 258, 266–274 and accompanying text.

for determining collective intent.<sup>358</sup> It regards the explicit statements of decision-makers as relevant to those standards.<sup>359</sup>

In Establishment Clause cases outside of the immigration context, the Court has imposed a standard that is difficult for plaintiffs to meet, not one that is impossible to apply.<sup>360</sup> The Court asks whether the “predominant purpose” of the law was religious.<sup>361</sup> In conducting this inquiry, courts give deference to the legislature’s stated secular purposes.<sup>362</sup> They ask whether the secular rationales are so “implausible or inadequate” as to be “sham[s]” or “merely secondary to a religious objective.”<sup>363</sup> In practice, this inquiry does not require that all members of a legislative body be deposed about their intentions. Rather, courts ask whether the legislature’s secular aims are so specious, post-hoc, or irrational as to be pretexts for more obvious religious purposes.<sup>364</sup> This “predominant purpose” inquiry is qualitative, keyed more to the expressive than the material harms of discrimination.

In equal protection and Title VII cases, courts have adopted a more plaintiff-friendly rule. In the 1977 equal protection case *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court adopted a burden-shifting framework to address concerns about the mixed motives of legislators.<sup>365</sup> It rejected an inquiry that would have required a

<sup>358</sup> See Verstein, *supra* note 292, at 1113 (“Mixed motive analysis is much easier than commonly thought. Courts should be less reluctant to allow mixed motive analysis because when they do it, they can cabin its scope to the pertinent issues.”).

<sup>359</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729–31 (2018) (holding that an adjudication violated the Free Exercise Clause based on the remarks of one of the adjudicators disparaging a party’s religious beliefs); *Cooper v. Harris*, 137 S. Ct. 1455, 1475–76 (2017) (examining, among other evidence of a racial gerrymander, the public statements of legislators that race was an explicit consideration).

<sup>360</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 (2005) (noting the Court has seldom invalidated legislation under the Establishment Clause merely because it lacked a genuine secular purpose). *McCreary County* was a case about a Ten Commandments display, not about discrimination against a particular religion. In a free exercise challenge to a law that targeted a particular religious group, the Court applied strict scrutiny. See *Lukumi*, 508 U.S. at 533. But in a free exercise challenge to a decision of an adjudicatory body that was tainted by anti-religious bias, the Court overturned the decision without applying strict scrutiny. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

<sup>361</sup> *McCreary County*, 545 U.S. at 860. The predominant purpose test is also used in cases involving racial gerrymanders. *Cooper*, 137 S. Ct. at 1464 (holding that the design of a voting district must survive strict scrutiny if racial considerations were predominant); see Verstein, *supra* note 292, at 1134 (explaining that the “primary purpose” analysis is one of four tests courts commonly use in analyzing mixed motives).

<sup>362</sup> *McCreary County*, 545 U.S. at 864.

<sup>363</sup> *Id.* at 864–65.

<sup>364</sup> *Id.* at 871–73 (noting, among other things, that the legislature had created “new statements of [secular] purpose . . . only as a litigating position,” that it omitted matters one would have expected if its purposes were secular, and that it had not disclaimed its obvious religious objectives).

<sup>365</sup> 429 U.S. 252, 265–66, 270 n.21 (1977).

showing of sole purpose or primary purpose.<sup>366</sup> Instead, the Court held that the question was “whether invidious discriminatory purpose was a motivating factor.”<sup>367</sup> This required that a plaintiff show, at the threshold, “[p]roof that the decision . . . was motivated *in part* by a racially discriminatory purpose.”<sup>368</sup> This “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”<sup>369</sup> Courts should consider the historical background of the decision, particularly if it reveals a pattern of official actions taken for discriminatory reasons, or a suspicious sequence of events.<sup>370</sup> Once a plaintiff has shown that discrimination had some part in motivating a policy, the burden shifts to the defendant to establish “that the same decision would have resulted even had the impermissible purpose not been considered.”<sup>371</sup> In Title VII cases, the Supreme Court borrowed this burden-shifting approach,<sup>372</sup> and a similar standard was later codified by the Civil Rights Act of 1991.<sup>373</sup> This approach is keyed to the material harms of discrimination: it asks, Was race, sex, or another forbidden ground a “but for” or necessary cause of the plaintiff’s material misfortune?

The Supreme Court has held that statements of explicit bias are “highly relevant” to its contextual inquiry into whether discrimination was a motivating factor.<sup>374</sup> The Court has even analyzed the statements of legislators long dead. *Hunter v. Underwood* was a 1985 decision about whether the voter disenfranchisement provisions of the Alabama Constitution of 1901 were enacted with discriminatory intent.<sup>375</sup> The Court noted the historical record was replete with statements about the “zeal for white supremacy” that had motivated the constitutional changes.<sup>376</sup>

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<sup>366</sup> *Id.* at 265–66.

<sup>367</sup> *Id.* at 266.

<sup>368</sup> *Id.* at 270 n.21 (emphasis added).

<sup>369</sup> *Id.* at 266.

<sup>370</sup> *Id.* at 266–67.

<sup>371</sup> *Id.* at 271 n.21.

<sup>372</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 268 (1989) (O’Connor, J., concurring) (noting, about the Court’s burden-shifting approach, that “[w]e adhered to similar principles in *Arlington Heights* . . . , a case which, like this one, presented the problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions”).

<sup>373</sup> *See supra* notes 248–51 and accompanying text.

<sup>374</sup> *Arlington Heights*, 429 U.S. at 268 (“The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”).

<sup>375</sup> 471 U.S. 222, 223–24 (1985).

<sup>376</sup> *Id.* at 229.

This contextual approach to discriminatory intent has also proven workable in equal protection cases challenging recent laws. It was used by the Fourth Circuit to find discriminatory intent in *North Carolina State Conference of the NAACP v. McCrory*, a case striking down North Carolina’s omnibus elections bill because that bill was passed with intent to discriminate against African American voters.<sup>377</sup> In *McCrory*, the court examined North Carolina’s history of racial discrimination and voter suppression, stretching back to slavery, through the Jim Crow era, and continuing even after the passage of the Voting Rights Act in 1965, which North Carolina attempted to violate on several occasions.<sup>378</sup> North Carolina’s 2013 omnibus elections bill was rushed through the legislature within days of the Supreme Court’s decision in *Shelby County v. Holder*, a case that released North Carolina from the obligation to seek federal approval of proposed changes to voting laws to ensure they were not discriminatory.<sup>379</sup> The challenged law had no persuasive justification for restricting voting practices used disproportionately by African Americans, like Sunday voting, but not voting practices used disproportionately by whites, like absentee voting.<sup>380</sup>

For the *McCrory* court, evidence of explicit bias was relevant. The state had argued before the district court that its reason for eliminating Sunday voting was that “[c]ounties with Sunday voting in 2014 were disproportionately black and disproportionately Democratic.”<sup>381</sup> While the district court saw nothing discriminatory about this statement, the Fourth Circuit thought it came “close to a smoking gun.”<sup>382</sup> The Fourth Circuit reasoned: “[T]he State’s very justification for a challenged statute hinges *explicitly* on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”<sup>383</sup>

Once a plaintiff has presented evidence that discrimination was a motivating factor, the burden shifts to the government or employer to demonstrate it would have made the same decision even absent discrimination.<sup>384</sup> Such a showing might be made with evidence that a

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<sup>377</sup> 831 F.3d 204, 226 (4th Cir. 2016).

<sup>378</sup> *Id.* at 223.

<sup>379</sup> *Id.* at 223, 227 (discussing *Shelby County v. Holder*, 570 U.S. 529 (2013)).

<sup>380</sup> *Id.* at 230.

<sup>381</sup> *Id.* at 226 (alteration in original) (internal quotation marks and citations omitted).

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> See *supra* notes 248–51 and accompanying text. In cases involving corruption of the criminal justice process by explicit bias on the part of prosecutors or jurors, a new trial may result. See *supra* note 28.



majority of decision-makers voted for the proposal for nondiscriminatory reasons.<sup>385</sup> But rather than this sort of head-counting, courts generally scrutinize the plausibility of nondiscriminatory motives as explanations for legislative or employer action, asking whether, as an objective matter, they are credible explanations.<sup>386</sup> Although the aim of this inquiry is to assess what motivated the legislature as a descriptive matter, not to balance competing interests, in practice, this inquiry resembles the balancing of strict scrutiny. As the *McCrorry* court explained: “Once the burden shifts, a court must carefully scrutinize a state’s non-racial motivations to determine whether they alone can explain enactment of the challenged law.”<sup>387</sup> This inquiry will often entail assessment of the weight of the state’s purported interests.<sup>388</sup>

Thus, courts are able to assess mixed motives and the motives of collective entities with inquiries that examine the totality of the circumstances, including explicitly biased statements.

### B. Remedial Problems

Courts may refuse to consider explicit bias because they are worried about the remedy. One concern is that evidence of explicit bias might “taint[]” otherwise valid policies and decisions.<sup>389</sup> This could lead to good policies and decisions being undermined by a few biased statements, causing public policy and employment markets to suffer. A second type of argument is that official decision-making processes eliminate explicitly biased inputs. Underlying this argument is the worry that institutions with sound procedures will be unfairly penalized for the biased statements of some of their constituents. And a third argument relates to institutional competence: judges may be concerned that if the threshold for finding discrimination is low, they will too often be called upon to second-guess the merits of political and employment decisions, matters outside their ken.

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<sup>385</sup> See Fallon, *supra* note 308, at 581 (arguing that such inquiries are not impractical).

<sup>386</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 231 (1985); Verstein, *supra* note 292, at 1161–64 (making a similar point).

<sup>387</sup> N.C. State Conference of the NAACP v. *McCrorry*, 831 F.3d 204, 233 (4th Cir. 2016).

<sup>388</sup> See *id.* at 233–34 (“A court assesses whether a law would have been enacted without a racially discriminatory motive by considering the substantiality of the state’s proffered non-racial interest and how well the law furthers that interest.”).

<sup>389</sup> Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 25 (“Just as the Supreme Court has held that convictions tainted by the introduction of illegally obtained evidence should be reversed, so one might imagine a court holding that laws or regulations tainted by ‘admission’ into the law-making process of some forbidden consideration should be set aside.”).

### 1. *Taint and Lock-In*

If a challenged policy is forever tainted by the discriminatory motives that first inspired it, then the government can never implement that policy, no matter how circumstances might change or how noble its new reasons may be. Thus, it is forever “locked in” to the status quo.<sup>390</sup> A legislature that passed a law forbidding murder for racially discriminatory reasons could never repass the law for nondiscriminatory ones.<sup>391</sup> In the same vein, employers fear being “locked in” to retaining poorly performing employees because a supervisor has made discriminatory remarks. These concerns apply not just to explicit bias but to all inquiries into illicit intent. They implicate larger debates about judicial involvement in policymaking<sup>392</sup> and intrusion into business prerogatives.<sup>393</sup> Yet in constitutional and employment discrimination contexts, courts balance the interests of policymakers and employers through causation inquiries that resemble strict scrutiny review. Additionally, courts have proven able to respond to changing circumstances that show a policy or decision is no longer motivated by discrimination.

Fear of lock-in was central to the result in *Palmer v. Thompson*.<sup>394</sup> The concern there was that even if, at some point in the future, integrated swimming pools became a drain on the city’s finances, the city would be forbidden from closing them because its decision had once been tainted with racial animus.<sup>395</sup> Lock-in arguments have also featured prominently in the travel ban litigation.<sup>396</sup> Dissenting judges criticized the Fourth Circuit’s decision to invalidate the travel ban on the ground that the court gave “the President no guidelines for ‘cleansing’ himself of the ‘taint’” of religious

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<sup>390</sup> *Palmer v. Thompson*, 403 U.S. 217, 230 (1971) (Blackmun, J., concurring).

<sup>391</sup> *Cf.* Fallon, *supra* note 308, at 531 (offering a more plausible example from the Establishment Clause context: “[F]ew would judge it tolerable for courts to strike down a law prohibiting murder if historical examination revealed that most members of the legislature voted for it solely for the constitutionally forbidden purpose of enforcing one of God’s commandments”).

<sup>392</sup> *See* Tribe, *supra* note 389, at 25 (arguing that while allowing one guilty person to go free may be a fair price to pay to deter police misconduct, “[r]espect for the Congress as a coordinate branch, and for the sovereign state legislatures, is difficult to reconcile with such a strong prophylactic use of judicial review”).

<sup>393</sup> *See* SPERINO & THOMAS, *supra* note 239, at 78–83 (discussing judicial reluctance to act as a “super-personnel department” in evaluating the business reasons for employment decisions).

<sup>394</sup> 403 U.S. at 230 (Blackmun, J., concurring) (quoting Transcript of Oral Argument at 43–44, 403 U.S. 217 (No. 107)).

<sup>395</sup> *Id.*

<sup>396</sup> *See* *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc) (“Even if a politician’s past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result—namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate.”).

animus.<sup>397</sup> The underlying concern was that President Trump would be forever constrained in his ability to make policy with respect to majority-Muslim nations.<sup>398</sup> Related concerns undergirded the Court's deference to law enforcement arguments in *Iqbal* as well.<sup>399</sup>

In characterizing the racial animus motivating a law or policy as “taint,” these arguments minimize the harm of discrimination. This language may carry an implicit premise: that discriminatory intent, on its own, is not harmful.<sup>400</sup> In the introductory paragraphs of one recent opinion, the Court put the word “taint” in quotation marks, as if to distance itself from the very concept.<sup>401</sup> It is as though inquiries into explicit bias are no more than referenda on the characters of policymakers and discrimination could be alleviated if those policymakers would simply repent, do penance, and seek absolution. But this “sticks and stones” objection does not apply here. In none of the cases discussed in this Article is a plaintiff complaining simply of symbolic harm.<sup>402</sup> Rather, plaintiffs are complaining that, on account of race, sex, or religion, they have lost opportunities to work, vote, or use public services, they or their associates have been denied admission to the United States, or they have suffered abuse in the criminal justice system. The Court's standing doctrine requires that a plaintiff demonstrate this type of concrete injury.<sup>403</sup> In addition to these material consequences, policies enacted on explicitly biased rationales may express that some people, by virtue of their race, sex, or religion, are not worthy of equal concern. Such policies stigmatize and burden minority groups, compounding the material harms.<sup>404</sup>

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<sup>397</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 651 (4th Cir. 2017) (en banc) (Niemeyer, J., dissenting), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>398</sup> *Id.*

<sup>399</sup> See *supra* notes 185–89 and accompanying text.

<sup>400</sup> Philosophers might argue that sometimes people do the right thing for the wrong reason. See, e.g., HELLMAN, *supra* note 58, at 138–68.

<sup>401</sup> *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018).

<sup>402</sup> By contrast, the “taint” argument may have more traction in Establishment Clause cases in which plaintiffs allege the harm is government endorsement of religion: for example, in cases about displays of religious symbols or slogans. Those cases are beyond the scope of this Article.

<sup>403</sup> See, e.g., *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)) (discussing requirements for standing to challenge discrimination, including Article III's requirements of “an ‘injury in fact’ that is ‘fairly traceable’ to the defendant's conduct and ‘that is likely to be redressed by a favorable judicial decision’”). While Establishment Clause cases about government use of religious symbols, rather than religious discrimination, have received unusual treatment, again, that topic is outside the scope of this Article. See Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 119 (2017).

<sup>404</sup> See *supra* Section I.B.

Moreover, the law avoids “lock-in” problems from the start by asking whether a policy or decision was supported by compelling nondiscriminatory reasons.<sup>405</sup> When courts find discriminatory motives, they do not generally invalidate policies automatically. Rather, in some cases, courts apply strict scrutiny, asking whether the policy was narrowly tailored to meet a compelling state interest.<sup>406</sup> In cases following *Arlington Heights*, once the plaintiff makes a showing that a decision was motivated, even partially, by discrimination, the burden shifts to the government to demonstrate that it would have taken the challenged action even absent discriminatory motive.<sup>407</sup> And in Establishment Clause cases outside the immigration context, courts ask whether secular or religious concerns were the primary reasons for the law.<sup>408</sup> In conducting all of these inquiries, courts ask questions that go to whether the policy is a good one, as an objective matter.<sup>409</sup> Thus, even if statements of explicit bias in the record demonstrate a legislature passed a law prohibiting murder due to racial animus, a court would be likely to find that the law was justified for nondiscriminatory reasons.<sup>410</sup>

Theoretically, inquiries into actual motives could still result in the lock-in problem. Under *Arlington Heights*, for example, if the legislature would not have passed its murder law but for racial animus, then the murder prohibition would be invalid. Then, the question is whether a later legislature could repass the same law for good faith, nondiscriminatory reasons. No one argues it could not.<sup>411</sup> In Establishment Clause cases, courts ask whether a reasonable observer would understand the lawmaker’s reasons to have changed.<sup>412</sup> There is no bright-line rule for determining changes in meaning.

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<sup>405</sup> Fallon, *supra* note 308, at 569 (“Despite assertions in some cases that statutes with constitutionally forbidden predominant motivations are categorically invalid, I know of no case in which the Supreme Court has ever struck down a law that it plausibly could have adjudged necessary to promote a compelling governmental interest.”).

<sup>406</sup> See *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (equal protection redistricting case); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (free exercise challenge to a statute targeted at a religious minority).

<sup>407</sup> Fallon, *supra* note 308, at 555–56. Courts might apply both *Arlington Heights* and strict scrutiny. See *Lukumi*, 508 U.S. at 540 (Kennedy, J., joined by Stevens, J.) (finding *Arlington Heights* instructive on the intent question prior to applying strict scrutiny).

<sup>408</sup> See *supra* notes 358–64 and accompanying text.

<sup>409</sup> See, e.g., *supra* notes 364, 387–88 and accompanying text.

<sup>410</sup> See *supra* note 405.

<sup>411</sup> In *Palmer v. Thompson*, for example, the dissenting Justices argued that good faith, nonracial reasons could justify a later change in policy. 403 U.S. 217, 258–60, 271 (1971) (White, J., dissenting); *id.* at 273 (Marshall, J., dissenting).

<sup>412</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866, 874 (2005) (concluding that district courts can “take account of genuine changes in constitutionally significant conditions” although the history behind a policy matters, because “the world is not made brand new every morning” and “reasonable

The Supreme Court has assessed whether the taint of discriminatory motive has faded by analyzing context and circumstances.<sup>413</sup> It asks whether policymakers have “disavowed” their biased remarks.<sup>414</sup> While the Supreme Court did not engage in any such analysis in the travel ban litigation,<sup>415</sup> lower courts grappled with the changing meaning of the ban as the Trump Administration repeatedly revised its executive order to address judicial concerns.<sup>416</sup> In conducting this interpretive task, they considered factors such as the President’s continued public statements and changes made to the terms of the executive order in response to prior judicial decisions.<sup>417</sup> They scrutinized whether the government’s new national security justifications were plausible or pretextual.<sup>418</sup>

*Price Waterhouse* recognized an analogous lock-in problem under Title VII.<sup>419</sup> If an initial decision to fire an employee was tainted by discriminatory motives, an employer would be locked in to retaining that employee, no matter how poor that employee’s performance was.<sup>420</sup> Such a result would

observers have reasonable memories”). *McCreary County* involved three attempts by a county to install a Ten Commandments display in its courthouse, in violation of the Establishment Clause. *Id.* at 855. The same analysis applies to cases where the government has discriminated against a religious group.

<sup>413</sup> See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2324–26 (2018) (assessing all relevant “direct and circumstantial evidence” to find no discriminatory intent in a Texas redistricting plan enacted two years after a court had found discriminatory intent in a prior plan); *McCreary County*, 545 U.S. at 861 (discussing *McGowan v. Maryland*, 366 U.S. 420 (1961), which upheld laws requiring businesses to close on Sundays on the grounds that, although the laws were once religiously motivated, “when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless,” and noting the result would have been different “if the government justified its decision with a stated desire for all Americans to honor Christ”).

<sup>414</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018).

<sup>415</sup> See *supra* notes 142–158 and accompanying text.

<sup>416</sup> *Compare, e.g., Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 624, 627–28 (D. Md. 2017) (concluding that the third iteration of the travel ban was still likely to have been motivated by anti-Muslim purpose, and observing that, rather than repudiating his anti-Muslim statements, the President had only made more of them since taking office), with *Sarsour v. Trump*, 245 F. Supp. 3d 719, 737–38 (E.D. Va. 2017) (“[T]he substantive revisions reflected in [the second version of the travel ban] have reduced the probative value of the President’s statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of [the order] is to discriminate against Muslims based on their religion and that [the order] is a pretext or a sham for that purpose.”).

<sup>417</sup> See *supra* note 416.

<sup>418</sup> See, e.g., *Int’l Refugee Assistance Project*, 265 F. Supp. 3d at 625 (concluding that the government’s new national security rationale—that the travel ban was a result of a Department of Homeland Security (DHS) review of the information-sharing practices of the targeted states—was deficient because of evidence that the results of the DHS review were “preordained” rather than objective).

<sup>419</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion).

<sup>420</sup> See *id.* at 249 (discussing a similar issue raised in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977), where the Court held that a public employee “ought not to be able, by engaging in . . . [conduct protected under the First Amendment], to prevent his employer from

go too far in abridging an employer's "freedom of choice," which Title VII sought to preserve.<sup>421</sup> Title VII is not "'for cause' legislation" that requires that employers justify every employment decision; it only removes sex, race, religion, and national origin as permissible considerations.<sup>422</sup> For this reason, when a plaintiff has evidence that discrimination was a motivating factor in her termination, an employer can raise the defense that it would have still terminated her absent discrimination.<sup>423</sup> This inquiry requires that the employer show that it actually "*would have*" fired the employee, not that it *could* have fired her for some nondiscriminatory reason.<sup>424</sup> But, as in the equal protection context, in terms of proof, these two questions blur.<sup>425</sup> For example, an employer who discovers, in the course of defending against an employment discrimination claim, that an employee has committed a fireable offense, is not required to reinstate that plaintiff.<sup>426</sup>

In Title VII cases alleging race, sex, or religious discrimination, unlike in equal protection cases, defendants do not emerge unscathed if they establish they would have taken the same action absent discrimination. They must pay the plaintiff's attorney's fees and costs, and they may be required to change their policies to comply with the law.<sup>427</sup> These limited remedies address the expressive harms of discrimination.<sup>428</sup> They provide some measure of deterrence against future discrimination and ensure that

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assessing his performance record and reaching a decision not to rehire on the basis of that record" (internal quotation marks omitted)).

<sup>421</sup> *Id.* at 242.

<sup>422</sup> *Id.* at 239.

<sup>423</sup> See *supra* notes 248–53 and accompanying text.

<sup>424</sup> 42 U.S.C. § 2000e-5(g)(2)(B) (2012) (emphasis added).

<sup>425</sup> *Price Waterhouse*, 490 U.S. at 261 (White, J., concurring) ("[W]here the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof.").

<sup>426</sup> *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995) ("It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."). Under this rule, a plaintiff's damages are limited to losses incurred up until the time the evidence was discovered. *Id.* A plaintiff who is fired after complaining of discrimination can bring a claim of illegal retaliation under Title VII. See 42 U.S.C. § 2000e-3(a). To prevent plaintiffs from making opportunistic complaints of discrimination, putting their employers in a position where termination might result in a retaliation suit, courts hold plaintiffs to the entire burden of proving retaliatory motives were the cause of the termination. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358–60 (2013). The burden never shifts to the employer. *Id.* at 362–63.

<sup>427</sup> 42 U.S.C. § 2000e-5(g)(2)(B) (providing that the court may not grant damages or any "order requiring any admission, reinstatement, hiring, promotion, or payment," but it "may grant declaratory relief, injunctive relief . . . and attorney's fees and costs").

<sup>428</sup> See Section I.B. In such cases, discrimination was not the necessary cause of the material harm to the plaintiff.

plaintiffs' lawyers are compensated for bringing cases.<sup>429</sup> While prophylactic rationales may offend principles of separation of powers in the equal protection context, no such concerns exist when Congress is regulating private actors.<sup>430</sup>

Thus, in both constitutional and statutory cases, courts can consider evidence of explicit bias while balancing concerns about impairing policymaking, law enforcement, and employment markets.

## 2. *Whitewashing*

Another argument is that institutional decision-making processes cleanse any taint from explicit bias. This argument sounds in procedural justice: that the law should do no more than ensure that institutions use certain formal processes for decision-making. So long as the processes are adequate, their outputs cannot be questioned. Whether they have received explicitly biased inputs is irrelevant. Thus, in the stray remarks cases, courts consider only the employer's formal decision-making processes, excluding evidence of explicit bias outside the context of that process.<sup>431</sup> In the travel ban cases, the government asked the courts to look only to official rationales vetted by legal advisors, not to campaign statements, social media commentary, or interviews by President Trump or his surrogates.<sup>432</sup> While the Supreme Court did not go so far as to hold that the President's remarks were irrelevant, its analysis gave no weight to those statements.<sup>433</sup> Rather, it characterized the ban as "the result[] of a worldwide review process undertaken by multiple Cabinet officials and their agencies."<sup>434</sup> In a case challenging the DACA rescission, the government asked the court to consider only statements of purpose from an acting secretary, rather than the President.<sup>435</sup>

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<sup>429</sup> Cf. Katz, *supra* note 63, at 534–36 (arguing this provision is inadequate in its ability to deter employers from discrimination and incentivize plaintiffs' lawyers to bring suits, and proposing more meaningful punitive damages and attorney's fees awards).

<sup>430</sup> See *supra* note 392. Deterrence also makes sense in contexts in which the law seeks to restrain the behavior of individual, low-level government officials. Fallon, *supra* note 308, at 531 (giving the example of discriminatory use of peremptory challenges by a prosecutor, which may require a new trial).

<sup>431</sup> See *supra* notes 239, 244, 258–63 and accompanying text.

<sup>432</sup> See *supra* notes 321–25 and accompanying text.

<sup>433</sup> See *supra* notes 145–53 and accompanying text.

<sup>434</sup> Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018).

<sup>435</sup> Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 278–79 (E.D.N.Y. 2018) (rejecting the "remarkable argument that" only the motives of an acting secretary, rather than the President, were relevant to an equal protection challenge to DACA's rescission, and noting, "If, as Plaintiffs allege, President Trump himself directed the end of the DACA program, it would be surprising if his 'discriminatory intent [could] effectively be laundered by being implemented by an agency under his control'" (alteration in original) (citation omitted)).

Institutions should not avoid liability for explicit bias by adopting formal procedures and practices that create no more than the appearance of fairness. A rule that focuses solely on formal processes eliminates potentially relevant evidence of whether discrimination caused harm to a plaintiff. It is a fiction that only remarks made within the bounds of a formal decision-making process can motivate a decision. It is also a fiction that official decision-makers are never influenced by others.<sup>436</sup> The fiction is particularly implausible when the person influencing the decision is in leadership (or, needless to say, is the President of the United States).

Even when explicit bias is expressed by those without immediate authority, it may be reasonable to infer an institution's discriminatory intent from the fact that it allowed explicit bias to go unchecked.<sup>437</sup> What is more, in employment discrimination cases, explicitly biased remarks may also show that a plaintiff never had a chance in the first place because her coworkers presumed she was incompetent from the start due to sexist or racist stereotypes.<sup>438</sup> When such predictions of failure are explicit, they fulfill themselves by undermining the confidence and expectations of their targets.<sup>439</sup>

In the Title VII context, the better explanation for deference to process is not that courts regard "stray remarks" as irrelevant, but rather that they have concluded that employers should not be held accountable for policing the remarks of employees made outside of formal decision-making processes.<sup>440</sup> But this judgment errs too far on the side of preserving

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<sup>436</sup> Remarks by coworkers who were not decision-makers may evince a "corporate culture" of discrimination. *See, e.g.,* *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 300–01 (4th Cir. 2010) ("It is not unfair to observe that the corporate culture evinced a very specific yet pervasive aversion to the idea of female Pickup and Delivery drivers. Old Dominion employees, of all ranks, seemed to share a view that women were unfit for that position."). Moreover, remarks by people who are not direct decision-makers may influence direct decision-makers. *See, e.g.,* *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (discussing cases in which the official making the employment discrimination decision "has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else").

<sup>437</sup> *See* Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 368 (2008) ("If the decisionmaker acted in a work environment in which discriminatory remarks and behavior were common and went unchecked by the employer, then it is more likely that the decisionmaker acted with discriminatory bias."); Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 791–92 (2010) ("[W]ork environments in which discriminatory remarks and behavior are common and unchecked may show not only that a decisionmaker acted with discriminatory bias, but also that the employer intended such a result.").

<sup>438</sup> *See supra* notes 269–274 and accompanying text (discussing the *Sreeram* case).

<sup>439</sup> *See supra* notes 104–108.

<sup>440</sup> *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1410 (2014) ("For Justice O'Connor, Title VII does not require employers to



employer discretion. In explaining why the law has stalled in eliminating racial and gender disparities in the workplace, sociologist and law Professor Lauren Edelman describes how courts defer to “symbolic” gestures by employers.<sup>441</sup> Rather than looking at results, courts ask only whether an employer uses what management lawyers regard as best practices, such as having an independent committee decide on promotions and terminations.<sup>442</sup> As employers win more cases due to judicial deference to “symbolic” processes, those processes become more popular with employers.<sup>443</sup> In turn, plaintiffs’ lawyers become unlikely to take cases if an employer has formal processes in place, leaving victims with no recourse when those processes fail.<sup>444</sup> Professor Edelman writes, “[W]hen courts . . . rely on myth and ceremony, inferring nondiscrimination from the mere presence of symbolic structures, rights themselves become merely symbolic.”<sup>445</sup>

In the constitutional law context, the conclusion that the judiciary should never take seriously the public statements of an elected official is even more untenable. When the question is whether discriminatory purpose animated a policy, an official’s statements to the public are particularly probative.<sup>446</sup> To be sure, there may be circumstances in which courts should give weight to the fact that a decision was later vetted through unbiased processes.<sup>447</sup> But the idea that courts should invariably defer to a whitewashed version of the Executive Branch’s purpose offends the principle that government should be transparent and accessible.<sup>448</sup> When a politician’s own public statements conflict with his administration’s official

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police their employees’ thoughts and expression generally, but it does require employers to keep sexism out of [the] figurative boardroom [where decisions are made].”)

<sup>441</sup> EDELMAN, *supra* note 352, at 168–96 (offering examples from case law and discussing empirical research demonstrating that courts increasingly defer to organizational processes to infer a lack of discriminatory intent and, when they do, plaintiffs are more likely to lose their cases).

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 196.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.* at 217.

<sup>446</sup> See *supra* notes 329–33 and accompanying text.

<sup>447</sup> Huq, *supra* note 231 (arguing that, in the travel ban context, courts would have given more deference to the Trump Administration “if the White House had required publicly requested relevant departmental heads to consider and to propose a new immigration-related regime in respect to terrorism-related risk” and “such bodies had convened internal experts and expeditiously proposed a new measure, supplying some relevant evidence of why it was needed, and presented it to the president”).

<sup>448</sup> Cf. Huq, *supra* note 14, at 1273 (“Those who urge the disregard of campaign statements implicitly treat the democratic process as little more than a cheap vaudeville—bright lights, thickly caked makeup, and nought of enduring substance.”); Shaw, *supra* note 329, at 132 (arguing that the values of “accessibility, transparency, and accountability” counsel for judicial consideration of a President’s public statements as evidence of purpose).

position, judicial disregard for those public statements “blur[s] the lines of political accountability” and is likely to confuse voters.<sup>449</sup>

Deference to procedure may reflect the unstated assumption that prejudice is atypical and inconsequential.<sup>450</sup> Judges may imagine that fair, meritocratic decision-makers, whether they be supervisors or cabinet officials, always override prejudiced ones.<sup>451</sup> This view might be explained by deeply held “meritocracy beliefs”: convictions that American systems of advancement and punishment are colorblind and gender neutral.<sup>452</sup> There are reasons for skepticism of meritocracy beliefs.<sup>453</sup> In any event, this is an explanation, not a legal argument. The question in an individual discrimination case is not whether we live in a just world or one marred by systemic inequality.<sup>454</sup> It is whether the cause of a particular plaintiff’s misfortune was discrimination based on race, sex, or religion.

Automatic deference to bureaucratic procedures renders the guarantee of equal rights hollow and is not a reason for blanket exclusion of evidence of explicit bias.

### 3. Institutional Competence

Another remedial concern is related to the judiciary’s competence. Judges may disregard evidence of explicit bias because, if the trigger for finding discriminatory intent is too sensitive, they will constantly be called

<sup>449</sup> See *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 347 (4th Cir. 2018) (en banc) (Wynn, J., concurring) (quoting *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 678 (2012) (Scalia, J., dissenting)); see also *id.* (“Voters would be confused as to whether the Proclamation advances the President’s promise to ban entry of Muslims, as the President has proclaimed, or is intended to prevent entry of aliens from countries that fail to maintain or share adequate information regarding their nationals, as the Government and the Proclamation claims. Voters, therefore, would not know which policy to hold the President accountable for at the polls.”).

<sup>450</sup> Haney-López, *supra* note 14, at 1859 (arguing that “[t]he ‘intentional blindness’ of [equal protection doctrine] . . . represents not a genuine application of equal protection law, but a successful effort by conservative Justices to protect themselves from discomfiting evidence that racial mistreatment persists”); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1164 (2008) (arguing that the stray remarks doctrine “may actually be [a] vehicle[] for judicial skepticism about the prevalence of discrimination”).

<sup>451</sup> Cf. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011) (“[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion . . .”).

<sup>452</sup> Eyer, *supra* note 77, at 1278–79 (arguing that the “resistance to ‘seeing’ discrimination appears to derive, moreover, not . . . from the specifics of discrimination doctrine, but instead from widely shared and deeply intractable background beliefs regarding discrimination and meritocracy in America”).

<sup>453</sup> See, e.g., *supra* notes 1–6.

<sup>454</sup> Meritocracy beliefs are an American take on the “just world” outlook: “[M]ost individuals feel a strong need to believe that they live in a world that is just, in the sense that people generally get what they deserve and deserve what they get.” Dhammika Dharmapala et al., *Belief in a Just World, Blaming the Victim, and Hate Crime Statutes*, 5 REV. L. & ECON. 311, 312 (2009) (describing the psychological literature on just world beliefs).

upon to interrogate the merits of political and employment decisions. These concerns are heightened in areas where courts are traditionally loath to invalidate executive action, such as immigration<sup>455</sup> and national security.<sup>456</sup> And a recurring mantra in Title VII cases is that “[f]ederal courts ‘do not sit as a super-personnel department that reexamines an entity’s business decisions.’”<sup>457</sup>

And yet, courts cannot neatly extract themselves from analysis of business and policy decisions if they are to decide discrimination cases. In nearly every discrimination case, courts are asked to sift through evidence of discriminatory and nondiscriminatory motives. Both procedural and substantive irregularities in a defendant’s decision-making are relevant, even at the outset of the inquiry.<sup>458</sup> At this stage, courts do not abandon their deference to business or policy objectives, but they must still inquire into whether the defendant’s nondiscriminatory explanation holds up on its own terms.<sup>459</sup> If not, it is more likely that discrimination occurred. To be sure, some explicit statements, considered in the context of all the evidence, may not be sufficiently indicative of discrimination for a case to proceed past summary judgment. But it is illogical to categorically exclude this particular genre of evidence.

Evidence that a decision was motivated, even partially, by discrimination requires that courts abandon their traditional deference. In *Arlington Heights*, the Court explained:

[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions . . . . But racial discrimination is not just

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<sup>455</sup> Under the plenary power doctrine, courts regarded immigration decisions as impervious to constitutional challenge. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 602–04 (1889) (upholding the government’s ability to exclude immigrants based on race and nationality). The strong version of the plenary power argument was not invoked by the government in the travel ban cases. *See supra* note 145; *see also* Margo Schlanger, *Symposium: Could This Be the End of Plenary Power?*, SCOTUSBLOG (July 14, 2017, 9:45 AM), <http://www.scotusblog.com/2017/07/symposium-end-plenary-power> [https://perma.cc/VXM4-D8CV].

<sup>456</sup> While full consideration of this topic is beyond the scope of this Article, there are persuasive arguments in favor of judicial review of factual determinations made by the Executive Branch with respect to national security. *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1965–68 (2015).

<sup>457</sup> *See, e.g.*, *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988)); SPERINO & THOMAS, *supra* note 239, at 78 (discussing the “super-personnel department” concern as a trope in Title VII litigation).

<sup>458</sup> *See, e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977) (explaining the various types of evidence that must be examined, including whether a pattern is “unexplainable on grounds other than race” and “[d]epartures from the normal procedural sequence”).

<sup>459</sup> *Id.* at 267 (“Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.”).

another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.<sup>460</sup>

That some lawmakers acted for biased reasons calls into question whether a legislative body took seriously its constitutional duty of equal protection, requiring more careful judicial scrutiny into whether a law is in the public interest.<sup>461</sup> The same goes for the Executive.<sup>462</sup> Similarly, in Title VII cases, even partial reliance on a discriminatory factor calls into question the credibility of an employer's decisions.<sup>463</sup>

### C. *Conflicting First Amendment Rights*

Judicial refusal to recognize explicit bias may also be rooted in concerns about free speech values. First Amendment doctrine draws a line between (a) the impermissible suppression of speech due to its particular message,<sup>464</sup> and (b) the permissible consideration of speech as evidence of illicit motives.<sup>465</sup> The Supreme Court has suggested that antidiscrimination law,<sup>466</sup> including prohibitions on discriminatory harassment,<sup>467</sup> falls on the

<sup>460</sup> *Id.* at 265–66.

<sup>461</sup> *Cf.* Fallon, *supra* note 308, at 577 (arguing that “when the legislature demonstrably breaches its deliberative responsibilities by acting for forbidden purposes, courts should respond by applying elevated scrutiny as a compensatory hedge against the risk that a challenged statute violates constitutional rights”).

<sup>462</sup> *Cf.* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2018) (manuscript at 45–46), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3200695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200695) [<https://perma.cc/4X4W-GX45>] (arguing that the Constitution’s lack of any privilege for public speech by the executive akin to legislative immunity “may provide an affirmative constitutional warrant for considering presidential statements and presidential intent in constitutional cases”).

<sup>463</sup> *See supra* notes 370–371 and accompanying text.

<sup>464</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (striking down a hate speech ordinance on the ground that “[w]hat we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups . . . ; but rather, a prohibition of fighting words that contain . . . messages of ‘bias-motivated’ hatred and in particular, as applied to this case, messages ‘based on virulent notions of racial supremacy’” (citation omitted)).

<sup>465</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (upholding a hate crimes law that established enhanced penalties for racially motivated crimes on the reasoning that “[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent”); Tribe, *supra* note 389, at 13 & n.30 (explaining the distinction in First Amendment law between inquiries that ask whether particular facts—like a person’s race—triggered a behavior, and inquiries that ask about whether internally held beliefs or values—such as particular opinions or specific stereotypes about racial groups—triggered the behavior).

<sup>466</sup> *See, e.g., Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (“Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”).

<sup>467</sup> *See R.A.V.*, 505 U.S. at 389–90 (“Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices . . . . Where the government does not target conduct on the basis of its expressive

permissible side of the line. Nonetheless, doctrines shielding biased expression from legal consideration may stem from concerns about the chilling effects of discrimination law on free speech. This argument can be refuted on empirical and normative grounds.

The genesis of the stray remarks doctrine was in concerns about free expression.<sup>468</sup> In *Price Waterhouse*, Justice O'Connor noted that Title VII's critics in Congress in 1964 argued the statute was a "thought control bill" aimed at eradicating prejudicial beliefs and worldviews.<sup>469</sup> To avoid such a construction, the bill was crafted to "eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts."<sup>470</sup> Thus, Justice O'Connor concluded liability should only attach if impermissible discrimination caused a plaintiff to be denied some opportunity or advantage, not on account of "stray remarks in the workplace."<sup>471</sup>

The stray remarks doctrine may reflect a desire to avoid giving employers incentives to censor employee expression.<sup>472</sup> If judges have discretion to decide whether to admit evidence of discriminatory remarks, a litigation-averse employer might simply forbid *all* employee speech with respect to protected classifications, not just such speech with respect to formal decisions on hiring, firing, pay, and promotions, and not just speech that might be demeaning, stereotyping, or otherwise threatening to equal opportunity. Speech suggesting biased motivations often expresses political viewpoints, such as opposition to discrimination law or affirmative action.<sup>473</sup> Some theorists have argued that the workplace is an essential site for civil society, in which freedom of expression makes an important contribution to

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content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 1 ("Somewhat surprisingly, in light of increased publicity about collisions between speech and equality interests and despite briefing of free speech issues by both sides, the Court's opinion in *Harris [v. Forklift Sys.]*, 510 U.S. 17 (1993), on speech that constituted sexual harassment] made no reference to the First Amendment.").

<sup>468</sup> See *supra* note 241.

<sup>469</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring) (quoting 100 CONG. REC. 7,254 (1964) (remarks of Sen. Ervin (D-NC))).

<sup>470</sup> *Id.*

<sup>471</sup> *Id.* at 277. Congress ultimately rejected Justice O'Connor's proposed rule that discriminatory motive be shown with "substantial" and "direct" evidence. See *supra* notes 248-51 and accompanying text.

<sup>472</sup> Ford, *supra* note 440, at 1413 ("Justice O'Connor's concern with 'thought control' suggests that imposing Title VII liability for sexism 'in the air' might lead to an excess of caution on the part of employers, leading them to police legitimate, if controversial, expressions of opinion.").

<sup>473</sup> See, e.g., *supra* note 277 and accompanying text (discussing *Diamond v. Bea Maurer, Inc.*, 128 F. App'x 968, 972 (4th Cir. 2005), a case in which an employer commented "that if a federal contract required [her company] to hire a certain number of minorities, she would close her shop").

democracy.<sup>474</sup> If speech outside the workplace is fair game for discovery, employers have incentives to fire workers who express bigoted attitudes on their own time as well.

In the travel ban litigation, the government argued that considering a candidate's campaign statements as proof of discriminatory intent would have a chilling effect on political speech.<sup>475</sup> A dissenting Fourth Circuit opinion agreed, arguing that examination of a politician's past statements would have no stopping point.<sup>476</sup> Courts might consider "statements from a previous campaign, or from a previous business conference, or from college."<sup>477</sup> A Ninth Circuit dissent made this point as well, arguing that "[p]ersonal histories, public and private, can become a scavenger hunt for statements that a clever lawyer can characterize as proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day."<sup>478</sup> The result would be to "chill campaign speech, despite the fact that our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'"<sup>479</sup> While these dissenting opinions emphasized the impact on campaign speech, the worry about whether a court might one day consider a candidate's "college essay" harkens to controversies over free speech on campuses. The reference to "proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day" likens constitutional litigation to broader debates over political correctness. It suggests equal protection litigation is about chasing trends rather than preserving enduring national values.

Chilling effects arguments are ostensibly empirical ones, which might be disputed with arguments about the likely behavior of employers, employees, and politicians.<sup>480</sup> But chilling effects arguments are more fundamentally about a normative question: whether the law should favor the risk averse who will over-comply with legal restrictions and err on the side

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<sup>474</sup> See, e.g., Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 695 (1997).

<sup>475</sup> Trump Cert. Pet., *supra* note 20, at 30.

<sup>476</sup> Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 650 (4th Cir. 2017) (en banc) (Niemeyer, J., dissenting), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017).

<sup>477</sup> *Id.*

<sup>478</sup> Washington v. Trump, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from denial of reconsideration en banc).

<sup>479</sup> *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 191–92 (2014)).

<sup>480</sup> See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 488–89 (1993) (rejecting a "chilling effect" argument against a hate crimes law as speculative because "[w]e must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status").

of protecting free speech, or whether “a substantial governmental interest can be safeguarded only by restricting free speech to some extent.”<sup>481</sup> The answer to this question depends on the relative weight afforded the values of free expression and equal opportunity in a particular context.<sup>482</sup>

As an empirical matter, in the employment context, there are reasons to be skeptical of predictions that abandoning the stray remarks doctrine would lead to further restrictions on employee speech. This is because, entirely apart from discrimination law, few employees have rights to free expression vis-à-vis their employers, and norms that might protect employee speech are weak. Most employees can be fired at will, for any sort of speech the employer objects to, for almost any reason.<sup>483</sup> Employers already fire and reprimand employees for discriminatory speech, both on and off the job, for reasons independent of legal compliance.<sup>484</sup> For example, in one case, a Texaco gas station fired a supervisor after learning from newspaper reports that he was “operating a ‘mail order neo-Nazi skinhead music company’” on his own time.<sup>485</sup> The court regarded as justified the employer’s concern that if it continued to employ this supervisor, the public might “learn of the views expressed on his website and believe that [the employer] condoned such ideas.”<sup>486</sup> In another example, James Damore, a Google employee, was fired for posting an internal memo pointing to “biological” reasons for women’s underrepresentation in technology, in violation of Google’s internal Code of Conduct.<sup>487</sup> Google’s decision was prompted by concern about the productivity and retention of female employees, who would worry that

<sup>481</sup> See Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 730–31 (1978) (arguing that chilling effects arguments do not and cannot turn on “specific, and most likely unprovable, predictions of human behavior”).

<sup>482</sup> See Ford, *supra* note 440, at 1418.

<sup>483</sup> See Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012) (cataloguing state laws that provide varying levels of protection against employer reprisals for employee speech and political activity); David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 45–46 (1998) (discussing potential sources of free speech protection for employees).

<sup>484</sup> See Jessica A. Clarke, *Should Employers Fire Employees Who Attend White Supremacist Rallies?*, HARV. BUS. REV. (Sept. 19, 2017), <https://hbr.org/2017/09/should-employers-fire-employees-who-attend-white-supremacist-rallies> [<https://perma.cc/SKV7-BUUM>] (discussing cases in which employees were fired after being exposed as participants in a white supremacist rally); see also White & Crandall, *supra* note 70, at 414–15 (offering other examples).

<sup>485</sup> *Wiegand v. Motiva Enters., LLC*, 295 F. Supp. 2d 465, 466 (D.N.J. 2003) (assuming, without deciding, that a tort cause of action for termination in violation of public policy was available under New Jersey law and concluding that the termination was not contrary to public policy).

<sup>486</sup> *Id.* at 477.

<sup>487</sup> *You’re Fired: A Google Employee Inflames a Debate About Sexism and Free Speech*, ECONOMIST (Aug. 10, 2017), <https://www.economist.com/news/business/21726078-sacked-james-damore-has-become-hero-alt-right-google-employee-inflames-debate-about> [<https://perma.cc/5VQQ-M84A>].

Damore might not treat them as equals.<sup>488</sup> Employers have business reasons for terminating these employees that do not depend on formal legal doctrine.

A rule forbidding evidence of stray remarks in typical discrimination cases is a poorly designed instrument for avoiding employer suppression of speech. Employment discrimination law will inevitably create incentives for employers to limit employee speech so long as there is liability for harassment. Harassment law gives employers incentives to censure employees who express sexism, racism, or other such biases. The incentive exists notwithstanding the fact that an employer is only liable for harassment that is “severe or pervasive.”<sup>489</sup> Because discriminatory speech creates a risk of harassment litigation and rarely serves the employer’s interests, employers have every incentive to ban it.<sup>490</sup> Harassment doctrine cannot be cabined to avoid this effect without eliminating the possibility of meaningful harassment law in the first place.<sup>491</sup>

At some level, equality law always requires suppression of speech because discriminatory speech, such as a sign reading “White Applicants Only”<sup>492</sup> or a remark on a negative performance review that a candidate for promotion “overcompensated for being a woman,”<sup>493</sup> is inseparable from discriminatory conduct. To exclude this evidence is to fail to see discrimination and to preclude all remedy.

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<sup>488</sup> See Sundar Pichai, *Note to Employees From CEO Sundar Pichai*, GOOGLE: KEYWORD (Aug. 8, 2017), <https://www.blog.google/topics/diversity/note-employees-ceo-sundar-pichai> [<https://perma.cc/6XEL-QZ2J>] (“Our co-workers shouldn’t have to worry that each time they open their mouths to speak in a meeting, they have to prove that they are not like the memo states, being ‘agreeable’ rather than ‘assertive,’ showing a ‘lower stress tolerance,’ or being ‘neurotic.’”).

<sup>489</sup> See SPERINO & THOMAS, *supra* note 239, at 32–40 (discussing how courts are ungenerous to plaintiffs in applying this standard).

<sup>490</sup> See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1811 (1992) (“A prudent employer who is faced with even a small possibility of liability would quite likely demand that its employees avoid even arguably harassing speech.”).

<sup>491</sup> Professor Kingsley Browne has proposed that hostile environment claims exclude all evidence of speech that does not count as fighting words, obscenity, defamation, or some other such form of unprotected speech. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 544 (1991) (arguing that not even workplace displays of pornography should be evidence of sexual harassment). But racial harassment rarely falls into these categories, and most forms of sexual harassment do not either. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998) (discussing forms of harassment that undermine women’s competence rather than using obscenity or threats). Eugene Volokh has proposed an exception for speech that is not intentionally targeted at a particular employee, but this would not avoid the problem of overcompliance by rational employers. Volokh, *supra* note 490, at 1848–51.

<sup>492</sup> See *supra* note 466.

<sup>493</sup> See *supra* note 248.



This is not to say discrimination law should reach all workplace speech.<sup>494</sup> But once an employer chooses to close a door to a member of a minority group, it should not expect discriminatory statements to fall outside the realm of evidence that would be relevant to the question of whether it acted for discriminatory reasons. Those employers who can demonstrate that discrimination was not a factor in the employment decision will escape liability. And of course, the further a discriminatory comment was from the context of an employment decision, the less relevant it is likely to be to a factfinder. But courts go too far in creating special rules to exclude this type of evidence from any consideration. Employment discrimination cases, already among the hardest to prove,<sup>495</sup> are made all the more impossible by such extreme protection for expressive liberties.

As for politicians, there are also reasons to believe, as an empirical matter, that considering biased statements in litigation is not likely to have any unique chilling effects. Most politicians are already circumspect, avoiding gaffes for reasons related to the desire to be reelected rather than in anticipation of lawsuits.<sup>496</sup> In the travel ban litigation, the Fourth Circuit rejected the chilling effects argument as off the mark, pointing out that few campaign statements are likely to be relevant to the motives behind a challenged government action, and that statements from further back in a politician's history are even less likely to be relevant.<sup>497</sup>

Some politicians, however, may rise to prominence by eschewing “political correctness” and making overtly racist and sexist campaign promises.<sup>498</sup> This group is unlikely to be deterred by the prospect of litigation

<sup>494</sup> For example, harassment law should not create liability for discriminatory public statements by business owners, if those business owners do not close their doors to employees for discriminatory reasons and do not create hostile workplace environments. *Cf.* Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1128 (2016) (advancing this argument in the context of laws forbidding discrimination against customers). In Title VII cases, harassment must be severe or pervasive to be actionable. *See supra* note 46. Public statements are unlikely to meet this bar.

<sup>495</sup> *See, e.g.*, Eyer, *supra* note 77, at 1282–91 (describing studies).

<sup>496</sup> *See, e.g.*, JOHN SIDES & LYNN VAVRECK, *THE GAMBLE: CHOICE AND CHANCE IN THE 2012 PRESIDENTIAL ELECTION* 115–17 (2013) (discussing how politicians try not to make gaffes that will attract adverse media coverage in the twenty-four-hour news cycle).

<sup>497</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 599 (4th Cir. 2017) (en banc) (“A person’s particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause—rarely, if ever, will such evidence reveal anything about that person’s actions once in office.”), *vacated and remanded*, 138 S. Ct. 353 (2017), *dismissed as moot*, 876 F.3d 116 (4th Cir. 2017). Testimony on discriminatory intent may also be barred by legislative or executive privilege. *See Benisek v. Lamone*, 241 F. Supp. 3d 566, 574 (D. Md. 2017) (“[I]n deciding whether legislative privilege protects a state legislative actor from discovery, we must balance the significance of the federal interests at stake against the intrusion of the discovery sought and its possible chilling effect on legislative action.”).

<sup>498</sup> *See supra* note 85 and accompanying text.

either. The Fourth Circuit was candidly unconcerned with the risk: “To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.”<sup>499</sup> A dissenting judge argued this was “an approach that will limit communication to voters.”<sup>500</sup> The concern may be that voters should hear the biased views of candidates so those voters have important information. Perhaps the argument is that the public is better served by honest declarations of bias from politicians than “dog whistle” signals that only communicate a candidate’s discriminatory agenda to in-the-know supporters.<sup>501</sup> But when voters hear biased views and then elect candidates to enact discriminatory policies, courts cannot disregard evidence of explicit bias in evaluating those policies unless they wish to abdicate their role in enforcing the constitutional guarantee of equal protection. That this will cause politicians to better veil discriminatory motives is an inevitable effect of any legal doctrine that gives force to the concept of discriminatory intent.

Courts may be wary of identifying explicit bias because biased statements are difficult to distinguish from political opinions. Recent research shows racial appeals may be legitimate with a significant segment of American voters.<sup>502</sup> Justifications for prejudice may be both evidence of discrimination and political arguments against antidiscrimination law. The implicit argument is that, by considering these statements, the law stigmatizes the accused for their political beliefs, a harm that, on a superficial level, is akin to the stigmatizing harms of discrimination against women and minorities. But the law does not prohibit discrimination just because it is stigmatizing. Sexism, racism, and religious intolerance are systemic problems with material implications.<sup>503</sup> Individual instances of these forms of discrimination compound broad patterns of group-based inequality in employment markets, politics, and other domains of social life.<sup>504</sup> The harms to employers and government officials stigmatized by the law’s judgment that their statements are evidence of discrimination are not comparable. Such harms are inevitable if the law is to recognize and condemn intentional

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<sup>499</sup> *Int’l Refugee Assistance Project*, 857 F.3d at 600.

<sup>500</sup> *Id.* at 651 (Niemeyer, J., dissenting).

<sup>501</sup> See, e.g., IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS*, at ix (2014) (discussing “‘dog whistle politics’: coded racial appeals that carefully manipulate hostility toward nonwhites”).

<sup>502</sup> Valentino et al., *supra* note 3, at 758.

<sup>503</sup> See *supra* Part I.

<sup>504</sup> See *supra* notes 52–54 and accompanying text.

discrimination.<sup>505</sup> Discrimination law inevitably stakes out a position against justifications for discrimination; it cannot remain neutral.

Another variation on this argument may be that judges fear that evidence of explicit bias will unfairly influence juries, who will penalize defendants for transgressing norms of political correctness rather than evaluating the merits of their decisions. Yet this concern is rarely raised expressly.<sup>506</sup> This is because it would generally be difficult to demonstrate that the danger of prejudice substantially outweighs the probative value of such evidence.<sup>507</sup> Biased statements are highly probative of biased attitudes and workplace cultures.<sup>508</sup> And social science evidence suggests reasons to doubt that jurors will be unduly prejudiced against decision-makers who make explicitly biased remarks.<sup>509</sup>

As an empirical matter, it is doubtful that recognizing explicit bias will have unique chilling effects. As a normative matter, ruling out evidence of explicit bias incapacitates discrimination law and legitimizes prejudice. Free speech concerns do not justify this result.

#### D. Prudential Concerns

A final set of concerns about recognizing explicit bias may be related to possible political repercussions of judicial decisions. Legal actors may be skeptical of the law's ability to create social change by regulating

<sup>505</sup> See Bagenstos, *supra* note 13, at 21 (discussing how even accusations of implicit discrimination are understood as moral judgments).

<sup>506</sup> Compare Walker v. Daimler-Chrysler Corp., No. 02-CV-74698-DT, 2005 WL 8154351, at \*13 (E.D. Mich. Nov. 16, 2005) (“Comments made by non-decisionmakers have no bearing on whether discrimination played a part in the Plaintiff’s demotion and allowing these remarks may mislead the jury as to its importance.”), with Burlington v. News Corp., No. 09-1908, 2015 WL 3439149, at \*8 (E.D. Pa. May 27, 2015) (holding that evidence that nonsupervisory coworkers used the word “nigger” was relevant because “[a] reasonabl[e] jury could conclude that Defendants maintained an atmosphere that permitted treatment of employees differently on the basis of race”).

<sup>507</sup> FED. R. EVID. 403.

<sup>508</sup> See, e.g., Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 132 (3d Cir. 1997) (explaining that the importance of evidence of statements of “formal or informal managerial attitudes . . . seems to become ever more critical as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial precedent”). In any event, that such statements are prejudicial should not generally preclude admission. See, e.g., White v. Honeywell, Inc., 141 F.3d 1270, 1276 (8th Cir. 1998) (reasoning that “[t]he possibility that a jury might be so inflamed by the contents of the [racist] remark so as to decide the case based on passion, needs to be balanced against the fact that such remarks are potent evidence of attitude and environment” in concluding the evidence was admissible).

<sup>509</sup> See, e.g., Eyer, *supra* note 77, at 1278–79 (collecting studies showing survey participants’ resistance to seeing discrimination, even when obvious); see also Phoenix v. Coatesville Area Sch. Dist., No. 15-00072, 2016 WL 3000823, at \*4–5 (E.D. Pa. May 24, 2016) (discussing a trial in which the jury heard evidence of the decision-maker’s overt racism, including text messages about wanting to get rid of black employees—including the plaintiff—that used the n-word and referred to lynching, but the jury found the plaintiff was terminated for poor performance evaluations).

employment markets and politics, fearing backlash that might undermine the antidiscrimination project or even judicial review itself. For this reason, courts may find ways to withhold judgment.<sup>510</sup> Backlash may be more of a concern when courts draw attention to explicit bias. Charges of old-fashioned bigotry can engender defensiveness and “poison the atmosphere” for problem-solving and settlement.<sup>511</sup> They may “hand[] a political weapon to . . . racial intransigents.”<sup>512</sup> While this Article is not the place to rehash debates over the role of the judiciary as a countermajoritarian institution,<sup>513</sup> it can attempt a brief discussion of two recent case studies in which courts straightforwardly confronted explicit bias. These case studies offer qualified support for the claim that “[c]onflict is not only or always destructive.”<sup>514</sup> Additionally, hostile reactions to charges of *implicit* bias demonstrate that it may be impossible to pursue antidiscrimination goals without backlash. Moreover, judicial legitimacy may be undermined if the public believes judges are ignoring obvious bias for partisan reasons.

One possible case study is *NAACP v. McCrory*, the 2016 Fourth Circuit opinion holding that a North Carolina election reform law was expressly motivated by discrimination.<sup>515</sup> North Carolina’s NAACP president, Reverend William J. Barber, “declared the ruling ‘another major victory for justice’ that allows people to vote without ‘expansive restrictions by racist

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<sup>510</sup> Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 70 (1962) (discussing the “passive virtues,” in other words, how the Supreme Court “stays its hand” by “withholding constitutional judgment” in controversial matters).

<sup>511</sup> See Karst, *supra* note 229, at 1165.

<sup>512</sup> *Id.* at 1166 (offering this explanation for Supreme Court decisions in the 1960s that found grounds other than illicit motives for invalidating legislative action).

<sup>513</sup> Compare, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 422 (2d ed. 2008) (arguing that courts cannot cause social change, although they may consolidate it), with Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (“In our view the pendulum has swung too far, from excessive confidence in courts to excessive despair.”). Many of the arguments in this debate—about whether court decisions are outpacing public opinion or invalidating the results of the legislative process—do not apply to all of the examples in this Article. Although the acceptability of explicit bias may be on the upswing, majorities still condemn discrimination based on race and sex. See *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CTR. (Oct. 5, 2017), <http://www.peoplepress.org/2017/10/05/4-race-immigration-and-discrimination> [<https://perma.cc/ZH93-28DB>] (reporting that 61% of survey respondents agree that “the country needs to continue making changes to give blacks equal rights with whites”); Juliana Menasce Horowitz et al., *Wide Partisan Gaps in U.S. over How Far the Country Has Come on Gender Equality*, PEW RESEARCH CTR. (Oct. 18, 2017), <http://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality> [<https://perma.cc/XFG6-6E63>] (reporting that 82% of survey respondents agree that “it is very important for women to have equal rights with men in our country”).

<sup>514</sup> Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1730 (2017).

<sup>515</sup> See *supra* notes 377–383 and accompanying text.

politicians or racist policies.”<sup>516</sup> News stories interpreted the opinion as “delivering a stern rebuke to the state’s Republican general assembly and Governor Pat McCrory.”<sup>517</sup> Four months after the opinion, McCrory was unseated in a close governor’s race by his Democratic opponent.<sup>518</sup> The general assembly, however, remained in Republican control.<sup>519</sup> Over the opposition of the assembly, the new governor dropped the state’s petition for review of the *McCrory* decision in the Supreme Court.<sup>520</sup> However, it is dangerous to infer too much from this example, as the main issue in the governor’s race was not voting rights, but controversy over North Carolina’s House Bill 2, a law restricting restroom use by transgender people.<sup>521</sup> Commentators now regard North Carolina’s politics as increasingly acrimonious and partisan, but the causes are complex, and the role of judicial intervention uncertain.<sup>522</sup> Yet the *McCrory* opinion survived the political conflict and remains good law.

A second potential case study is *Floyd v. City of New York*, the 2013 case recognizing that explicit bias motivated the NYPD’s stop and frisk policy under New York City Mayor Michael Bloomberg.<sup>523</sup> In response to the *Floyd* litigation, the Bloomberg administration launched a media

<sup>516</sup> *US High Court Refuses to Reinstate North Carolina Voter ID*, FOXNEWS.COM (Aug. 31, 2016), <http://www.foxnews.com/politics/2016/08/31/us-high-court-refuses-to-reinstate-north-carolina-voter-id.html> [<https://perma.cc/6XJQ-8CBB>].

<sup>517</sup> David A. Graham, *North Carolina’s Deliberate Disenfranchisement of Black Voters*, ATLANTIC (July 29, 2016, updated 9:30 PM), <https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649> [<https://perma.cc/3CVH-LKFS>]; see also Linda Greenhouse, *The Courts Begin to Call Out Lawmakers*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/18/opinion/the-courts-begin-to-call-out-lawmakers.html> [<https://perma.cc/V9M6-SCXR>] (“Legislators, perhaps assuming they had friends in high judicial places, had taken bold, even flagrant steps to suppress the black vote . . . . Judges responded . . .”).

<sup>518</sup> David A. Graham, *North Carolina’s ‘Legislative Coup’ Is Over, and Republicans Won*, ATLANTIC (Dec. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/12/north-carolinas-republicans-succeed-in-power-grab/510950> [<https://perma.cc/7KUV-TX6G>].

<sup>519</sup> *Id.*

<sup>520</sup> *See* N.C. State Conference of the NAACP v. McCrory, 137 S. Ct. 1399 (2017) (Roberts, C.J., respecting the denial of certiorari).

<sup>521</sup> Veronica Stracqualursi, *Gov. Pat McCrory Concedes NC Governor’s Race to Democratic Challenger Roy Cooper*, ABC NEWS (Dec. 5, 2016, 2:14 PM), <http://abcnews.go.com/Politics/gov-pat-mccrory-concedes-nc-governors-race-democratic/story?id=43985544> [<https://perma.cc/YJ6H-NY92>] (reporting that 66% of voters in North Carolina exit polls opposed House Bill 2).

<sup>522</sup> Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES MAG. (June 20, 2017), <https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html> [<https://perma.cc/YGS7-AVTB>] (discussing partisan acrimony, the urban-rural divide, the restroom controversy pitting LGBT rights and business interests against religious traditionalists, gerrymandering, and demographic changes in North Carolina).

<sup>523</sup> *See supra* notes 207–211 and accompanying text.

campaign to delegitimize the case and the judge.<sup>524</sup> The opinion's straightforward allegations of racism likely played a role in that backlash. After the decision, the police commissioner "stated that the District Court's conclusions were particularly questionable given the NYPD's status as 'the most racially and ethnically diverse police department in the world.'"<sup>525</sup> The diversity of the police force was not an issue in the case, nor was it relevant to any issue in the case.<sup>526</sup> This misdirected response could be explained as an effort by the commissioner to defend himself against the charge that he holds racist attitudes. The *Floyd* decision was handed down during a contested New York City mayoral campaign. Democrat Bill de Blasio prevailed in that election, in part due to his pledge to reform stop and frisk.<sup>527</sup> The de Blasio administration then dropped the City's appeal of the *Floyd* decision.<sup>528</sup> Some researchers give credit to the *Floyd* litigation for decreases in New York City's stop and frisk practices,<sup>529</sup> coinciding with overall decreases in crime.<sup>530</sup> Even the sensationalist New York Daily News, long a critic of the *Floyd* decision, conceded in 2017 that "[a]ll now agree: The old way of stop-and-frisk was wrong. The new way is better. It's not perfect, but it's progress."<sup>531</sup>

In both of these cases, electoral returns could be interpreted as ratifying judicial condemnations of explicit bias. These examples demonstrate that

<sup>524</sup> See Kalhan, *supra* note 212, at 1062–63 ("While the trial was still underway, the Bloomberg administration—after failing to persuade the court to dismiss the complaints, grant summary judgment, or deny class certification in any of the stop and frisk cases—initiated an aggressive media campaign personally attacking Judge Scheindlin, in what some observers regarded as an effort either to intimidate Judge Scheindlin or to delegitimize her and the stop and frisk litigation in the eyes of the public."); *id.* at 1068–69 (discussing how City officials reacted to the decision by "continu[ing] to malign Judge Scheindlin in personal terms and to question her integrity").

<sup>525</sup> *Id.* at 1068.

<sup>526</sup> *Id.*

<sup>527</sup> Kenneth Lovett, *NYC Elections 2013: Exit Polls Show Bill de Blasio Swept Virtually Every Demographic over Joe Lhota*, N.Y. DAILY NEWS (Nov. 6, 2013, 1:46 AM), <http://www.nydailynews.com/news/election/exit-polls-show-bill-de-blasio-swept-demographic-article-1.1507854> [<https://perma.cc/BM7Z-EPBQ>] (reporting that of the "55% of voters [who] considered the use of stop-and-frisk as excessive . . . nearly 9 out of 10—87%—backed de Blasio").

<sup>528</sup> Kalhan, *supra* note 212, at 1128.

<sup>529</sup> Michael D. White et. al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 52–53 (2016) (noting that, between 2011 and 2014, the NYPD decreased its number of stop and frisk incidents by 93% and arguing "[i]t is reasonable to assert an association between the *Floyd* case—as well as the attention it garnered—and the substantial decline in stop-and-frisk that began in 2012. Certainly, the change in mayor and police commissioner in early 2014 . . . explains the continued decline in 2014").

<sup>530</sup> *Id.* at 60.

<sup>531</sup> Editorial, *A Policing Rift that Healed: The Remarkable Transformation of Stop-and-Frisk in New York City*, N.Y. DAILY NEWS (Nov. 26, 2017, 4:10 AM), <http://www.nydailynews.com/opinion/policing-rift-healed-article-1.3651968> [<https://perma.cc/7M7T-AX7A>].

there is no inevitable backlash that will undermine the staying power of judicial decisions recognizing explicit bias. However, conclusions about cause-and-effect cannot be drawn, and it is uncertain whether these judicial decisions may contribute to longer term trends in political polarization. It is impossible to assess whether these decisions would have been less divisive if they had rested on other grounds, such as disparate impact theories, assertions of implicit bias, or the universal rights to vote and to be free from unwarranted police harassment. But there are good reasons to be skeptical.<sup>532</sup> Professor Samuel Bagenstos points to the 2016 election campaign, in which vice presidential candidate Mike Pence argued that those pointing out implicit bias in policing were “bad mouthing” law enforcement.<sup>533</sup> Progressives are advocating the same policy agenda, only they have reframed their arguments in terms of implicit and explicit bias.<sup>534</sup> This distinction is unimportant to opponents of antidiscrimination policies. To these opponents, “the notion that the bias is ‘implicit’ and endemic to the human condition . . . [is] background noise.”<sup>535</sup>

Backlash arguments take a different form in employment discrimination cases. Courts recognizing explicit bias in employment discrimination cases would be following the instructions of Congress rather than invalidating the actions of the elected branches. But another type of backlash argument relates to the free speech objection: that without discriminatory speech as a “safety valve,” people are more likely to engage in discriminatory actions.<sup>536</sup> There is experimental evidence suggesting that when people suppress prejudice because they believe others are censoring them, the effect may be to increase discrimination rather than diminish it.<sup>537</sup>

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<sup>532</sup> See, e.g., Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2852 (2014) (“Compassion fatigue may limit the utility of a universalist response to civil rights problems.”); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 769 (2006) (explaining that disparate impact theories are controversial “because courts typically are reluctant to identify ambiguous behavior as discriminatory”).

<sup>533</sup> Bagenstos, *supra* note 13, at 1 (quoting *Full Transcript: 2016 Vice Presidential Debate*, POLITICO (Oct. 5, 2016, 11:56 AM), <http://www.politico.com/story/2016/10/full-transcript-2016-vice-presidential-debate-229185> [<https://perma.cc/M2KX-9BDP>]).

<sup>534</sup> *Id.* at 22–23.

<sup>535</sup> *Id.* at 22.

<sup>536</sup> Browne, *supra* note 491, at 541 (making a “safety valve” argument with respect to harassment and arguing that “[e]xpressions of hostility may be superior to the manifestations of hostility that might result if the expression is prohibited”).

<sup>537</sup> See, e.g., Thomas E. Ford et al., *Putting the Brakes on Prejudice Rebound Effects: An Ironic Effect of Disparagement Humor*, 157 J. SOC. PSYCHOL. 458, 459–60, 469 (2017) (discussing several studies on rebound effects in which participants asked to suppress prejudices later exhibit more biases, and reporting on the results of an experiment showing suppression of humor that disparages social groups caused participants to indicate they would take action against the disparaged groups); Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also*

This is a good argument for rethinking diversity trainings and other interventions that rely on generating external, rather than internal, motivations for compliance.<sup>538</sup> But the possibility that opponents of discrimination law will retaliate by covertly discriminating is not a reason to allow overt discrimination. This is an argument for policing covert forms of discrimination, not for ignoring explicit bias.

Concerns about judicial legitimacy often focus on how far courts can push powerful interests—government officials and corporate leaders accused of discrimination—but ignoring bias may also undermine judicial legitimacy. The public and victims of discrimination may lose faith in the judicial system if judges behave like “ostriches,” sticking their heads in the sand to ignore blatant and well-publicized facts about discriminatory intent.<sup>539</sup>

#### IV. RECOGNIZING EXPLICIT BIAS

This Article’s prescriptive advice is simple: courts should consider explicit bias as evidence of discrimination, employing normal rules of evidence. Arguments for foreclosing consideration of explicit remarks, including interpretive difficulties, remedial problems, First Amendment implications, and prudential concerns, do not justify a *de facto* evidentiary privilege for explicitly biased remarks. While there are many legal reforms that would better address inequality, few are plausible in the current political climate.<sup>540</sup> The aim of this Article is to draw judicial and public attention to explicit bias and to resist efforts to legitimize it.

Implementation of this Article’s proposal requires only the conscientious efforts of judges, who should find ample bases for

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*Increase) Prejudice*, 22 PSYCHOL. SCI. 1472, 1472 (2011) (“Ironically, motivating people to reduce prejudice by emphasizing external control produced more explicit and implicit prejudice than did not intervening at all.”).

<sup>538</sup> See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1960–71 (2009) (discussing reasons diversity trainings fail and proposing alternatives based on motivational principles that “support employee autonomy, competence, and relatedness”); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 590 (2006) (“We find a clear pattern in the data. Structures establishing responsibility . . . are followed by significant increases in managerial diversity. Programs that target managerial stereotyping through education and feedback . . . are not followed by increases in diversity.”).

<sup>539</sup> This point has been advanced by a number of judges in the travel ban litigation. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 345 (4th Cir. 2018) (en banc) (Wynn, J., concurring) (“Ignoring relevant information—particularly when, as with the President’s statements regarding the suspension on entry, the information is widely known and disseminated—also undermines judicial legitimacy by making the public believe judicial decisions rest on a false or inaccurate characterization of the governing facts.”).

<sup>540</sup> See EDELMAN, *supra* note 352, at 218–19.



distinguishing cases from *Palmer*, *Feeney*, and the stray remarks doctrine. While the Supreme Court may be a hostile forum for constitutional discrimination cases generally,<sup>541</sup> its doctrines do not preclude lower courts from considering explicit bias. *Trump v. Hawaii* will generally be distinguishable because it pertained to an immigration policy with national security implications involving the entry of noncitizens.<sup>542</sup> *Arlington Heights* calls for a holistic review of evidence of discriminatory intent, considering history, context, effects on minority groups, and statements by decision-makers.<sup>543</sup> Lower courts might protect their rulings from review with careful appraisals of all of the facts, in local and historical context.<sup>544</sup>

In employment discrimination cases, courts should disband with the stray remarks doctrine and use a holistic inquiry to assess evidence of disparate treatment. Federal circuit courts should follow the example of the California Supreme Court in eliminating the stray remarks doctrine altogether.<sup>545</sup> Federal courts would be wise to abandon the regressive formalism that plagues employment discrimination law generally and renders evidence of explicit bias inconsequential.<sup>546</sup> They should at least be more vigilant in correcting district court opinions that apply the stray remarks doctrine formalistically, divorced from the context of the other evidence in the case.<sup>547</sup> Progressive state courts have more options for recognizing explicit bias than federal ones, and litigants might think carefully about whether they should bring their claims under state law.<sup>548</sup> To the extent judges are trained on implicit bias, they should learn about the resilience of explicit bias as well.<sup>549</sup>

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<sup>541</sup> See, e.g., Haney-López, *supra* note 14, at 1871–77 (describing hostile treatment of all discrimination claims in the Supreme Court except those challenging affirmative action plans).

<sup>542</sup> See *supra* note 158.

<sup>543</sup> See *supra* notes 365–71.

<sup>544</sup> See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (holding that the “clearly-erroneous standard applies to the trial court’s finding . . . of discriminatory purposes” and stating “this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts”).

<sup>545</sup> *Reid v. Google, Inc.*, 235 P.3d 988, 1006–11 (Cal. 2010).

<sup>546</sup> See, e.g., *SPERINO & THOMAS*, *supra* note 239, at 88–90.

<sup>547</sup> Some circuits have attempted this on occasion. See, e.g., *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 116 (2d Cir. 2007).

<sup>548</sup> See, e.g., Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017); see also, e.g., Chuck Henson, *Title VII Works—That’s Why We Don’t Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41, 109–11 (2012) (discussing varying state approaches to employment discrimination law).

<sup>549</sup> I make this recommendation on the assumption that such trainings are inevitable. I note the evidence on whether diversity trainings are effective is mixed. See Katerina Bezrukova et al., *A Meta-Analytical Integration of Over 40 Years of Research on Diversity Training Evaluation*, 142 PSYCHOL. BULL. 127, 127 (2016) (finding diversity trainings increase awareness and skills, but are less effective in

This Article does not argue that explicit bias is always relevant to discrimination cases, nor that a finding of bias must automatically invalidate public policy or an employment decision. Rather, explicit bias should be treated like other types of evidence—evaluated for its relevance on a case-by-case basis—not routinely screened out through the use of special doctrines. Using normal rules of evidence, and considering the totality of the circumstances, courts might conclude that some biased statements were so far removed from a challenged decision that the prejudicial effects of introducing the evidence outweigh its probative value.<sup>550</sup> A finding of bias is not a basis for automatic invalidation—the law also asks whether a policy or decision might have been independently justified by compelling nondiscriminatory reasons.<sup>551</sup>

It is true that legal confrontation of explicit bias, on its own, may not lead to any victories by plaintiffs. Courts are generally skeptical of discrimination claims,<sup>552</sup> and when it becomes harder to dismiss them on one ground, courts find another.<sup>553</sup> Moreover, confrontation with explicit bias will not achieve all the goals of any civil rights movement. The causes and consequences of inequality are complex. Inequality is persistent, ever morphing into new social forms.

This Article advocates a holistic approach to problems of inequality, not one that would limit potential evidence of discrimination to statements of explicit bias. Such a limited view would reinforce the “bad apple” theory of discrimination—that inequality is driven solely by biases on the part of a few individuals, rather than sustained by individuals in interaction with social, economic, and institutional structures. The “bad apple” view risks turning discrimination law into a “hunt for individual bigots.”<sup>554</sup> On this understanding, the solution to problems of inequality is simply to fire those employees who express biased views, or to vote those politicians who express racist and sexist ideas out of office. This may once again cause

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changing attitudes and behaviors); Kalev et al., *supra* note 538, at 604 (finding diversity trainings have mixed effects, sometimes causing counterproductive reactions).

<sup>550</sup> See *supra* notes 507–509 and accompanying text.

<sup>551</sup> See *supra* notes 405–18 and accompanying text.

<sup>552</sup> See, e.g., Eyer, *supra* note 77, at 1278–79 (discussing research on meritocracy beliefs as an explanation for the high loss rate for plaintiffs in employment discrimination cases).

<sup>553</sup> See, e.g., Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027–28 (2013) (finding that, after Congress made it more difficult to dismiss disability discrimination cases on the ground that the plaintiff was not disabled, courts began dismissing more cases on an alternative ground: that the plaintiff was not qualified).

<sup>554</sup> See Haney-López, *supra* note 14, at 1798.

people to hide their bigotries and engage in covert discrimination.<sup>555</sup> Systemic enforcement efforts by administrative agencies,<sup>556</sup> more thoughtful and empirically grounded approaches by employers,<sup>557</sup> and creative public policy solutions<sup>558</sup> are required for change. Any broad-based national effort, however, seems unlikely in the short term. The hope of this Article is that for now, some courts can at least recognize explicit bias, joining the effort to resist the normalization of prejudice.

#### CONCLUSION

Antidiscrimination scholars are surely correct to decry the lack of legal options for combatting the effects of implicit bias, structural inequality, and other subtle forces that narrowly constrict equal opportunity and perpetuate systems of racism, sexism, and religious intolerance. But they should stop arguing that explicit bias is in the past. Explicit bias is ubiquitous. Important norms against discrimination are in jeopardy. While legal recognition of explicit bias will not eliminate the ideologies, prejudices, and material forces of racial injustice, anti-Muslim hatred, or the subordination of women, it would at least resist the message that these biases are legitimate grounds for action in politics, law enforcement, and the workplace.

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<sup>555</sup> See, e.g., *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) (describing the evolution of discrimination in housing markets from formal segregation to both overt and covert discriminatory actions).

<sup>556</sup> See, e.g., Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1339–41 (2012).

<sup>557</sup> See, e.g., Frank Dobbin et al., *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOC. REV. 1014, 1014 (2015).

<sup>558</sup> See ROITHMAYR, *supra* note 11, at 135–50.