Article

Discriminatory Permissions and Structural Injustice

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INTRODUCTION

America is engaged in a nationwide debate over the tension between civil rights laws and exemptions for those who object on grounds of conscience. So far, the controversy has featured LGBTQ citizens seeking to live their lives as equals and women seeking to exercise their rights to reproductive freedom, on the one hand, and religious traditionalists, on the other. Areas of particular conflict have included marriage, employment, public accommodations, housing, and child placement in foster care or adoption. Supreme Court decisions have addressed marriage equality,[1] employment benefits for women,[2] and antidiscrimination rules for retail stores.[3] The opinion in *Bostock v. Clayton County* extends the area of potential conflict to federal employment discrimination law, which now protects LGBTQ workers.[4] And the Court's decision in *Fulton v. City of Philadelphia* exempts a religious child placement agency from antidiscrimination policies that protect same-sex foster parents.[5]

Compromise on these issues has proven extremely difficult to achieve, given the polarized nature of American politics. Nevertheless, a recognizable pattern is beginning to emerge. On the one hand, robust civil rights protections for LGBTQ people are being recognized.[6] On the other hand, exemptions from those protections are being extended to those who object on grounds of traditional religion or morality.[7] Some elements of this twofold trend have been supplied by the Court, both on the antidiscrimination side[8] and on the exemption

1. Obergefell v. Hodges, 576 U.S. 644, 651–52 (2015).

2. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

3. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

4. 140 S. Ct. 1731, 1737 (2020).

5. 141 S. Ct. 1868, 1882 (2021).

6. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 651–52 (2015); *Bostock*, 140 S. Ct. at 1737.

7. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) (exempting a corporation from a regulatory requirement that it provide employees with insurance coverage for female contraception, where providing the coverage conflicted with the corporation's religious beliefs).

8. Obergefell v. Hodges, 576 U.S. 644, 670–74 (2015).

side.[9] Other elements have been adopted by the federal executive branch.[10] But many relevant policies are being enacted on the state level, where party politics may be more amenable to one side or the other because of geographic sorting. A growing number of state laws have extended civil rights protections to LGBTQ people, even while other laws have offered legal protections to persons and groups whose opposition is grounded in their beliefs.[11]

It would be a mistake to assume that this picture is stable or consistent with constitutional values. It does not resemble the civil rights framework pertaining to any other group—it is sui generis.[12] Nothing about the emerging compromise is inevitable, and nothing about it should be exempt from scrutiny for constitutionality or for consistency with political morality.

In this Article, we address the exemptions side of the trend. So far, the legality of exemptions from civil rights law has been considered in terms of religious freedom. Courts have asked whether special

9. Our Lady of Guadeloupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (exempting religious schools from employment discrimination rules with respect to teachers who have some responsibility for religious instruction or observance); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1781 (2020) (suggesting that the ministerial exception would apply to religious schools that discriminated against "[a]t least some teachers and applicants for teaching positions").

10. For just one example among many, think of the Trump administration's regulations extending broad religious and moral exemptions from the contraception mandate imposed under authority granted by the Affordable Care Act (ACA). *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2377–78 (2020) (describing 82 Fed. Reg. 47812 (2017) and *id.* at 47850).

11. *See State Equality Index 2020*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps [https://perma.cc/A4N7-YDE6] (Mar. 22, 2021) (surveying state civil rights laws); Julie Moreau, *Religious Exemptions Are Gutting Civil Rights Protections, Advocacy Groups Warn*, NBC NEWS (May 19, 2020), https://www.nbcnews.com/feature/nbc-out/religious-exemptions-are-gutting-civil-rights-protections-advocacy-groups-warn-n1209826 [https://perma.cc/3F5V-N8VW] (describing recent religious exemptions from civil rights laws).

12. When a South Carolina restaurant defended its racial segregation on free exercise grounds, the Court rejected the argument in a fragment a of footnote in a *per curium* opinion. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402–03 n.5 (1968).

accommodations are required by the Free Exercise Clause or by statutes like the Religious Freedom Restoration Act (RFRA).[13] Alternatively, they have asked whether exemptions granted by legislatures or regulators are prohibited by the Establishment Clause.[14]

Yet that framing obscures a critical aspect of the controversy over exemptions from equality laws, namely the relevance of the Equal Protection Clause. Some exemptions do not only accommodate objectors; they also encourage people to discriminate against groups that are subject to structural injustice. Such laws violate equal protection, even though the actual discrimination comes at the hands of private citizens. By licensing private employers or retailers to target workers or customers on the basis of a protected status, exemptions like these run up against the Constitution. They work to subordinate members of vulnerable groups and to deprive them of the free and equal citizenship that is essential for their meaningful participation in the democracy. We call these acts *discriminatory permissions*, and we introduce them to the literature.

A Wave of Exemption Laws. Mississippi's exemption law provides a vivid example.[15] Enacted in the immediate aftermath of *Obergefell*, Mississippi's H.B. 1523 privileges three traditional beliefs concerning marriage, sexuality, and gender identity.[16] Persons and groups who hold these beliefs are permitted to act on them in a wide variety of ways.[17] By singling out specific religious beliefs, and exempting those who hold them from state and local antidiscrimination laws, Mississippi's statute endorses discrimination against LGBTQ citizens. Its permissions are tailored to shelter behavior that is adverse to same-

13. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 682 (2014) (granting an exemption to religious employers from the contraception mandate under 42 U.S.C. § 2000bb); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018) (explaining petitioners' claim of a free exercise exemption from state antidiscrimination law).

14. *See, e.g.*, *Little Sisters*, 140 S. Ct. at 2407 (Ginsburg, J., dissenting) (assessing harm to employees and citing Establishment Clause cases).

15. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. §§ 11-62-3 to -19 (2020)).

16. The three beliefs are (1) that "[m]arriage is or should be recognized as the union of one man and one woman"; (2) that "[s]exual relations are properly reserved to such a marriage"; and (3) that the terms "male" and "female" refer to "immutable biological sex as objectively determined by anatomy and genetics at time of birth." MISS. CODE ANN. § 11-62-3 (2020).

17. Retail businesses can refuse to provide any kind of support for the celebration of a same-sex marriage; public employees can decline to issue wedding licenses; religious organizations can discriminate in any of their employment decisions, in their sale or rental of housing units, and in their facilitation of child placements; and foster care or adoptive families cannot be disfavored because they "guide[], instruct[] or raise[]" a child on the basis of the three privileged beliefs. *Id.* at § 11-62-5.

sex intimacy and commitment, as well as to nontraditional gender identity. Its discriminatory purpose is evidenced, and its discriminatory effect is amplified by its enactment in the shadow of *Obergefell*. Mississippi's H.B. 1523 is a stark encouragement of discrimination against LGBTQ citizens, and it violates the Equal Protection Clause.

Although H.B. 1523 is extreme, it is not unique. As of this writing, two states are considering broad legislation that is similar in scope and content.[18] Moreover, elements of the legislation have been taken up by other states. Consider for instance the exemption for religious child placement agencies. At least ten states have enacted laws that permit foster care and adoption agencies to discriminate on the basis of their religious or moral beliefs.[19] At least four more states are actively considering such legislation,[20] and five states have seen unsuccessful attempts to enact such legislation.[21] In the face of the Court's recent decision in *Fulton*,[22] which stopped short of granting blanket protection for religious child welfare agencies that exclude same-sex

18. H. B. 1536, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2021) (protecting from discriminatory governmental action any religious organizations, adoption agencies, government officials authorized to perform marriages, providers of marriage services, and health care providers who decline services as a result of religious beliefs); H. File 170, 89th Gen. Assemb., 2021 Sess. (Iowa 2021) (protecting from adverse governmental action any person who refuses to perform or provide services for any marriage, declines to provide adoption or foster care services, declines to provide treatment or counseling, or makes any employment decision on the basis of sincerely held religious or moral beliefs); H. B. 1392, 191st Gen. Ct., 2019–2020 Sess. (Mass. 2019) (protecting from discriminatory governmental action any religious organizations, adoption agencies, government officials authorized to perform marriages, providers of marriage services, and healthcare providers who decline services as a result of religious beliefs); S. File 2193, 88th Gen. Assemb., 2020 Sess. (Iowa 2020) (protecting from adverse governmental action any person who refuses to perform or provide services for any marriage, declines to provide adoption or foster care services, declines to provide treatment or counseling, or makes any employment or housing decision on the basis of sincerely held religious or moral beliefs).

19. ALA. CODE § 26-10D-5 (2017); KAN. STAT. ANN. § 60-5322 (2018); MICH. COMP. LAWS § 722.124E (2015); MISS. CODE ANN. § 11-62-5 (2016); N.D. CENT. CODE § 50-12-07.1 (2003); OKLA. STAT. 10A, § 1-8-112 (2018); S.D. CODIFIED LAWS §§ 26-6-38 to -39 (2017); TENN. CODE ANN. § 36-1-147 (2020); TEX. HUM. RES. CODE ANN. § 45.004 (2017); VA. CODE ANN. § 63.2-1709.3 (2012).

20. H. File 170, 89th Gen. Assemb., 2021 Sess. (Iowa 2021); H. B. 1536, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2021); S.B. 13, 85th Leg., 2021 Reg. Sess. (W. Va. 2021); H. 3878, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

21. H.B. 20-1272, 72d Gen. Assemb., 2d Reg. Sess. (Co. 2020); S.B. 368, 155th Gen Assemb., 2019–2020 Reg. Sess. (Ga. 2020); H.B. 2043, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); H.B. 524, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021).

22. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021).

married couples from serving as foster or adoptive parents, state legislative activity of this sort can be expected to continue or even accelerate.

Other state enactments concern weddings. North Carolina gives some public officials license to recuse themselves from issuing licenses or performing marriages if their religious beliefs are affronted,[23] while Utah gives some public officials permission to decline to perform marriages.[24] States like Florida[25] and Kansas[26] give religious organizations and officials broad ability to refuse to perform, support, or accommodate marriages that contravene their beliefs.

Another category of legislation prohibits colleges from interfering with religious student organizations that require their leaders or members to comply with beliefs on sexuality and gender identity.[27] Yet another type was enacted by Tennessee, which permits counselors or therapists to refuse to serve patients whose "goals, outcomes, or behaviors" conflict with their religious beliefs.[28] "Freedom of conscience" legislation for healthcare providers has been considered in at least ten other states.[29]

State religious freedom restoration acts are part of this picture. These "little RFRAs"[30] nullify state and local laws insofar as they substantially burden persons acting on their religious beliefs, unless those laws are necessary to achieve a compelling state interest. Such statutes' ability to function as permissions to discriminate is sharply limited if—but only if—courts applying them hold that civil rights laws are necessary to a compelling state interest.[31] Twenty-three states have RFRAs.[32] Of these, three were enacted in the context of

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23. N.C. GEN. STAT. ANN. § 51-5.5 (2015).

24. UTAH CODE ANN. § 63G-20-201 (2015).

25. FLA. STAT. § 761.061 (2016).

26. Kan. Exec. Order No. 15-05 (July 7, 2015).

27. KAN. STAT. ANN. § 60-5312 (2016).

28. TENN. CODE ANN. § 63-22-302 (2016).

29. S.B. 1515, 57th Leg., 2d Sess. (Okla. 2020); S.B. 300, 121st Gen. Assemb., 2d Reg. Sess. (Ind. 2020); S. File 2193, 88th Gen. Assemb., 2020 Sess. (Iowa 2020); S.B. 289, 93d Gen. Assemb., 2021 Reg. Sess. (Ark. 2021); S.B. 83, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); S.B. 245, 67th Leg., 2021 Sess. (Mont. 2021); S.B. 323, 55th Leg., 1st Sess., (N.M. 2021); H.B. 3518, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021); H.B. 1247, 96th Leg., Reg. Sess. (S.D. 2021); H.B. 1424, 87th Leg., Reg. Sess. (Tex. 2021).

30. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 47 (2007) ("Several states passed 'little RFRAs' that recreated the Religious Freedom Restoration Act as a matter of state law.").

31. *See infra* notes 264–265 and accompanying text.

32. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra

Obergefell v. Hodges: Kentucky adopted its version in 2013[33] during the runup to *Obergefell*, and two others—Arkansas[34] and Indiana[35]—passed their laws as it was coming down. All three of these enactments were sharply contested precisely on the ground that they would encourage and facilitate discrimination against members of the LGBTQ community.[36] In Indiana, the pushback was sufficiently intense that the state was obliged to pass an amendment that made the law inapplicable to most forms of discrimination against protected groups, including LGBTQ citizens.[37] Things may be heating up again on this front. While Indiana recently introduced legislation that would repeal the proviso protecting against discrimination,[38] two states enacted RFRAs in 2021[39] and at least five other states are considering new RFRA shields for religiously motivated conduct.[40]

We are not suggesting that every one of these laws violates equal protection. But in light of all this activity, it is time to take a hard look at the constitutional status of state permissions. Do some of these offend equal protection? And, if so, which count as prohibited discriminatory permissions and which are benign accommodations of religion or conscience?

The Case Against Discriminatory Permissions. Discriminatory permissions do real harm. Imagine the following story: Late one night, two newlyweds arrive at a stately hotel in Jackson, Mississippi, where

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-statutes.aspx [https://perma.cc/U5YE-HUFY] (noting twenty-one states have enacted RFRAs as of 2015). In 2021, South Dakota and Montana each enacted their own RFRA. S.B. 124, 96th Leg., Reg. Sess. (S.D. 2021); S.B. 215, 67th Leg., 2021 Sess. (Mont. 2021).

33. KY. REV. STAT. ANN. § 446.350 (2020) (effective June 25, 2013).

34. ARK. CODE ANN. § 16-123-401 (2020) (effective April 2, 2015).

35. IND. CODE § 34-13-9 (2020) (effective July 1, 2015).

36. Arizona's proposed amendment to its RFRA legislation was vetoed in 2014, partly because of the impact it would have on civil rights. *See* Mackenzie Weinger & Lucy McCalmont, *Brewer Vetoes Arizona SB 1062*, POLITICO (Feb. 27, 2014) (quoting remarks by Arizona Gov. Jan Brewer at a press conference on S.B. 1062), https://www.politico.com/story/2014/02/jan-brewer-vetoes-arizona-sb-1062-104018 [https://perma.cc/FH7A-J6KG] ("I understand that long-held norms about marriage and family are being challenged as never before . . . . however, I sincerely believe that Senate Bill 1062 has the potential to create more problems than it purports to solve.").

37. IND. CODE § 34-13-9-0.7 (2020) (effective July 1, 2015).

38. H.B. 1503, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021).

39. S.B. 124, 96th Leg., Reg. Sess. (S.D. 2021); S.B. 215, 67th Leg., 2021 Sess. (Mont. 2021).

40. S.B. 221, 2019 Gen. Assemb., Reg. Sess. (Ga. 2019); S. File 508, 88th Gen. Assemb., 2020 Sess. (Iowa 2020); H.B. 542, 2021 Gen. Ct., Reg. Sess. (N.H. 2021); H.B. 2545, 85th Leg., 2021 Reg. Sess. (W. Va. 2021); H.B. 264, 66th Leg., 2021 Gen. Sess. (Wyo. 2021).

they have reserved the honeymoon suite. They then endure an embarrassing and painful encounter with the hotel owner, who explains that he cannot serve them because he considers same-sex marriage to be an affront to God. Later, they sue the hotel and its owner. They rely on the City of Jackson's public accommodations law, their contract to rent the honeymoon suite for three nights, and an additional claim that the hotel's illegal behavior constituted the intentional infliction of emotional distress. But the defendants confidently offer H.B. 1523 as a full defense to all of these claims.

At first glance, this may look like an intramural conflict among state law claims. Absent an applicable federal statute, national law does not seem pertinent, and H.B. 1523 is likely to prevail.[41] The Constitution may seem irrelevant because the conduct came at the hands of the hotel and its owner, who are not state actors. At most, H.B. 1523 could be condemned as an establishment of religion.[42] But with the Establishment Clause being gradually weakened by the Supreme Court, that claim is less and less likely to prevail. Moreover, the core harm here is to the equal standing of same-sex couples; what seems wanting is a constitutional response to that.

But there is an equal protection dimension to this story, waiting to be uncovered. Mississippi effectively has targeted certain vulnerable groups, and it effectively has licensed private citizens to engage in discrimination against them. Admittedly, its statute constitutes a special kind of state discrimination because it specifies what government will *not do*, namely impose any disadvantage on groups or individuals who discriminate in certain ways under certain circumstances. It is, in other words, a permission. In formal terms, H.B. 1523 announces that the state is stepping aside, and stepping aside is not a familiar form of state action.

Some governmental permissions, however, do more than just declare that the state is refraining from regulation; they carry an unmistakable message of approval of the discriminatory conduct they purport to leave untouched and they thereby encourage that conduct. H.B. 1523 is an example of such a discriminatory permission.[43]

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41. *Cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020). Although the *Bostock* Court extended Title VII to LGBTQ workers, the Court has not yet ruled on whether federal antidiscrimination laws protect the same group from discriminatory public accommodations. *See id.* at 1754.

42. *See* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 49-70 (2017) (exploring the Establishment Clause argument against religious exemptions that harm others).

43. *See infra* Section III.B. But we imagine that many readers will agree that H.B. 1523 carries a message of approval.

The normative case for an equal protection rule against discriminatory permissions is straightforward. When governments encourage discrimination against members of groups that suffer pervasive and enduring patterns of disrespect and discrimination, they contravene the values of the Constitution. We call these patterns of subordination *structural injustice*. Groups that are subject to structural injustice include those defined by the traditional criteria of race, religion, sex, sexual orientation, gender identity, and the like.[44] When government licenses and encourages discrimination against their members, it frustrates the free and equal citizenship status that everyone requires to participate meaningfully in the democratic project of cooperative self-government.

Not only is the case against discriminatory permissions supported by normative reasons, but—perhaps more surprisingly—it is established by longstanding Supreme Court doctrine. The Court has already developed a distinct vocabulary to describe discriminatory permissions: It calls them *authorizations*. And it has repeatedly held that government authorizations of discrimination against people subject to structural injustice are unconstitutional.[45] Its unbroken line of decisions has been conspicuously stable against a changing backdrop of judicial values. Remarkably, the principle against discriminatory permissions was first announced in a case decided in 1914, when separate but equal was the reigning norm of racial justice.[46] It then figured centrally in several landmark cases during the height of the civil rights era.[47] And it was affirmed in passing exactly a century after its first appearance, when the Court otherwise seemed to be losing enthusiasm for racial justice.[48] Outside the context of race, the Court has applied the principle in cases concerning LGBTQ rights.[49] Our task

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44. *See infra* Section I.A.2 (explaining the concept of structural injustice).

45. *See infra* Section I.B.2 (discussing cases).

46. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 155–56 (1914) ("The act [permitting railroads to offer differing levels of service to members of different races] conflicts with the Fourteenth Amendment. It is discriminatory . . . . An act that permits and even authorizes and directs the excluding of one class of persons . . . must defeat the purpose, defy the spirit, and violate the express provision of the Fourteenth Amendment.").

47. *See infra* Section I.B.2.

48. Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 302–03 (2014) (noting with approval that in *Reitman v. Mulkey*, 387 U.S. 369, 376, 381 (1967), the Court invalidated a state law because it "expressly authorized and constitutionalized the private right to discriminate" and explaining that its effect "was to significantly encourage and involve the State in private racial discriminations" (internal quotation marks omitted)).

49. *See infra* Section I.B.2 (discussing *Romer v. Evans*, 517 U.S. 620 (1996)).

therefore is not to invent the rule against discriminatory permissions, but only to recover it.

Objections to Our Argument. Two objections deserve particular attention. The first is that our argument proves too much. After all, in the modern state, law is everywhere. Government either prohibits every particular act of discrimination or permits it. And if all government permissions to discriminate are unconstitutional, then lawmakers are constitutionally obliged to enact laws prohibiting discrimination, on this account. But that cannot be right. No court would order a legislature to enact antidiscrimination laws in the first place.[50]

Our response is twofold. First, only those permissions that encourage discrimination are subject to judicial invalidation. Silent, passive permissions embedded in longstanding doctrines of private prerogative do not implicate the doctrine we are describing. The Court may be drawn to the language of authorization because that term connotes permissions that are articulate and affirmative.

Second, states actually *are* constitutionally obliged to ameliorate structural injustice and consequently they are required to prohibit some forms of discrimination. There are, however, good reasons to believe that their affirmative obligations are not judicially enforceable. Here, by contrast, we are concerned with state permissions that not only fail to prohibit discrimination against those suffering structural injustice, but that actively authorize such discrimination. Such laws are not merely unconstitutional, but they are properly subject to judicial invalidation.

The second objection is that our argument proves too little. If only blatant invitations to discriminate are prohibited, then the rule will be powerless to protect those disfavored by structural injustice against many state laws. Or, in a weaker version, the objection is that authorization of discrimination exists only in the eye of the beholder and cannot support a finding that a law is unconstitutional. Virtually all exemptions from civil rights laws are motivated in part by concern for the plight of religious traditionalists and therefore virtually all of them can be called benign.

Yet the fact that a discriminatory permission is granted in the name of interests other than naked animus is not necessarily a defense to the charge that the permission signals approval of discrimination,

50. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 389 (1967) (Harlan, J., dissenting) ("[A]ll that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance.").

encourages that discrimination, and exacerbates the pervasive patterns of disrespect that construct structural injustice. In the past, provisions granted in the name of fundamental rights have been invalidated as authorizations.[51] The key question is one of *social meaning*. While some recent exemptions have ambiguous meanings, or multiple meanings, others plainly signal the state's endorsement of discrimination and disrespect. They can and should be invalidated by the judiciary.

Why This Matters. The deepest concern about discriminatory permissions occasioned by *Obergefell* is that they reinforce entrenched patterns of discrimination and disrespect toward LGBTQ citizens. The equal protection objection goes to the nerve of that constitutional concern in the most direct and explicit way. But our argument matters for more practical reasons as well.

So far, conflicts between religion and equality law have been debated primarily in terms of religious freedom, as we have said.[52] For example, a district court held that H.B. 1523 violated the Establishment Clause by preferring certain religious beliefs over others.[53] But arguments like these face real challenges at a moment when the Roberts Court has been weakening the Establishment Clause across a range of applications.[54] By comparison, the discriminatory permissions doctrine offers a potentially more durable basis for challenging state exemptions that encourage discrimination. It also speaks to what is most poignantly at stake in these cases, which is the exacerbation of structural injustice.

Moreover, the discriminatory permissions doctrine does real work in an emerging set of disputes where religion is not treated specially. Increasingly, accommodations extend beyond religion to cover

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51. *Id.* at 374 (invalidating a state law that "establishes a purported [state] constitutional right" to property that the Court found amounted to a right "to privately discriminate" (internal quotation marks omitted)); *see also infra* Section I.B.2 (discussing additional cases).

52. *See* TEBBE, *supra* note 42 (exploring the tensions between religious freedom and equality law).

53. Barber v. Bryant, 193 F. Supp. 3d 677, 716–20 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345, 350 (5th Cir. 2017) (reversing on standing grounds).

54. *See* Richard C. Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, AM. CONSTITUTION SOC'Y: SUP. CT. REV. (2019), https://www.acslaw.org/analysis/acs-supreme-court-review/establishment-clause-inversion-in-the-bladensburg-cross-case [https://perma.cc/5BQG-BC28] ("The Court has been chipping away steadily on precedent that restricts the government from providing material and expressive support for religion.") Standing law is an important component of the Court's campaign to weaken the Establishment Clause. *See id*. at n.39 and accompanying text.

objections grounded in secular conscience as well.[55] In those cases, the Establishment Clause arguably does not apply because religion is not treated uniquely.[56] Plaintiffs harmed by discriminatory permissions therefore may seek to root their constitutional arguments in equal protection.

Finally, and more generally, religious freedom statutes are often thought to enjoy enhanced authority because of their connection to the First Amendment.[57] Think of the federal RFRA and its state analogues, or consider state constitutional protections for free exercise. Recognizing the equal protection interests on the other side restores some balance to the political rhetoric surrounding these laws.

In Part I, we make the case for the principle against discriminatory permissions as a matter of democratic political morality and we ground it in settled constitutional doctrine. In Parts II and III, we defend against the two objections we have just described. In Part IV, we assess whether recent exemptions should be considered unconstitutional permissions or whether they are acceptable accommodations of traditional beliefs.

I. STATE PERMISSIONS AND STRUCTURAL INJUSTICE

In this Part, we examine the case for a constitutional prohibition of state permissions that exacerbate structural injustice by encouraging discrimination. We begin with the normative argument in Section A, before showing how settled doctrine firmly supports this principle in Section B.

A. STATE PERMISSIONS THAT ENCOURAGE DISCRIMINATION

We construct the normative argument in three steps. First, we establish that permissions to discriminate are state action and answerable to the Constitution, even though the most proximate discrimination comes at the hands of private actors. Second, we distinguish structural injustice from other forms of inequality and we underscore the special threat to equal protection it poses. Finally, we show why discriminatory permissions are properly viewed as constitutionally problematic.

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55. For example, the Trump administration's exemptions from the contraception mandate extend not just to religious actors but also to those with moral objections. 82 Fed. Reg. 47812 (2017) (religious exemption); 82 Fed. Reg. 47850 (2017) (moral exemption).

56. We say "arguably" to acknowledge the possibility that certain commitments of conscience may be treated as religious by the Court. *See* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1143–44 (2011) (discussing cases).

57. *See infra* Section IV.A.

1. State Permissions are State Action

Two questions need to be distinguished: "Does the behavior of citizen X with regard to citizen Y violate the Constitution?" and "Does the behavior of the state with regard to interaction of citizen X and citizen Y violate the Constitution?" Whatever the answer to the first question—generally no under current law, with certain exceptions for situations where a private actor is entwined with the government[58]—the answer to the second question can be yes. And our topic, state permissions, raises the second question rather than the first. In other words, the question for us is not whether the state has acted, but whether the state has acted unconstitutionally.[59]

To see this clearly, imagine a variation on *Plessy v. Ferguson*.[60] Suppose that the state had a common-law rule that required common carriers to serve all customers equally, absent a legitimate business rationale.[61] Imagine further that the state legislature exempted railroad companies from that law, permitting them to practice "the separation of the White and Negro races" (rather than requiring them to do so, as in *Plessy* itself).[62] More than likely, the *Plessy* majority would have upheld such a rule and Justice Harlan would have dissented. But their disagreement would have had nothing to do with state action. Instead, it would have taken much the same form as it did in the actual

58. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) ("Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." (citations omitted)).

59. Gardbaum argues that state action should never defeat a claim at the threshold stage. *E.g.*, Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 391 (2003) ([S]ince . . . all law [is] fully, directly, and equally subject to the Constitution—including contract, property, employment, trespass, and testamentary law—there should be no separate threshold issue of state action . . . to be resolved on a case-by-case basis whenever the constitutionality of a law invoked in litigation between private actors is challenged. The only genuine issue is the substantive one of whether that law violates the Constitution.").

60. 163 U.S. 537 (1896).

61. A rule like that existed in many states before the Civil War. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292, 1294 (1996). It has not been eliminated everywhere. *See, e.g.*, Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370, 375 (N.J. 1982) ("[W]hen property owners open their premises to the general public . . . they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner . . . .").

62. *Plessy*, 163 U.S. at 540 ("[The state] statute enacts 'that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races . . . .'").

case—it would have turned on the social meaning of the state's behavior. Did the state violate equal protection by permitting railroads to segregate on the basis of race?[63] No question of state action would arise.

Burton v. Wilmington Parking Authority nicely illustrates the distinction between our two questions.[64] The majority opinion answers the first question, while the minority opinions address the second—the one we are exploring in this Article.

A public parking authority leased space in a garage building to a private restaurant. Money collected from the twenty-year lease was crucial to the garage's financial success. And the availability of nearby parking contributed to the restaurant's profitability. So the two enterprises were financially interwoven. Neither the lease agreement nor local law prohibited racial exclusion, which the restaurant in fact practiced. A bare majority of the Court held that the state had insinuated itself so fully into the restaurant's operation that it had to be considered a "joint participant" in the discrimination, so that "the proscriptions of the Fourteenth Amendment must be complied with *by the lessee* as certainly as though they were binding covenants written into the agreement itself."[65]

The majority thus decided that the restaurant was constitutionally liable for its discriminatory behavior.[66] But the remaining four Justices addressed the narrower issue that concerns us here, namely, whether a state statute permitted racial discrimination in a manner that violated the Constitution.[67] Justice Stewart concurred in the outcome on the ground that the Delaware Innkeepers Law had *authorized*[68] the restaurant to refuse to serve Black customers in violation of

63. We wrote this passage invoking a hypothetical railroad permission before we realized that, twenty years after *Plessy*, the Court had actually considered a state law permitting private railroads to discriminate and determined that the permission was unconstitutional—without any reference to the question of state action. *See infra* Section I.B.2 (discussing McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914)).

64. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). We discuss *Burton* at greater length below in Section I.B.2.

65. *Id.* at 726 (emphasis added).

66. *Id.* at 724–26.

67. *Id.* at 726–30.

68. *Authorized* has become a term of art for the Court in discriminatory permission cases, but the Court has not made its content clear. As we mention in the Introduction and explain further below, a state *authorizes* discrimination when it both permits and signals its approval of that discrimination. *See infra* Part I.B.2.

equal protection.[69] The three remaining Justices agreed that the statute would indeed be unconstitutional if it authorized racial discrimination, but they believed the statute was ambiguous and required a remand.[70] For all four of these Justices, any relief would run against the state, not against the restaurant.[71] So for them the question was not whether the state had acted, but whether it was culpable.[72]

In sum, state permissions to discriminate are plainly state action. The question is whether and when they are unconstitutional.

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69. *Burton*, 365 U.S. at 726–27 (Stewart, J., concurring) ("[T]he [Delaware] statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid."). The Delaware statute read:

> No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business. As used in this section, 'customers' includes all who have occasion for entertainment or refreshment.

Id. at 717 n.1 (quoting 24 DEL. CODE ANN. tit. 24, § 1501 (1953)).

70. Justice Harlan put the point most forcefully:

> If . . . as my Brother [Stewart] suggests . . . the Delaware court construed this state statute "as authorizing discriminatory classification based exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment. It would then be quite unnecessary to reach the much broader questions dealt with in the Court's opinion. If, on the other hand, the state court meant no more than that under the statute, as at common law, [the restaurant] was free to serve only those whom it pleased, then, and only then, would the question of "state action" be presented in full-blown form.

Id. at 729–30 (Harlan, J., dissenting). As Justice Harlan put it in one of the lunch counter cases, "Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether . . . the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination." Peterson v. City of Greenville, 373 U.S. 244, 249 (1963) (Harlan, J., concurring in the judgment in one consolidated case and dissenting in whole or in part in other cases).

71. *See Burton*, 365 U.S. at 727 (Frankfurter, J., dissenting).

72. *Id.* at 715 (majority opinion). The Court and its commentators have not always kept this distinction clear. Decisions like *Shelley v. Kraemer*, 334 U.S. 1 (1948), and lunch counter cases like *Peterson v. City of Greenville*, 373 U.S. 244 (1963), are often discussed as state action cases, despite the fact that the Court is explicitly concerned with the constitutional liability of the state in each of those cases. Moreover, the category of state *inaction* is sometimes applied to decisions that invalidate explicit changes to state constitutions. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Romer v. Evans, 517 U.S. 620 (1996).

It could be the case, of course, that a state could both signal its approval of discrimination and entwine itself in a private discriminatory enterprise to the extent that the private entrepreneur became a state actor for constitutional purposes. Then both the state and the private entrepreneur would be constitutionally liable. This may have been true in *Burton* and also in *McCabe*, 235 U.S. 151, 163–64 (1914).

2. Structural Injustice

State permissions that raise constitutional doubts are those that encourage structural injustice. By that term, we mean to describe a pattern of diminished membership in the political community in which a class of persons is systematically regarded and treated as less worthy by many others in the community. Often people in the affected class also find themselves unable to exercise the basic capacities of democratic participation, such as using their moral powers to form independent goals, discussing those conceptions with others, criticizing the state freely and communally, and voting on the basis of those views. Historically and still today, patterns of diminished membership have existed in the United States, where people subject to structural injustice have been defined by race, gender, ethnicity, religion, sexual orientation, gender identity, and the like.

Such patterns of inequality are "pervasive, enduring, and tentacular."[73] They are deeply unjust and inconsistent with the aims of a democratic Constitution.[74] Where these patterns exist, governmental action adverse to the interests, concerns and status of members of subordinated groups are not freestanding, one-off events.[75] They are compounded by historic repetition. Where these patterns exist, harms are experienced not merely as losses of opportunities or benefits, but as losses occasioned by the poor regard in which the losers are held.[76] Adverse governmental actions can send a message to the community at large, reinforcing the poor regard in which members of the subordinated class are held.[77]

When a government enacts the community's prejudices into law, these problems take a particular form. Structural injustice gets transmuted into a legal status that characterizes the relationship between affected individuals and their government.[78] For example, segregation of state facilities on the basis of race characterizes and constitutes racial minorities as ineffective and unequal persons as a matter of law. It alters the legal relationship of people to their government, making them stand before officials and one another not simply as people, but as people who are differentiated and subordinated on the basis of a

73. Lawrence G. Sager, The Unacknowledged Constitution 10 (unpublished manuscript) (on file with authors).

74. *Id.* at 15.

75. *Id.* at 10.

76. *Id.*

77. *Id.*

78. *Id.* at 10–11.

racial characteristic.[79] The Constitution prohibits this kind of official articulation of a caste system by prohibiting governments from sorting and subordinating people according to their race—as well as other socially salient characteristics that have provided the basis for structural injustice.[80]

Not all government sorting subordinates in this way, not even where it is accompanied by a negative value judgment. Only discrimination that is structural offends the Constitution in this particular manner.[81] So government officials may condemn smoking—and smokers—as unhealthy, and they may communicate an official disfavor on this basis, not only through pure messaging but also through active regulation such as taxation, minimum age laws, and prohibitions in public places. Yet that kind of targeting does not rise to the level of constitutional concern for the simple reason that smokers have not been relegated to an inferior caste, nor thwarted in their democratic freedoms.

A central insight of the Reconstruction Era, and of the "Second Reconstruction" of the mid-twentieth century, is that structural injustice is a complex, community-wide pattern of attitudes and behaviors involving both public and private actors.[82] Government bias is central, of course. But private discrimination can effectively exclude classes of people from political, social, and economic communities alongside governmental discrimination, even though it does not carry the same legal significance.[83] Systematic exclusion from employment, housing, and public accommodations can stratify citizens, even without government action. People can find themselves unable to work in meaningful jobs, excluded from residential neighborhoods, and blocked from restaurants, hotels, theaters, hospitals, nursing homes, and the

79. *Cf.* Town of Greece v. Galloway, 572 U.S. 565, 621 (2014) (Kagan, J., dissenting). This case argues that sectarian prayer offered by a town in settings where a citizen is engaging a civic function "brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government" and concluded that such prayer is forbidden by the U.S. Constitution because:

> Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture .... [Citizens] participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose.

Id.

80. Sager, *supra* note 73, at 11.

81. *Id.*

82. *Id.* at 4–8.

83. *Id.* at 7.

like—all because of an identity characteristic that has become socially salient in a harmful way.

3. Permissions that Encourage Discrimination Against Those Subject to Structural Injustice

We have established that state permissions are uncontroversially acts of the state. And we have roughly sketched the unhappily familiar circumstances of structural injustice—circumstances that are familiar in part because they justify the special attention of the Constitution and civil rights laws to the project of protecting the targets of such injustice from discrimination. With these understandings on the table, we are in a position to take measure of the constitutional vice of state permissions to discriminate that signal state approval of that discrimination.

Our earlier example of a state enactment permitting rather than requiring railroads to segregate[84] shows how it can be the case—how *easily* it can be the case—that a state permission can constitute an invitation, not merely the absence of a prohibition. Our permissive form of *Plessy* does not just create negative regulatory space; in context, it unmistakably signals that the state approves of discrimination against Black citizens.[85] State endorsement of structural injustice is vividly harmful to the constitutional project of equal membership, and state permissions to discriminate can be endorsements.

When the government discriminates directly—say, by impairing the right to vote or the opportunity to serve on juries on the basis of race—it violates the Equal Protection Clause in the most flagrant way possible. When it segregates its public schools or even its drinking fountains it offends equal protection just as clearly. In the case of segregation, a major part of the wrong consists of the states' endorsement of the pervasive patterns of discrimination and disrespect we have called structural injustice. When the law requires private actors to segregate, the pernicious endorsement of the state is no different in kind and no less egregious than when it segregates public facilities. And when, as in our *Plessy* variation, the state permits private railroads to segregate under the prevailing circumstances that produced *Plessy* itself, the wrong is of a piece not just with *Plessy,* but with all of this litany of racial injustice. Structural injustice necessarily involves the complex interaction of public and private behavior. When the state

84. *See supra* note 60–63 and accompanying text.

85. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (Justice Harlan, dissenting from the Court's judgment that a state requirement that railroad cars be segregated is constitutional).

places its warrant behind subordination, as it does in all of these cases, its behavior is an affront to equal membership.

Discriminatory permissions place the warrant of the state behind subordination. In so doing they violate the Constitution, and courts may and must strike them down. That is the straightforward claim of this Article.

B. PRECEDENT: THE DISCRIMINATORY PERMISSIONS DOCTRINE AS LAW

It may come as a surprise that, over the course of more than a century, the Supreme Court has regularly invalidated legal permissions that endorse discrimination against protected groups. Though the Court has never explicitly named the doctrine in the way we are doing here, it has *enacted* it while articulating its animating values and underscoring its importance. The stable view of the Court that discriminatory permissions are unconstitutional begins when *Plessy v. Ferguson* is still good law, runs through the period of the Court's most robust commitment to civil rights, and continues into the period of the recent Court's skepticism about government's role in realizing social justice. We trace this line of cases in this Section. We begin with a well-established conceptual predicate of the discriminatory permission cases, the more general principle that governments may not encourage discrimination against constitutionally protected groups. Then we turn to the discriminatory permission cases themselves.

1. The Unconstitutionality of State Inducements of Private Discrimination

States violate the Constitution when they discriminate against people experiencing of structural injustice, of course. Equally well established is the proposition that states violate the Constitution when they induce private parties to discriminate against subordinated people.

The most extreme form of such unconstitutional inducement arises when official policies mandate unjust behavior. Where the state commands private discrimination against the victims of structural injustice, it obviously has acted unconstitutionally, even though the most immediate exclusion happens at the hands of private parties. The Louisiana regulation that was challenged in *Plessy v. Ferguson,* like other Jim Crow laws that required businesses to segregate customers, did not raise problems of state action but rather problems of substantive constitutional law even in an era when the Court was blind to the

constitutionally pernicious social impact of segregation.[86] When the *Brown* Court turned its back on *Plessy*, it relied on a different view of whether equal protection tolerated racial segregation; it did not think to distinguish the two cases on the basis that public schools are government entities, whereas railroad companies are not.[87]

When a state encourages rather than mandates subordinating behavior, its inducement of structural injustice is just as unconstitutional. Its decision to facilitate private discrimination in a manner that signals its approval runs up against the Equal Protection Clause. Both of these propositions are well illustrated by the sit-in cases from the 1960s. There, the Supreme Court encountered a continuum of state inducements of subordination, ranging in degrees from mandate to encouragement. Across that continuum, it consistently invalidated the governmental behavior in question.

Peterson v. City of Greenville is a government mandate case with a wrinkle.[88] An ordinance required all restaurants to segregate customers on the basis of race.[89] When ten young Black protesters sat at the whites-only lunch counter in a S.H. Kress store, the manager turned off the lights and announced that the lunch counter was closed. The protesters remained seated. Five short minutes later, they were arrested and charged with criminal trespass.[90] On these facts, *Peterson* seemed to be a straightforward case of government-mandated discrimination. But, the city resisted the equal protection argument on the ground that the Kress Company would have segregated its lunch counter even if there had been no ordinance requiring it.[91] And, of course, the argument continued, voluntary private exclusion could not violate the Constitution simply because it was enforced by the police.[92] Writing for the Court, Chief Justice Warren impatiently rejected

86. For another example of such a law, see Peterson v. City of Greenville, 373 U.S. 244, 246 (1963) ("'It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding-house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter . . . .'" (quoting CODE OF GREENVILLE § 31-8 (1958)). *See also* Joseph William Singer, *Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations*, 18 THEORETICAL INQ. L. 519, 530 (2017) (describing the shift after Reconstruction from state laissez-faire to Jim Crow laws mandating racial segregation in private businesses).

87. Brown v. Bd. of Educ., 347 U.S. 483, 485 (1954).

88. 373 U.S. at 246.

89. *Id*. (reproducing CODE OF GREENVILLE § 31-8 (1958)).

90. *Id.* at 245–46.

91. *Id*. at 248.

92. *Id*. at 247 ("It cannot be disputed that under our decisions 'private conduct abridging individual rights does no violence to the Equal Protection Clause unless to

that argument.[93] He explained that the City had placed its coercive authority behind segregation, it had achieved its desired result, and it had enforced that outcome through the criminal justice system.[94] The "mental urges" of Kress management could not exculpate the city.[95]

In another lunch counter case decided on the same day, the Court extended that rationale to segregation that was not mandated by an ordinance.[96] *Lombard* took place in New Orleans at a time when every restaurant in the city was segregated.[97] The mayor and police chief had issued statements condemning a series of sit-in demonstrations as contrary to "the community interest" and announcing that they would be prohibited.[98] The Court interpreted the officials' statements to mean that segregation policies not only would be *allowed* in New Orleans but also would be *enforced* by the state.[99] Chief Justice War-

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some significant extent the State in any of its manifestations has been found to have become involved in it.'" (quoting Burton v. Wilmington Packing Auth., 365 U.S. 715, 722 (1961))).

93. *Id.* at 248.

94. *Id.*

95. *Id.* ("When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators."); *see also id*. at 249 (Harlan, J., concurring in the judgment) ("In deciding these cases the Court does not question the long-established rule that the Fourteenth Amendment reaches only state action. And it does not suggest that such action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race." (citing *Civil Rights Cases*, 109 U.S. 3 (1883)).

Justice Harlan concurred in the result only, reasoning that there was state action only if the businesses felt subjectively compelled to obey the discriminatory local ordinance and finding that the Kress management did feel so compelled. *Id*. at 253 ("Asked for the reasons for his [discriminatory] action, [the store manager] said: 'It's contrary to local customs and its [sic] also the ordinance that has been discussed' (quite evidently referring to the segregation ordinance). This suffices to establish state action, and leads me to join in the judgment of the Court." (emphasis omitted)).

96. Lombard v. Louisiana, 373 U.S. 267 (1963).

97. *Id.* at 272 ("The Mayor and the Superintendent of Police both testified that, to their knowledge, no eating establishment in New Orleans operated desegregated eating facilities.").

98. *Id*. at 270.

99. *Id*. at 273 ("As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct.").

ren, speaking for the Court, held that the city's pervasive discrimination, although limited to private restaurants, was "commanded . . . by the voice of the State."[100] Accordingly, the demonstrators' convictions for criminal trespass were unconstitutional.[101]

During its next term, the Court went even further and invalidated a lunch counter exclusion even though the government had neither a statute nor an official policy insisting on segregation.[102] However, Florida did have two regulations that discouraged integration in Miami restaurants. First, the Florida Board of Health required all businesses that served Black customers to provide segregated restrooms.[103] Second, the state had issued a manual for food service providers providing that "[s]eparate [restroom] facilities shall be provided for each sex and for each race whether employed or served in the establishment."[104] The Court ruled that Florida had violated the Constitution by encouraging private restaurants to segregate and then facilitating that segregation by enforcing its criminal trespass statute.[105]

Justice Harlan would have remanded. *Peterson*, 373 U.S. at 255 (discussing *Lombard*, 373 U.S. 267). Unlike the majority, he interpreted the authorities' statements simply to mean that they would enforce the wishes of owners who elected to operate segregated facilities:

> [New Orleans officials] did not press private proprietors to segregate eating facilities; rather they in effect simply urged Negroes and whites not to insist on nonsegregated service in places where segregated service obtained. In short, so far as this record shows, had the McCrory store chosen to serve these petitioners along with whites it could have done so free of any sanctions or official constraint.

Id. at 254. However, he faulted the lower court for prohibiting defense counsel from pursuing the question of whether the police had collaborated with the owner to keep Black customers out of the restaurant. Thus, he would have returned the case to the lower court with instructions to conduct that inquiry. *Id*. at 255.

100. *Lombard*, 373 U.S. at 274.

101. *Id.*

102. Robinson v. Florida, 378 U.S. 153 (1964).

103. *Id*. at 156 ("[T]he Florida Board of Health had in effect a regulation, adopted under 'authority of the Florida Legislature' and applicable to restaurants, which provided that 'where colored persons are employed or accommodated' separate toilet and lavatory rooms must be provided." (quoting FLA. STATE SANITARY CODE, c. VII, § 6)). Note that, by its terms, this provision singled out members of a particular race—it did not apply to all interracial restaurants, but only to restaurants that served Black customers.

104. *Id.*

105. The Court explained:

> While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together . . . . we

These lunch counter cases set the stage for the Supreme Court decision that offered the most forceful and conceptually clear statement of the proposition that when a state allows and encourages private subordinating behavior it violates the Fourteenth Amendment. In *Anderson v. Martin*,[106] the Court unanimously struck down a Louisiana law that required ballots and other election materials to designate the race of all candidates for elective office. The Court framed its analysis by observing that "[t]he crucial factor is the interplay of governmental and private action."[107] Although any discriminatory vote would be cast by a private citizen, the state could not encourage or promote such discrimination without violating the Equal Protection Clause.[108] In light of private prejudices, the statute could only have a "repressive effect."[109] Given that a state could not explicitly "encourage its citizens to vote for a candidate solely on account of race," it followed that a state could not telegraph the same message "by indirection."[110] The *Anderson* Court had little trouble striking down the Louisiana law . The constitutional vice of the racial ballot requirement was not voting corrupted by racial prejudice; the Court had no intention of intruding the Constitution into the democratic voting choices of private citizens. The constitutional vice was "the placing of the power of the State behind a racial classification that induces racial prejudice at the polls."[111]

Anderson throws into sharp relief the principle that state inducement of private discrimination is unconstitutional. As with the sit-in cases in their various forms, there was no problem with the state action requirement involved in *Anderson*, because it was the behavior of the state in encouraging the private subordinating behavior that was found to be unconstitutional, not the private behavior the state had induced. No one was suggesting that racial bias in a Louisiana voter's choice among competing candidates was unconstitutional; voters could vote as they wished, notwithstanding the prejudice that they might carry into the voting booth. The question was simply and strictly whether Louisiana's law requiring the racial identification of candidates was unconstitutional because it encouraged racial bias at

> conclude that the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment.

Id. at 156–57.

106. 375 U.S. 399 (1964).

107. *Id.* at 403 (internal quotation marks omitted).

108. *Id.* at 404.

109. *Id.* at 403 (citing Bates v. Little Rock, 361 U.S. 516, 524 (1960)).

110. *Id.* at 404.

111. *Id.* at 402.

the polls by both facilitating and signaling approval of such bias.[112] The case turned on a question of state *culpability,* not state action. And the answer to the question of culpability was clear: to be constitutionally liable, a state did not have to mandate private discrimination as in *Peterson*, or pressure private actors to discriminate with burdensome regulations as in *Robinson*. It need only "induce racial prejudice," by facilitating and signaling approval of private discrimination.[113]

2. Discriminatory Permissions

Discriminatory permissions do just that. They facilitate discrimination against a group that is subject to structural injustice by renouncing any legal bar to such discrimination; and they do so under circumstances that signal the state's approval of that discrimination. The only difference is that discriminatory permissions take the form of government exemptions or allowances. When the lessons of the sit-in cases and *Anderson v. Martin* are applied to state decisions to allow and encourage structural injustice, the unconstitutionality of discriminatory permissions follows as a matter of course.

On their surface, discriminatory permissions assume a form that may distract from the force of this lesson. Formally, a permission simply lifts a regulatory burden. How can deciding not to regulate private discrimination be unconstitutional, unless the state is obliged to outlaw that discrimination in the first place? And while we suggest below that states may well have an obligation to ameliorate structural injustice, we do not take that obligation to be judicially enforceable. There are good reasons to leave this duty in the hands of legislatures, and nothing in Supreme Court doctrine suggests otherwise. So the puzzle remains.

Its resolution, however, is simple. In the case of a discriminatory permission, the state has framed its permission in a visible and articulate way, under circumstances where its action carries with it the social meaning of condoning discrimination against a protected class, and where the consequences of its action are all but certain to include

112. The Court explained:

> At the outset it is well that we point out what this case does not involve. It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race.

Id.

113. *Id.* at 399.

an uptick in the incidents of injustice. It differs appreciably from a state failure to prohibit private discrimination in the first place.

The Supreme Court has not been distracted by the form in which discriminatory permissions present themselves. Over the span of more than a century, it has looked past the simple fact of an assent to see whether the state has endorsed the structural subordination of groups. Remarkably, the unconstitutionality of discriminatory permissions was first recognized by the Court not in the civil rights era, but much earlier, when *Plessy v. Ferguson* guided the Court's response to racial injustice generally.

The first discriminatory permissions case of which we are aware was *McCabe v. Atchison, Topeka and Santa Fe Railway Company*,[114] decided in 1914. *McCabe* concerned an Oklahoma law with two parts. First, the statute required private railroads to segregate, in much the same way as the Louisiana law that was upheld in *Plessy.* Second, moreover, it granted private railroads license to offer luxury rail cars to customers of only one race, if there was not sufficient demand among those of the other race.[115] A group of Black Oklahomans sued for an injunction that would prohibit railroads from offering only spartan carriage to them while providing white customers with amenities like Pullman cars, dining cars, and "chair cars."[116]

After *Plessy*, one might have imagined that the Court would regard the second part of Oklahoma's law as a benign permission that simply assured the affected railroads that it would not interfere with their decisions regarding luxury services. But the *McCabe* Court was of a very different mind. It held that state *authorization* of the differential provision of rail services along racial lines violated the Equal Protection Clause, understood to require only "separate but equal" facilities.[117] The Court denounced the permission notwithstanding the private demand by whites for more luxurious rail services:

> It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter *under the authority of a state law*, a facility or convenience in the course of his journey which under

114. 235 U.S. 151 (1914).

115. This provision of the statute provided that "nothing contained in the act should be construed to prevent railway companies 'from hauling sleeping cars, dining or chair cars attached to their trains, to be used exclusively by either white or negro passengers, separately but not jointly.'" *Id*. at 158. The parties and the Court agreed that "the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes." *Id.* at 161.

116. *Id.* at 158.

117. *Id.* at 155.

> substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.[118]

Crucially, the railroad's discriminatory behavior would not be merely free of legal interference by Oklahoma, but would be undertaken under the authority of the state.

Subsequent decisions by the Supreme Court not only have followed *McCabe* in finding that state permissions to perpetuate structural injustice violated the Equal Protection Clause (even though the actual exclusion came at the hands of private parties), but they have continued to make a finding of state *authorization* crucial to the constitutional outcome. Though we use the term *discriminatory permissions*, the Court often says that discrimination has been authorized by the state or that it enjoys the backing of state *authority*. Whatever the terminology, the key is state approval. In *McCabe*, for instance, Oklahoma communicated an expectation that railroads would deny luxury services to Black customers. Far from hiding its expectations, the state argued for the constitutionality of its discriminatory permission on the basis of its assumption that market forces would provoke the railroads to stratify their services.

Almost fifty years after *McCabe,* a skirmish among the Justices of the Supreme Court made clear that the *McCabe* approach to discriminatory permissions was a given, even for the conservative wing of the Court. The opinions in *Burton v. Wilmington Parking Authority* also shed some additional light on the idea of state authorization.[119] There, a state parking authority built a public garage and leased space within it to a private restaurant, Eagle Coffee Shoppe.[120] William Burton—a member of the City Council—was refused service by the restaurant because he was not white.[121] His equal protection claim seemed to run squarely into state action problems because the restaurant's refusal was not mandated by the state. But the parking authority and the state were more than a little entwined. Not only was the parking authority the restaurant's landlord, it also provided convenient parking for customers and posted signs that identified the structure as government

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118. *Id.* at 161–62 (emphasis added). The Court ultimately ruled against the plaintiffs on a somewhat murky combination of lack of standing and absence of the prerequisites of equitable relief. *See id.* at 163–64. On the merits, the *McCabe* Court may have been prepared to go further than we would. In the block quote above, it may have suggested that the railroads themselves, not merely the state, would violate the Equal Protection Clause by providing different portfolios of available services "under authority" of state law. *See supra* note 112.

119. 365 U.S. 715 (1961).

120. *Id.* at 716.

121. *Id.*

owned.[122] The authority had built out the space specifically to suit the needs of the restaurant, and it had covenanted not to obscure the restaurant's signs.[123] In turn, rent from the twenty-year lease was crucial to the financial viability of the public garage.[124] That circumstance might help to explain why the authority had taken no steps, in drafting the lease or otherwise, to require the restaurant to integrate. In the view of the five Justice majority, "[t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity," and the action of the restaurant was itself state action.[125] As a result, "the proscriptions of the Fourteenth Amendment must be complied with *by the lessee* as certainly as though they were binding covenants written into the agreement itself."[126]

The four remaining Justices in *Burton*, reluctant to reach the question of whether the restaurant had become a state actor bound by the Equal Protection Clause, focused on the conceptually less provocative possibility that a state statute, the Delaware innkeepers law, unconstitutionally permitted the restaurant to discriminate against Mr. Burton.[127] No question of state action was involved in this rationale, of course, only whether the innkeeper's law was a discriminatory permission.

Justice Stewart concurred in the judgment on this ground. In his view, the Delaware Supreme Court had construed the innkeepers law

122. *Id.* at 720.

123. *Id.* at 719.

124. *Id.*

125. *Id.* at 725.

126. *Id.* at 726 (emphasis added).

127. Delaware's statute read: "No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business." DEL. CODE ANN. tit. 24, § 1501 (1953).

"as *authorizing* discriminatory classification based exclusively on color."[128] Under that interpretation, the law was unconstitutional.[129]

Justice Harlan, writing for himself and Justice Whittaker, agreed that state authorization of discrimination would be unconstitutional.[130] Because Justices Harlan and Whittaker were unsure that Justice Stewart's understanding of the state court's decision was correct,

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128. *Burton*, 365 U.S. at 726–27 (Stewart, J., concurring) (emphasis added). Here is the entirety of Justice Stewart's argument on this point:

> In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers . . . ." There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment.

Id. (footnote omitted). Possibly, Justice Stewart was relying on the fact that Burton had argued in the state court that Delaware common law required businesses open to the public to serve everyone, absent a business reason. The Delaware Supreme Court had read the innkeepers law to override that rule, allowing restaurants to exclude those whose who were "offensive" to other customers. Wilmington Parking Auth. v. Burton, 157 A.2d 894, 902 (Del. 1960) ("It is argued that, at common law, an inn or tavern could deny service to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of [the innkeepers law], which does not compel the operator of a restaurant to give service to all persons seeking such."). Justice Stewart may have been reading the Delaware Supreme Court to be authoritatively construing the innkeepers law to specifically authorize discrimination on the basis of race. *See Burton*, 365 U.S. at 726–27 (Stewart, J., concurring).

Justice Harlan, by contrast, was not convinced that the Delaware Supreme Court had construed the common law that way. He pointed to a different passage in the lower court opinion:

> It [Eagle] acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in [the innkeepers law] with respect to restaurant keepers. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Burton, 365 U.S. at 729 (Harlan, J., dissenting) (alteration in original) (citations omitted) (quoting *Burton*, 157 A.2d at 902). Justice Harlan reasoned that, on this reading, the state court had construed its common law to allow businesses to exclude customers for any reason, and the innkeepers law merely restated that rule in one particular circumstance regarding restaurants. On that reading of the lower court, the Delaware statute did not specifically authorize racial discrimination. *Id.* at 730. Justice Harlan therefore would have remanded the case to the state court for clarification. *Id.*

129. *Id.* at 729.

130. *Id.* at 729–30 (Harlan, J., dissenting) ("If . . . as my Brother [Stewart] suggests

they dissented. They would have remanded the case for clarification on the question of the authorization of discrimination.

Justice Frankfurter also agreed that any state authorization of racial discrimination would be unconstitutional:

> According to my brother [Stewart], the Supreme Court of Delaware has held that one of its statutes… sanctions a restaurateur denying service to a person solely because of his color. If my brother is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment.[131]

Like Justice Harlan, Justice Frankfurter dissented.[132] He too would have remanded to determine whether Delaware had authorized racial discrimination.

The question of Delaware's authorization of racial discrimination was a bit puzzling. There was only one statute in question and it was neither long nor complex.[133] And the Delaware Supreme Court clearly held that the statute permitted the operator of the restaurant to refuse service to Mr. Burton solely on the ground of his race.[134] So just what was there left to know about the state's *authority* or the statute's *authorization*? Justice Frankfurter's opinion helped to explain what was at stake. He would have no trouble striking down a statute that "sanctions a restaurateur denying service to a person solely because of his color."[135] And it was plainly unconstitutional for a state "to place its authority behind discriminatory treatment based solely on color."[136] Certainly, Delaware permitted the restaurant to discriminate on grounds of race. What further could it mean for the state to "sanction" or "place its authority" behind such discrimination? Pretty clearly, the additional ingredient was state endorsement of that discrimination.[137]

. . . the Delaware court construed this state statute 'as authorizing discriminatory classification based exclusively on color,' I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment. It would then be quite unnecessary to reach the much broader questions dealt with in the Court's opinion.").

131. *Id.* at 727 (Frankfurter, J., dissenting).

132. *Id.* at 728.

133. For the text of the statute, see *supra* note 127.

134. *Burton*, 365 U.S. at 715.

135. *Id.* at 727 (Frankfurter, J., dissenting).

136. *Id.*

137. The Court in *McCabe* also pointed to the authority of the state:

> It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161–62 (1914).

There was much about the Delaware's innkeepers law that suggested that the state would have been widely and correctly understood as inviting racial discrimination. There was the formulation of the statute itself, which made the permissibility of an exclusion turn on the offensiveness of a customer's presence to the "major part of [a business's] customers."[138] There was the date of original adoption, which was 1875, during the reaction to Reconstruction. And there was an accompanying section of the legislation, which was more suggestive still, providing that carriers could assign a particular place to customers "whose presence elsewhere would be offensive [sic] persons."[139]

In all, it would have been surprising if the Delaware innkeepers law did not have its roots deep into a well-understood effort by the state to approve racial exclusion and segregation.[140] But the important point was that the tough-minded, state-action skeptics in *Burton* agreed that the innkeepers law *could* in appropriate circumstances be understood to place the authority of the state behind racial discrimination.[141] That was so even though in form the innkeepers law only granted permission to proprietors to exclude customers who gave offense, and even though it nowhere mentioned race. And further, they assumed that, so understood, the law would be unconstitutional. Finally, although the Justices in the majority took a more aggressive position, holding the private restaurant directly accountable to the Equal Protection Clause, some or all of them almost certainly would have embraced the weaker legal claim that the state statute could not authorize private racial discrimination by innkeepers without violating

138. *See supra* note 127 and accompanying text.

139. DEL. CODE ANN. tit. 15, § 194-3 (1875) ("And be it further enacted, [t]hat carriers of passengers may make such arrangements in their business, as will, if necessary, assign a particular place in their cars, carriages or boats, to such of their customers as they may choose to place there, and whose presence elsewhere would be offensive to the major part of the traveling public, where their business is conducted, [p]rovided, however, that the quality of the accommodation shall be equal for all, if the same price for carriage is required from all." (emphasis omitted)).

140. But in *State v. Brown,* 195 A.2d 379 (Del. 1963), the Delaware court denied that the statute was enacted with the "purpose of . . . favoring the exclusion of Negroes from places of public accommodations." *Id.* at 382–83. The court applied a presumption that the legislature had proceeded within the scope of its legitimate powers. *Id*. It went on to find further that *Burton* did not apply because the restaurant in question was not entwined with the state. *Id.* at 384. Finally, however, the court found that if the state had involved itself in removing an unwanted patron from the premises of a restaurant or otherwise had enforced its trespass laws, then the state had violated the Fourteenth Amendment. *Id.* at 386.

141. *Burton*, 365 U.S. at 721–22.

the Constitution.[142] The rationale of *McCabe* was a given. And for the *Burton* Justices, permissions were clearly acts of the state and were

142. Earlier decisions invalidating the white primary in Texas could be conceptualized as discriminatory permission cases, though there too there was some ambiguity. Texas initially enacted a statute that limited voting in the Democratic primary to whites. Nixon v. Herndon, 273 U.S. 536, 540 (1927). After that law was invalidated in *Nixon v. Herndon*, the state passed a statute vesting the power to determine party membership in the party's state executive committee, which promptly limited primary voting to whites. Nixon v. Condon, 286 U.S. 73, 81–82 (1932). Both the political party and its executive committee were presumed to be private entities. *Id.* at 83 Nevertheless, the Supreme Court held that because the executive committee did not normally make such policies, and had only been empowered to do so by the state statute, it had become answerable to the Constitution. *Id.* at 88–89. The Democratic Party responded by reestablishing the white primary for the third time, now acting through its statewide convention, the party's normal policymaking body. The Supreme Court invalidated that exclusion as well in *Smith v. Allwright*. 321 U.S. 649, 663 (1944).

Admittedly, *Allwright* could be understood as a traditional state action case, where the Court found that the Texas Democratic party was so heavily regulated that it had become an organ of the state, answerable to the Constitution for that reason. *See, e.g.*, *id.* ("We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election."); *id.* at 664–65 (explaining that when the state makes party membership an essential qualification for determining which candidates participate in the general election, "the State makes the action of the party the action of the State").

But it is also possible to read *Allwright* as a discriminatory permissions case. After all, it would have been perfectly clear to Texans that the state had given authority to the party precisely in order to avoid the Court's ruling in *Herndon*, and therefore that the state had fully endorsed the predictable decision of the Democratic Party to exclude Black voters from its primaries. Accordingly, the *Allwright* Court explicitly grounded its opinion on the principle against discriminatory permissions. The majority explained:

> If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment.

Id. at 664. Note that here the Court is finding that the *state itself* violated the Constitution, not just the Democratic party acting as the government. *See id.* So while there is some ambiguity in the opinion, it can be fairly read as prohibiting Texas from authorizing discrimination by the party and as providing relief against the state itself, regardless of whether the political party could be considered to be an arm of the state.

The *Allwright* Court reinforced that reading when it insisted that Texas could not escape responsibility for racial discrimination by delegating that exclusion to a private entity:

> The United States is a constitutional democracy. Its organic law grants to all

unconstitutional if they carried with them the warrant of state approval.

Five years after *Burton*, the Court made explicit the conceptual unity of the anti-inducement principle that implicitly drove the sit-in cases and the racial ballot case, on the one hand, and discriminatory permissions, on the other. The Court also demonstrated that *authorize* and *authorization* had become terms of art, and that state permissions to discriminate that carried with them a message approving of such discrimination were flatly unconstitutional.

The case was *Reitman v. Mulkey.*[143] California had enacted extensive prohibitions on racial discrimination by property owners and operators.[144] State voters reacted to those protections by approving a ballot initiative, Proposition 14, which amended the California constitution to prohibit government interference with the right of a residential property owner to refuse to sell or lease to any person for any reason.[145] That provision effectively unwound the preexisting prohibitions on housing discrimination.

> citizens a right to participate in the choice of elected officials without restriction by any State because of race. *This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.* Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664 (emphasis added). We conclude that *Allwright* can faithfully be read as a discriminatory permissions case and that it is best understood that way.

143. 387 U.S. 369 (1967).

144. For example, Lincoln Mulkey relied on the state Unruh Act when he sued a landlord for denying him a lease because of his race:

> All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.
>
> . . .
>
> Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

Id. at 372 n.3 (quoting CAL. CIV. CODE §§ 51–52 (1959)). The Court also cites "the Rumford Fair Housing Act, Health & Safety Code §§ 35700–35744, . . . prohibiting racial discriminations in the sale or rental of any private dwelling containing more than four units." *Id.* at 374.

145. After Proposition 14, the amended California Constitution read:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell,

The Supreme Court of California struck down the new provision as a violation of the Equal Protection Clause.[146] The United States Supreme Court affirmed, relying heavily on the findings and reasoning of the California high court. Both courts embraced what we have called the discriminatory permission doctrine. Justice White, writing for the Supreme Court majority, drew on the line of cases we have been tracking:

> [T]he state court examined certain prior decisions in this Court in which discriminatory state action was identified. Based on these cases, *Robinson v. Florida*, *Anderson v. Martin*, *Barrows v. Jackson*, *McCabe v. Atchison, Topeka & Santa Fe R. Co.*, it concluded that a prohibited state involvement could be found "'even where the state can be charged with only encouraging,"' rather than commanding discrimination. Also of particular interest to the court was Mr. Justice Stewart's concurrence in *Burton v. Wilmington Parking Authority*, where it was said that the Delaware courts had construed an existing Delaware statute as "authorizing" racial discrimination in restaurants and that the statute was therefore invalid.[147]

As we have seen, *Robinson* and *Anderson* were grounded in the anti-inducement principle, and *McCabe* introduced the discriminatory permissions doctrine.[148] For Justice White, what the *McCabe* Court was doing was "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment."[149] Applying the rule of that case, Justice White held that the California amendment "was intended to authorize, and does authorize, racial discrimination in the housing market" and that "the right to discriminate is now one of the basic policies of the State," for its high court "believes that the section will significantly encourage and involve the State in private discriminations."[150]

A central issue is what methodology a court should use to identify a discriminatory permission. To determine whether Proposition 14 constituted an "authorization to discriminate,"[151] the *Reitman* Court "undertook to examine the constitutionality of [the state provision] in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical

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> lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

CAL. CONST. art. I, § 26 (1964).

146. Mulkey v. Reitman, 413 P.2d 825, 834 (Cal. 1966).

147. *Reitman*, 387 U.S. at 375 (citations omitted) (quoting *Mulkey*, 413 P.2d at 833).

148. Later, we consider another source of support for the discriminatory permissions doctrine, namely *Barrows v. Jackson*, 346 U.S. 249 (1953). *See infra* notes 168173 and accompanying text.

149. *Reitman*, 387 U.S. at 379.

150. *Id.* at 381.

151. *Id.* at 379.

context and the conditions existing prior to its enactment.'"[152] These factors speak to what we are calling social meaning. Of particular interest to us, the Court affirmed that "a prohibited state involvement could be found even where the state can be charged with only encouraging, rather than commanding, discrimination."[153]

Reitman is sometimes regarded with puzzlement. California was not under a constitutional obligation to legislate against private discrimination in the sale or rental of real estate—or at least no obligation that could be judicially enforced. But if its antidiscrimination laws were in that sense voluntary, how could their repeal be prohibited? Was there an unexplained antiretrogression principle afoot? Do states in fact have a judicially enforceable obligation to legislate against structural injustice? Was the state action doctrine being quietly interred?

Yet *Reitman* seems correct—and much less disruptive—if we understand it as a discriminatory permission case. California's Proposition 14 was unconstitutional because it was not a simple repeal but an unmistakable invitation to California property owners to engage in racial discrimination. That is what it means for a state to authorize pri-

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152. *Id.* at 373 (quoting *Mulkey*, 413 P.2d at 828).

153. *Id.* at 375. In the key passage, the *Reitman* Court explained:

> [The California Supreme Court] conceded that the State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them. But, because a significant state involvement in private discriminations could amount to unconstitutional state action, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market. Its conclusion was that it did.
>
> . . .
>
> To the California court "[t]he instant case presents an undeniably analogous situation" wherein the State had taken affirmative action designed to make private discriminations legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decisions"; § 26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination . . . ." The court could "conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination . . . ." The judgment of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.
>
> There is no sound reason for rejecting this judgment.

Id. at 374–76.

vate discrimination in a manner that violates equal protection. So understood, *Reitman* expresses the mature version of a discriminatory permissions doctrine that already had a substantial pedigree.[154]

While *McCabe*, *Burton*, and *Reitman* all concerned racial discrimination, *Romer v. Evans* addressed bias on the basis of "sexual orientation."[155] After a number of Colorado municipalities made it unlawful to discriminate on that basis, Colorado voters amended the state constitution to prohibit any state or local law from shielding against discrimination on the basis of "homosexual, lesbian or bisexual orientation."[156] In *Romer*, the Court found that the resulting provision of the state constitution violated the Equal Protection Clause.[157]

Romer presented a question similar to the one in *Reitman*: If the state was under no constitutional obligation to enact antidiscrimination laws in the first place, or at least no obligation that could be enforced in court, how could its withdrawal of those provisions be unconstitutional? Amendment 2 was at once a better and a worse candidate than Proposition 14 for categorization as a discriminatory permission. It fit the category better because Colorado had imposed an explicit and broad disability on a single group. It fit less well because classifications based on sexual orientation had not been found to be suspect.[158] Our own view is that LGBTQ citizens have long been the targets of structural injustice, should be considered a protected class, and effectively have been so protected ever since *Romer*. Consistent with that view, *Romer* prohibited a state permission that encouraged discrimination against a group whose members were already subject to structural injustice, just as had California's Proposition 14.

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154. Accordingly, the *Reitman* Court relied on the line of cases that we have been tracking. *See id.* at 379 (relying on *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151 (1914)); *id.* at 380 (discussing the sit-in cases, *Peterson v. City of Greenville*, 373 U.S. 244 (1963), and *Lombard v. Louisiana*, 373 U.S. 267 (1963)); *id.* at 379 (citing *Nixon v. Condon*, 286 U.S. 73 (1932), for support); *id.* at 379–80 (discussing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)). Also consistent with our argument, *Reitman* has subsequently been treated as a discriminatory permissions case, if not precisely in those terms. *See* Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 302–03 (2014) (noting with approval that in *Reitman* the Court invalidated a state law because it "expressly authorized and constitutionalized the private right to discriminate" and explaining that its effect "was to significantly encourage and involve the State in private racial discriminations" (internal quotation marks omitted)).

155. Romer v. Evans, 517 U.S. 620, 624 (1996).

156. *Id.* at 623–24.

157. *Id.* at 625.

158. *Id.* at 630–31.

Justice Kennedy's opinion for the Court in *Romer* stressed two features of Colorado's Amendment 2 that supported the Court's invalidation of the provision. The first was state constitutionalization of an extraordinarily broad and durable legal disability.[159] To secure protection from unjust treatment on gender orientation grounds, LGBTQ individuals would have to amend the state constitution. The other was the animus that motivated the state to enact such a sweeping measure.[160]

Justice Kennedy's first rationale, concerning distortions in a state's political process, was undermined by an opinion he himself wrote nearly two decades later in *Schuette v. Coalition to Defend Affirmative Action*.[161] By ballot initiative, Michigan had amended its constitution to ban affirmative action in state universities, inter alia. Justice Kennedy, in a plurality opinion announcing the judgment of the Court, upheld the amendment. He flatly rejected the political process claim in the context of racial discrimination.[162] He began, however, by turning back to *Reitman* and affirming its continued validity on grounds entirely compatible with our reading of the case as involving a discriminatory permission. It is unclear whether the political process argument in *Romer* survives *Schuette*. But *Reitman* is, if anything, strengthened as a discriminatory permission case. *Romer* is still good law, though perhaps with an increased emphasis on animus.

Without a further understanding, however, the animus rationale seems to falter on the basic puzzle of *Romer*: If Colorado is under no obligation to protect LGBTQ people from discrimination, what prevents it from repealing its various voluntary antidiscrimination provisions in one, wholesale stroke? Justice Kennedy cited *Department of Agriculture v. Moreno* in support of his animus argument, but there, persons who met the financial need requirements for food stamps

159. *Id.* at 632–34.

160. *Id.* at 634–35.

161. 572 U.S. 291 (2014).

162. *Id*. at 307 ("[*Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)] stated that where a government policy 'inures primarily to the benefit of the minority' and 'minorities . . . consider' the policy to be 'in their interest,' then any state action that 'place[s] effective decisionmaking authority over' that policy 'at a different level of government' must be reviewed under strict scrutiny. In essence, according to the broad reading of *Seattle*, any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legislation that is in their interest' is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.").

were denied them solely because they lived in communal group arrangements rather than as individuals or families.[163] The naked dislike of communes, the *Moreno* Court ruled, was not a legitimate governmental reason to deny food stamps to persons whose financial needs would otherwise entitle them to assistance.[164] But Colorado, like most if not all state and local governments with antidiscrimination provisions, chose a relatively narrow set of groups to protect from discrimination. If it was under no obligation to include LGBTQ citizens in the list of protected groups in the first place, what prevents its citizens from removing LGBTQ status from all of the lists of characteristics protected from antidiscrimination? What does animus have to do with the logic of that?

The answer is that while Colorado may not be obliged to protect LGBTQ citizens from discrimination, it cannot endorse or authorize discrimination against them. In Justice Scalia's jarring words in dissent, Amendment 2 was a weapon in a Kulterkampf.[165] It shimmered with hostility to the rights of the LGBTQ community and with approval of discrimination against that community. It was a powerful invitation to discriminate, a case study in what constitutes a discriminatory permission in violation of equal protection. The mystery of *Romer* is readily solved once the case is understood as an application of the discriminatory permissions doctrine.

In sum, the principle against state permissions that authorize structural injustice has a long history in constitutional law, spanning not just Reconstruction, but also Jim Crow, the New Deal heyday in the 1940s, the Second Reconstruction of the 1950s and 1960s, and the early years of the LGBTQ rights movement in the 1990s. In fact, we are unaware of any decision by the Court upholding a clear discriminatory permission.

3. Postscript: *Shelley v. Kramer* and Its Progeny

Before we leave this genealogy of the concept of discriminatory permissions in legal doctrine, we want to consider situations where police and courts have been asked to enforce the common law in ways that are explicitly discriminatory. In at least some contexts, these

163. Romer v. Evans, 517 U.S. 620, 634–35 (1996) ("A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).").

164. *Moreno*, 413 U.S. at 534.

165. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

cases can resemble state permissions to discriminate, though in other contexts they look somewhat different.

Of course, the paradigmatic judicial enforcement case is *Shelley v. Kraemer*, where the Court condemned a state court's decision to enforce a racially restrictive covenant.[166] State judges could not give effect to a discriminatory term in a property deed without offending equal protection, according to the *Shelley* Court, even though the parties to the transaction were not government actors, and even though the state had no law or policy *requiring* racial segregation in housing.[167]

But for our purposes, the more interesting decision is *Barrows v. Jackson*,[168] which is usually considered a footnote to *Shelley*. There, the question was whether a white owner selling to a Black buyer in breach of a racially restrictive covenant could be liable for money damages.[169]

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166. 334 U.S. 1, 23 (1948).

167. Many have wondered how *Shelley* could be distinguished from the run-of-the mill situation where a business excludes a customer for discriminatory reasons, in the absence of any legislation. A common intuition holds that businesses may freely exclude customers on the basis of race without interference from the Constitution. *See, e.g.*, Robinson v. Florida, 378 U.S. 153, 155 (1964) ("[W]e do not reach the broad question whether the Fourteenth Amendment of its own force forbids a State to arrest and prosecute those who, having been asked to leave a restaurant because of their color, refuse to do so."). And yet state officials, including perhaps courts, would be called in to enforce any violations of trespass or contract law by customers who resist being excluded from discriminatory businesses. So all discrimination is ultimately backed up by state authorities. And that leads some to wonder whether there is a serious tension between The Civil Rights Cases and *Shelley*.

One possible resolution is that states may enforce trespass and contract law even where they know the owner is motivated by bias, but they may not enforce discriminatory *policies*. (We thank Michael Dorf for this insight.) So in *Palmore v. Sidoti*, the Court invalidated a state court's decision to remove custody from a child's mother because the state court believed her decision to marry someone of another race would subject the child to social prejudices and stigma. 466 U.S. 429, 433 (1984). "Private biases may be outside the reach of the law," the Supreme Court reasoned, "but the law cannot, directly or indirectly, give them effect." *Id.* at 433. This theory holds that while state legislatures can decide not to prohibit certain forms of private bias, state courts cannot actually enforce or implement those prejudices without offending the Equal Protection Clause.

We believe this theory has some explanatory power, but only once it is supplemented by the values that we have been exploring, particularly federalism and separation of powers. Permitting state legislatures to refrain from passing civil rights protections is one matter, but allowing state courts to enforce discriminatory policies is another matter altogether. Thinking about the allocation of authority between courts and legislatures helps to make sense of that distinction. So does federalism, once it is realized that it is the federal Constitution that is removing this particular power from state courts.

168. 346 U.S. 249 (1953).

169. *Id.* at 251–52.

(That question was not addressed in *Shelley*, which concerned an injunction). Not surprisingly, the Court said no. But it did so in a way that drew an explicit connection between the judicial enforcement cases and discriminatory permission cases.

In an injunction case like *Shelley*, the state court was being asked to deprive a Black buyer of a right to acquire the property. In the *Barrows* suit for damages, that was not the case—a white neighbor was suing a white seller for selling to a Black buyer, thereby breaching a contract term and allegedly reducing property values.[170] So the state court was not being asked to order the parties to obey a racially restrictive covenant; it was being asked merely to impose a money judgment against a white seller who disobeyed a racially restrictive covenant by transferring the property so it could be used by the Smallys, who were "non-Caucasian."[171] Whoever prevailed, the Smallys could stay in their new home and would not be liable for damages.[172] This difference may have pushed the Court to a view of the case that put it more squarely in the tradition of the discriminatory permissions doctrine.

The *Barrows* Court held:

> To compel [the seller] to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants.[173]

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170. *Id.*

171. Barrows v. Jackson, 247 P.2d 99, 101 (Cal. Dist. Ct. App. 1952).

172. The *Barrows* Court had to confront a standing question because the Black resident was not a party. 346 U.S. at 255. Chief Justice Vinson dissented on the standing question for that reason, but he also reached the substantive question of whether the state courts were violating the constitutional rights of any identified individual:

> But even if the merits are to be reached, even if we must decide whether enforcement of this covenant in a lawsuit of this kind is state action which contravenes the Fourteenth Amendment, I think that the absence of any direct injury to any identifiable non-Caucasian is decisive. The *Shelley* case, resting on the express determination that restrictive covenants are valid between the parties, dealt only with a state court's attempt to enforce them directly against innocent third parties whose right to enjoy their property would suffer immediate harm.

Id. at 267 (Vinson, C.J., dissenting). That argument likely provoked the majority to explain that allowing a state court to award a damages remedy would "encourage" racially restrictive covenants, even if no property transaction was blocked. *Id.* at 254. Promoting the racial segregation of neighborhoods would not even present a tricky question of state action—it would constitute government implementation of structural injustice of the most damaging sort.

173. *Id.* at 254.

If the state court were to have enforced the covenant, whether by injunction or damages, that would have constituted permission to discriminate. A state cannot authorize a web of agreement that functions like a racially restrictive zoning ordinance.

Structurally, judicial enforcement of racially restrictive covenants can constitute a particular form of permission to discriminate, one that will exacerbate structural injustice. Just as permission is the antithesis of prohibition, enforcement is the antithesis of public-policy-based refusal to enforce, whether driven by judicial prudence or statutory mandate. So a court's recognition of a discriminatory covenant as legally binding can be understood to be a discriminatory permission.

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In the end, the case for the discriminatory permissions doctrine is straightforward. Laws granting individuals or groups license to discriminate are state action and are answerable to the Constitution. When states send a message of public endorsement of discrimination against a group that is subject to structural injustice, they do structural harm. Laws that induce discrimination against subordinated groups violate the Equal Protection Clause, and discriminatory permissions do just that. It is not a surprise, accordingly, that the Supreme Court for over a century has made it clear that when the state in this fashion places its warrant behind private discrimination, when it authorizes such discrimination, it violates the Constitution.

II. THE WORRY THAT OUR ARGUMENT PROVES TOO MUCH

Having set out the conceptual and doctrinal foundations of the discriminatory permissions doctrine, we now turn to two objections. We aim to meet these objections on their own terms, but we also welcome the opportunity to set the doctrine in a broader conceptual framework. The first objection is that our argument on behalf of the doctrine proves too much. With regard to any private discriminatory act, the state either prohibits that act or permits it. Therefore all—or virtually all—lawful private discriminatory behavior is conducted under the umbrella of state permission. This would seem to entail the view that any failure by the state to prohibit discrimination is a discriminatory permission and it appears to explode the idea of state action in a way that seems inconsistent with the limited understanding of the scope of the Constitution that undergirds the state action doctrine in the first place.

It is true that our analysis brings with it a realization that state action pervades a modern society. And it is true that this realization

carries with it implications for the broad responsibility of the state to ameliorate structural injustice. It does not follow, however, that this understanding undermines the traditional conception of the role of the constitutional judiciary in political life.

Two observations limit the impact of our argument. First, the ubiquity of state action is entirely consistent with the distinction between state behavior and private behavior. And second, an institutional division of labor separates the judiciary from the legislature with regard to the amelioration of structural injustice. These two understandings shape the discriminatory permissions doctrine.

We begin this Part with an acknowledgment of the conceptual breadth of state action, properly interpreted. We then turn to the surviving distinction between state and private behavior, and to the division of labor that substantially restrains the role of constitutional courts. Finally, we show how the discriminatory permissions doctrine marks a limited role for the judiciary in constitutional enforcement.

A. STATE RESPONSIBILITY FOR STRUCTURAL INJUSTICE

1. The Breadth of State Action

Private action depends on the regime of law provided by the state. Even the "private law" doctrines of contract, tort, and property are shaped and enforced by persons acting in the name of government. Officials have created and maintained the matrix of rules upon which citizens and groups routinely rely in their relations with one another, relations that are backstopped by public power.

When government regulatory power is added to the picture, as it is in administrative and criminal law, government's pervasiveness becomes even clearer. The state not only polices private conduct, backstopping its permissions and prohibitions with coercive authority, but it also sends public messages of endorsement or disapproval. Those messages can matter greatly. Think of *Obergefell*, where the Court emphasized the importance of government disapprobation. That made the exclusion of same-sex couples from civil marriage unconstitutional even in situations where same-sex relationships would have enjoyed every material benefit through comprehensive civil union laws.[174]

Once the ubiquity of state activities is recognized, the conventional distinction between action and omission loses some of its

174. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 676–81 (2013) (arguing before *Obergefell* that marriage exclusion laws cause expressive harm, using the example of jurisdictions where all the material rights and obligations of marriage are extended to same-sex couples and only the marriage label is withheld).

power to determine when a state is constitutionally accountable. A state must conform to the Constitution in its permissions as well as its prohibitions. The question then becomes whether any particular state permission offends equal protection, and further, whether it is vulnerable to judicial invalidation.

2. Ubiquity, Not Singularity

It may be tempting to conclude from the fact of the state's ubiquity that there is *no* meaningful distinction between public and private action for constitutional purposes.[175] We could call this position "singularity," echoing the use of that term by some futurists to evoke a time when there will be no discernable distinction between humans and intelligent machines.[176]

To recognize the ubiquity of state involvement in private affairs, however, is not to embrace singularity. We can recognize that constitutional liability is reserved for state action, and we can accept that the constitutional judiciary has a limited role, while recognizing that the state lawmaker is almost always present and accountable to the Constitution in its regulation of the interaction of private citizens.

While the ubiquity of the modern state in the interactions of its citizens does not unseat the distinction between public and private behavior, it does implicate the state in structural injustice. States very often are directly responsible for the existence of subordination, having once promulgated and sustained regimes of law that actively enforced central elements of that social structure. And even where—in the rare case—a state has not actively had a major role in *causing* structural injustice, its laws scaffold private injustice.[177] The state is responsible for laws that govern the interactions of its citizens and stand passive in the face of the ferocious affront to constitutional values represented by the division of citizens into castes.

Our case for the discriminatory permissions doctrine does not strictly depend on the proposition that the state has the affirmative

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175. *See, e.g.*, Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 444 (2018) ("[T]he state action doctrine should be fundamentally reformed. To ensure equal protection of law, the analysis must refocus on a more progressive conception of equal protection informed by contemporary understandings of equality and dignity foundational to a free and democratic society.").

176. *See Singularity*, OXFORD ENG. DICTIONARY, https://en.oxforddictionaries.com/definition/singularity [https://perma.cc/H8EG-JMVL] (defining singularity as "[a] hypothetical moment in time when artificial intelligence and other technologies have become so advanced that humanity undergoes a dramatic and irreversible change").

177. *See infra* Part II.A.2 (discussing the ubiquity of state action).

duty to work to ameliorate structural injustice, but we do not shrink from that implication. In our view, the state *does* have an obligation to create the background conditions for equal membership and cooperative self-governance.[178] Providing those conditions crucially includes ensuring that members of the political community are not methodically disabled or discounted. So officials have an obligation to act affirmatively to restore the free and equal status of people who have been socially stratified.[179] In our view, state and federal laws prohibiting private discrimination against disfavored classes are instantiations of legislative enforcement of the equality principles *of the Constitution.*

If that obligation were taken to mean that states were required to make all acts of private discrimination illegal, the distinction between private and public behavior would, for practical purposes, be fundamentally altered. But that would be a poor reading of the state's equality-promoting obligation, which is a good deal more nuanced and indeterminate.

A state setting out to ameliorate structural injustice must set boundaries between personal choice and public obligation. Acute concerns should restrain the state from interfering with private choices of companions, friends, mentors or mentees, and dinner guests.[180] Likewise, states should balk at controlling churches in their choice of clergy, or supervising religious groups and private clubs in their choice of members.[181] Even with regard to more familiar bearers of

178. *Cf*. Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959 (2020) (arguing that certain material conditions are necessary for citizens to be meaningfully free and equal, and that constitutional actors have a role to play in realizing those conditions).

179. *See* Sager, *supra* note 73, at 16 (arguing for an affirmative constitutional duty to combat structural injustice).

180. Charles L. Black, Jr., *The Supreme Court 1966 Term Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 102 (1967) ("If the equal protection clause were held to apply to [a lunch-counter proprietor's] dinner-list at home, it would be breaking in upon a process of discriminating selectiveness which has the flesh-tones of real life; it would be doing so in a manner quite unknown to prior law and astounding to his expectations as to the ambit of law, constitutional and otherwise, in our society."). Following Black's recommendation and protecting such private choices with other individual rights, such as freedom of intimate association, gets to the same substantive result.

181. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 854 (2005) (exploring the limits and conceptual foundations of the right of expressive association); Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 77 (Micah Schwartzman, Chad Flanders & Zöe Robinson, eds. 2016) (citing the same); TEBBE, *supra* note 42, at 80–97 (citing the same).

egalitarian responsibilities—like retailers, employers, and landlords—an indiscriminate insistence on equal treatment could in some cases trench on competing rights.[182] Accordingly, antidiscrimination laws that apply against private individuals properly accommodate rights of autonomy and association. They hesitate to reach personal choices of the sort we just mentioned. To take only the most familiar examples, employment and housing discrimination laws have size thresholds, and public accommodation statutes excuse churches and private clubs from their reach.[183]

The problem is deeper and wider—and more demanding of governmental effort and judgment—than these issues of balance and limitation suggest. Fulfilling the obligation to combat structural injustice requires making decisions about the particular means and institutional designs that would best ensure meaningful membership. Lawmakers must decide how to define a protected group, how to craft rules to protect that group, and which part and level of government will most effectively administer the resulting legal rule. They must choose among options that include not merely coercive antidiscrimination regulations, but research and publicity, the education of officials and citizens, and the fair distribution of diverse economic opportunities.

We have at hand as we write an unhappily apt example. We all have witnessed a wave deadly police force directed at Black women and men that has drawn a cry, a protest, and an insistence that Black Lives Matter. This is structural injustice with a vengeance, and we have no difficulty in insisting that the Constitution obliges governments to address the situation. Remedies might demand the alteration

182. *Cf*. Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring in the result and dissenting in part) ("This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction.").

183. One of us has suggested that the way courts have defined the limit on public accommodations laws for "bona fide private clubs" can serve as a model for defining the reach of constitutional protection for associations. TEBBE, *supra* note 42, at 84. And the other has argued that the impulse to provide a special dispensation for churches, like the impulse to provide such a dispensation for clubs, is appropriately grounded in a common source, namely, the right to close association. Sager, *supra* note 181, at 77–79.

of profound currents of trust and respect, the rethinking of philosophies of maintaining order, and the strategic reordering of budgetary allocations, though even these fundamental reconceptualizations seem insufficient and blinkered.

3. The Institutional Division of Labor

Courts are poor custodians of the calibrated and open-ended responsibility of government to end structural injustice. Courts work best on questions of principle and they are obliged to follow those commitments where they lead. They are not well equipped to be as nimble and nuanced as legislators in this respect.[184] It would be far harder for judges to draw lines that cabined the robust antidiscrimination principle at the heart of equal protection without compromising autonomy and associational rights. And harder still for courts to take on the deep, wide, and sometimes deadly dimensions of structural injustice.

A government's obligation to work at the amelioration of structural injustice could helpfully be said to fall into the class of *imperfect constitutional duties*.[185] These are insistent and demanding duties, but they are duties with diffuse and complex—and with regard to specifics, discretionary and alternative—entailments. Imperfect duties are "driven by a value, not a rule" and they stipulate "a required end and not a requirement on action."[186] For our project, the constitutional value is equal membership and the required end is the extirpation of extreme injustice. An imperfect duty to pursue these values and ends is best discharged in the first instance by lawmakers that are democratically accountable, in part because satisfying them requires judgments of strategy and commitment, and, in related part, because courts lack the capacity to judge state compliance with the duty at a given time and with regard to any given feature of state law.[187]

There are strong reasons of individual autonomy and separation of powers for substantial restraint on the part of courts with regard to the federal constitutional obligation of states to ameliorate structural injustice. They are joined by concerns of federalism. If federal judges

184. *See* Sager, *supra* note 73, at 5–6 ("This suggests a deep division of constitutional labor between Congress and the Court with regard to fundamental questions of social justice . . . . ").

185. Sager, *supra* note 73, at 11.

186. Barbara Herman, *Thinking About Imperfect Duties* 1 (2014) (unpublished draft), http://www.law.nyu.edu/sites/default/files/upload_documents/ImperfectDutiesNYU.pdf [https://perma.cc/5WTJ-BB2V].

187. Sager, *supra* note 73, at 11–12.

were to supervise state and local legislatures and state judges with regard to the legal status of private discriminatory behavior, the intrusion on state judgment would be serious. Our own sympathies lie with federalism theories that emphasize the ways in which devolving power to the states works to serve national commitments.[188] After all, federalism bolsters constitutional rights for individuals, among other interests.[189] But however the balance between national and state power is understood, its objectives would be undermined by the broad, spontaneous intervention of the federal judiciary to force states to affirmatively combat structural subordination.

On first blush, it might seem that the same federalism concerns are raised by federal legislation. But there are prominent federalism-based reasons to disfavor freestanding federal judicial applications of the Constitution while welcoming federal legislation. Courts follow constitutional principle where it leads. Congress, in contrast, can and does leave large areas of concern to the states. Federal civil rights legislation can draw lines that are somewhat arbitrary in necessary ways. Congress is structured so as to favor local interests and restrain federal overreach. For all these reasons, Congress enjoys considerable deference in setting its own federalism boundaries in light of national values and concerns.

This last proposition was most clearly signaled in *Jones v. Alfred H. Mayer Co*.[190] There, the Court held that Congress had the authority to enact legislation protecting Black people from discrimination in private property transactions, pursuant to its authority to enforce the Thirteenth Amendment's abolition of slavery and its entailments.[191] The Court's rationale was that Congress had discretion to identify and

188. *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890 (2014) ("[A] committed nationalist ought to believe in federalism, just as a committed proponent of federalism ought to care about the states' evolving role in our national system."); Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1388–89 (2005) (envisioning a process in which national norms are formed and propagated in state and local contexts before becoming consolidated and enforced at the federal level).

189. This is true of federalism in the specific domain of the state action doctrine, as elsewhere. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. . . . [This principle] require[s] the courts to respect the limits of their own power as directed against state governments and private interests.").

190. 392 U.S. 409 (1968).

191. *Id.* at 440 ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.").

condemn the "badges and incidents of slavery."[192] That view of Congress's enforcement authority, coupled with its broad authority to regulate interstate commerce, permits it to reach a swath of private discriminatory behavior in an effort to ameliorate structural injustice. But the Court has never ceded itself that authority. When Moose Lodge Number 107 refused to serve food or drink to K. Leroy Irvis because of his race, the Court was not at all inclined to spontaneously characterize the Lodge's behavior as a violation of the Thirteenth Amendment.[193]

There are thus powerful concerns sounding in rights of autonomy and association on the one hand, and federalism on the other, that combine to significantly limit the role of the judiciary with regard to state permissions. In response to these concerns, a sharp division of constitutional labor has emerged, pursuant to which the constitutional obligation to ameliorate structural injustice falls on legislatures, not courts. The ubiquity of state action may well obligate a state to work affirmatively to undo structural injustice. But it does not follow that a state must or should outlaw all private discrimination. Still less does it follow that the judiciary acting in the name of the Constitution should intervene broadly in state laws governing private discrimination. Hence, it is the general view that a state cannot be sued for failing to protect a particular class in its civil rights laws, even if that class is in fact subject to structural injustice.[194] Courts acting in the name of the Constitution will not disallow states from simply declining to protect employees, customers, and tenants from the vagaries of commercial judgment.[195] So separation of powers plays a role in the state action doctrine, alongside and largely in the service of federalism and concern for individual rights.[196]

But this division of constitutional labor ought not and does not immunize a state from judicial scrutiny when it not only permits but encourages discrimination. When a state both facilitates and endorses

192. *Id.* at 439.

193. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972) (finding no state action under the Fourteenth Amendment without mentioning the Thirteenth Amendment).

194. *See* Sager, *supra* note 73, at 10–11.

195. Some other countries have adopted a different rule, implementing "horizontal" application of constitutional rights to nongovernmental actors, but that approach has not been adopted in the United States because of its trifold commitment to countervailing individual rights, separation of powers, and federalism. *See, e.g.*, Gardbaum, *supra* note 59, at 394–98 (describing a spectrum of possible approaches with examples from various countries including the United States).

196. Gardbaum, *supra* note 59, at 420.

discrimination against the victims of structural injustice—when it *authorizes* such discrimination—the federal judiciary will step in. It has consistently done so because the discriminatory permissions doctrine is compatible with the well-settled role of the federal judiciary.[197]

B. TEXT AND HISTORY

This picture of the institutional division of labor should satisfy the worry that our analysis leads to a far broader view of state constitutional obligation than is reflected in our experience. But it does not address the more formal worry that the broad view of state constitutional obligation to which our analysis leads is at odds with the text and history of the Reconstruction Amendments.

Many of us carry around in our head a shorthand understanding of the Equal Protection Clause as barring state discrimination along the historical fault lines of unequal citizenship—most notably race, ethnicity, religion, gender, sexual orientation, and gender identity. But the Fourteenth Amendment does not say "no state shall discriminate," it says "[n]o State shall . . . deny . . . the equal protection of the laws."[198] That language is consistent with the possibility that state permissions to discriminate can sometimes be unconstitutional. Where citizens in a particular class live lives dominated by enduring, pervasive and tentacular patterns of disrespect by government officials and their fellow citizens, a state that permits—and worse, promotes—that situation certainly seems to have failed in its duty to provide that class with the equal protection of the laws. That wording is entirely open to the reading that states can neither encourage nor tolerate structural injustice.

Neither does the history of the Reconstruction Amendments present any decisive barrier to the conclusion that courts may sometimes apply the Fourteenth Amendment in situations where nongovernmental actors discriminate. This is true despite *The Civil Rights Cases*,[199] which established the state action doctrine. According to the conventional account, that decision provided not only that Congress could not enforce the Equal Protection Clause against private actors, but also that courts could not apply it against them.

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197. Importantly, we do not mean to argue that discriminatory permissions mark the only circumstance in which federal courts can appropriately enforce the Equal Protection Clause in response to private discrimination. Cases where state action is so entwined with private enterprise as to render the latter liable to the Constitution are another such case. And there may be others as well.

198. U.S. CONST. amend. XIV, § 1.

199. 109 U.S. 3 (1883).

In fact, neither proposition is as obvious as it seems. There is *some* evidence suggesting that the Fourteenth Amendment was originally understood to be enforceable in court against private parties, at least in certain situations where neither the states nor Congress was adequately protecting the economic freedoms and social standing of minorities.[200] And there is no evidence conclusively establishing the opposite, and little material suggesting it. That is true even though, admittedly, the framers of the Fourteenth Amendment did not explicitly say that the equal protection provision could be enforced in court in situations where the proximate discrimination was committed by private actors.

Start with the Civil Rights Act of 1866, which provides context that is helpful for understanding the meaning of the Fourteenth Amendment.[201] Authors of the Civil Rights Act of 1866 worried that the Thirteenth Amendment perhaps did not give Congress power to enact it, and they passed the Fourteenth Amendment (at least in part) to rectify that deficiency.[202] And it turns out that members of Congress understood, and largely assumed, that the Act's provisions would be enforceable against private discriminators because they would often be acting "under color of law and customs."[203]

For example, Senator Trumbull, the main author of the Civil Rights Act of 1866, explained that it targeted "[n]ot State officers especially, but everybody who violates the law. It is the intention to punish everybody who violates the law."[204] In fact, public and private action was distinguished during debates over the Act *only* to specify that nongovernmental bias could occur under color of state law.[205]

The close relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment of 1868 suggests that the former's assumption of relevance for disputes between citizens carried over to the latter. That suggestion holds even though, again, the matter of private application remained unarticulated during debates over the

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200. *See, e.g.*, Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1393 (2017).

201. *See, e.g.*, *id.* at 1391 ("Scholars have long looked to the 1866 Civil Rights Act for clues to the original meaning of the Fourteenth Amendment.").

202. Just to be sure, Congress reenacted the Act after the Fourteenth Amendment was ratified. *Id*. at 1454.

203. Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 585 (1989).

204. George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 310 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 500 (1866)).

205. *Id.* at 312.

framing and ratification of the Amendment.[206] That the equal protection provision applied to private discrimination, because it necessarily occurred under color of state law, appeared to be an unstated assumption of the framers and ratifiers.

Actually, that reading is perfectly compatible with a reading of *The Civil Rights Cases* according to which the Court was saying simply that the Equal Protection Clause prohibits states from abrogating their duty to protect citizens' civil rights.[207] Congress erred only by interfering with states that *were* sufficiently protecting Black customers from discrimination, including by private parties. As the Court itself put the essential point, the Civil Rights Act of 1875 was unconstitutional because it wrongfully applied to "[s]tates which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws."[208]

That the Fourteenth Amendment may have been understood to apply even in some disputes between citizens, at least where states were failing to protect civil rights, is supported by debates over the Enforcement Act of 1870,[209] the Enforcement Act of 1871,[210] and the Civil Rights Act of 1875.[211] All three laws were passed by a Congress whose members largely overlapped with the body that framed the Fourteenth Amendment.[212] For example, John Bingham, the primary author of the Equal Protection Clause, defended the Enforcement Act of 1871 this way:

> [T]he States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution . . . . They denied trial by jury and he [the wronged citizen] had no remedy. They took property without compensation and he had no remedy. They restricted the freedom of the press and he had no remedy . . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, *or combinations of persons*?[213]

To be sure, some argued that the Fourteenth Amendment only worked to "forbid discriminatory action by the state governments acting offi-

206. *See id.*

207. *See* 109 U.S. 3, 55 (1883).

208. Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 13 (2018) (quoting *The Civil Rights Cases*, 109 U.S. at 14).

209. 16 Stat. 140 (1870).

210. 17 Stat. 13 (1871).

211. 18 Stat. 335 (1875).

212. Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1357 (1964).

213. HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE 66 (2000); CONG. GLOBE, 42d Cong., 1st Sess. 85 (1871) (emphasis added).

cially," and they used that argument to urge against passage of the Enforcement Act of 1871.[214] But, importantly, they did not prevail—the Enforcement Act became law.

These debates, our reading of the *The Civil Rights Cases,* and debates over the Fourteenth Amendment itself, are all directed primarily at the question of congressional authority to protect Black people from discrimination. Latent in the historical material is exactly the point we have explored at some length: Where the state has failed in the project of protecting individuals against deep structures of injustice—including those constructed by private behavior—there is a failure of equal protection *by the state*. The most immediate consequence of this observation is that Congress has the authority under Section 5 of the Fourteenth Amendment to police the defaulting state and protect citizens against structural injustice, including injustice perpetrated or perpetuated by private conduct.

But the implications do not stop at federal legislative authority. They also suggest that states cannot permit or promote private action that subordinates groups without violating equal protection. Our overlay is that when that permission is patent, it may be policed by federal courts, insofar as court enforcement is consistent with federalism, separation of powers, and regard for essential individual rights.

Whether or not this history *requires* a reading of the Fourteenth Amendment consistent with the understanding we advance here, at the very least it *permits* that reading. And our understanding can be defended not only despite *The Civil Rights Cases*, but consistent with them. While it is unlikely that any of the contested meanings of the Reconstruction Amendments can claim dominance on the basis of text or history alone, our view is entirely consistent with both.

III. THE WORRY THAT OUR ARGUMENT PROVES TOO LITTLE

Fair enough, a skeptic might respond, but then your argument falls short of addressing the cases that worry you most, such as the challenge to H.B. 1523.[215] Mississippi is neither approving nor encouraging discrimination in that law; it is merely seeking to accommodate the conscientious objections of those who are opposed to marriage between persons of the same-sex by dint of religious or moral conviction. This objection is useful, because answering it takes us further into the conceptual infrastructure of the discriminatory permissions doctrine.

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214. MEYER, *supra* note 213.

215. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. §§ 11-62-3 to -19 (2020)).

A. SOCIAL MEANING AND DISCRIMINATORY PERMISSIONS

We can begin by referring once again to Justice Harlan, dissenting in *Plessy v. Ferguson.*[216] The majority leaned heavily on a factual proposition that seems from our vantage implausible and offensive, namely that any perception by the plaintiffs that segregation "stamps the colored race with a badge of inferiority" is not because of anything inherent in the state law mandating segregation, but only because "the colored race chooses to put that construction upon it."[217]

In response, Justice Harlan famously insisted that "[t]here is no caste here," and he disputed the majority's argument that the meaning of the law was subjective or indeterminate:

> What can more certainly arouse race hate, what [can] more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[218]

Harlan's conviction was that the state was sending an unmistakable message to its citizens. By authorizing private discrimination, the state was not only making the lives of Black people worse as a practical matter, it was also demoting their status as a legal matter.

State denigration is the heart of what made the state separation in railroad cars unconstitutional for Justice Harlan and, in turn, it is what best justified the outcome in *Brown v. Board of Education* in the view of many commentators, ourselves included.[219] Any doubt about the centrality of state expression to the outcome of *Brown* should have been dispelled by the Court's finding that equal protection was also denied by separate drinking fountains and a host of other Jim Crow policies outside the field of education, sometimes involving consequences of symbolic rather than material importance.[220] To separate

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216. 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

217. *Id.* at 551.

218. *Id.* at 560 (Harlan, J., dissenting).

219. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426–27 (1960); *see also* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1273 ("Charles Black's response to Herbert Wechsler's fretting over *Brown*'s rationale remains the most persuasive and obvious account of *Brown*'s correctness." (footnote omitted)); Tebbe, *supra* note 174, at 659 ("As Charles Black put the point . . . , *Brown* was correct because 'the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority.'" (quoting Black, *supra* at 427)).

220. Seemingly to the contrary is *Palmer v. Thompson*, which upheld the city of Jackson's decision to privatize its swimming pools rather than integrate them. 403 U.S.

drinking fountains was to legalize the entrenched patterns of attitudes and behavior that composed the system of racial caste.

So when the state places its approval on private discrimination, it is constitutionally liable for the natural consequences of its actions. When officials endorse differential membership in society, the economy, and the political community, the Court honors the core of our constitutional commitments by invalidating their actions, even when the most proximate manifestations of that subordination come at the hands of nongovernmental actors.

The discriminatory permissions doctrine rests squarely on the ground staked out by Justice Harlan in *Plessy* and accepted by the Court in *Brown.* It is useful to take a moment to understand a bit more precisely what Harlan meant when he insisted that disparagement of Black citizens was the "real meaning" of Louisiana's segregation law.[221]

Harlan had in mind what we would call *social meaning.*[222] Among members of a community, there will sometimes be a widespread understanding that the enactment or maintenance of an act or practice reflects a connected set of values, judgments and purposes. The broad public understanding of those values, judgments and purposes is the social meaning of such an act or practice.

Governmental behavior need not be as blunt and grotesque as it was during Jim Crow in order to carry a shared meaning that deeply affronts the core constitutional value of equal membership. Colorado's Amendment 2 sent a clear and denigrative message about LGBTQ citizens, a message to the effect that they were so degraded as to be beneath concerns of equal treatment.[223] That Amendment 2 was enacted by ballot initiative made it if anything worse; social meaning is not a question of purpose in the narrow sense of a legislative history, it is about how a community understands the values, judgments and purposes underlying its own official act.

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217 (1971). Because the purpose and social meaning of that decision was almost certainly discriminatory, *Palmer* has dubious validity today. *See* Randall Kennedy, *Reconsidering* Palmer v Thompson, 2018 SUP. CT. REV. 179, 180 ("[t]he *Palmer* rulings were not only erroneous but profoundly misguided"); *id*. at 212 ("The ruling's breezy repudiation of judicial focus on discriminatory purpose was itself repudiated five years later in *Washington v Davis*.").

221. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

222. Charles Black used the term as well. *See* Black, *supra* note 219, at 427 ("[T]he social meaning of segregation is the putting of the Negro in a position of walled-off inferiority . . . .").

223. Romer v. Evans, 517 U.S. 620, 644 (1996).

The social meaning of an enactment or official practice is founded on intersubjective experience and understanding rather than on ontology. It is like language in this way. But although it is grounded only in convention, social meaning can be determinate. In a given time and place, the meaning of an enactment or official practice is not subjective but instead it is based on understandings widely shared by members of the relevant community. In other words, social meaning is not constituted by the perspective of any one individual but by collective perceptions and practices. Social meanings can be ambiguous or mixed, as we acknowledge below, but they are not idiosyncratic.

When official acts or enactments have social meaning, they carry the authority of the polity. They bear *official* meaning. So, while we describe laws like Louisiana's racial ballot requirement or California's Proposition 14 as "encouraging" racial discrimination, that understates the magnitude of the constitutional delict. Laws like these give official warrant to the structural injustice that already permeates social and economic relations. Targets then stand in an altered relationship to their government—in the official eye, they are not simply perceived as members of the political community, but they are differentiated as Black Americans, Jewish Americans, or female Americans.[224] Laws that carry a social meaning approving stratification are perhaps best described as "authorizing" that discrimination, to use the Court's own term.

Social meaning has played an important role in the endorsement thread of Establishment Clause jurisprudence, where the question has been, in effect, whether a particular public display or religious exercise carries with it a message valorizing some beliefs and believers while disparaging others.[225] Social circumstances have made minority religious believers vulnerable to disparaging social meaning, and the religious stratification of society has been an important concern in the Court's Establishment Clause rulings. Its methodology has been to ask

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224. *See* Town of Greece v. Galloway, 572 U.S. 565, 621 (2014) (Kagan, J., dissenting).

225. Justice Souter, writing for the Court in a Ten Commandments case, used the idea of governmental *purpose* in a way that usefully elided perceived and actual purpose. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 854 (2005). He stipulated that purpose was to be evaluated through the eyes of an "objective" observer. *Id.* at 862 ("The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." (internal quotation marks omitted)). And he noted that a secret motive was not a worry, since it would do no Establishment Clause harm. *Id.* at 863 ("A secret motive stirs up no strife and does nothing to make outsiders of nonadherents . . . ."). So understood, "purpose" is one form of social meaning, and it is the endorsement that comes with the perception of purpose that is constitutionally salient.

whether an objective observer, fully informed about the relevant factual context and legal framework, would conclude that the challenged governmental action will be widely read by members of the community to signal the embrace of some believers as privileged insiders in the political community, and the branding of others as disadvantaged outsiders.[226]

Admittedly, the endorsement test has been criticized as unworkable or as incompatible with traditional government use of religious words and symbols.[227] Yet it has not been explicitly abandoned by the Court, and for good reason. If it is unconstitutional for a government to erect a sign that reads "This is a Christian Town," even if it takes no other action against members of minority religions, then official expression alone can violate the Constitution. And if that is right, as a

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226. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) ("[A]ny endorsement of religion [is] 'invalid' because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'" (citations omitted)); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'" (citations omitted)).

227. *See Galloway*, 572 U.S. at 579–80 ("Four dissenting Justices [in *County of Allegheny*] disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the 'forthrightly religious' Thanksgiving proclamations issued by nearly every President since Washington." (quoting *Cnty. of Allegheny*, 492 U.S. at 671 (Kennedy, J., concurring in the judgment in part and dissenting in part))); *see also Cnty. of Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in the judgment in part and dissenting in part) (citations omitted) ("The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a 'reasonable observer' may 'fairly understand' government action to 'sen[d] a message to nonadherents that they are outsiders, not full members of the political community,' is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence."); *id.* at 674 (calling the endorsement approach "a jurisprudence of minutiae" because of its attention to factual detail to determine the meaning of a government display); *id.* at 675–76 ("My description of the majority's test, though perhaps uncharitable, is intended to illustrate the inevitable difficulties with its application. This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication." (footnotes omitted)); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring in the judgment) ("[H]ow 'reasonable' must our 'reasonable observer' be, and what exactly qualifies as impermissible 'endorsement' of religion in a country where 'In God We Trust' appears on the coinage, the eye of God appears in its Great Seal, and we celebrate Thanksgiving as a national holiday ('to Whom are thanks being given')?").

longstanding and widespread conviction holds that it is, then a methodology is needed for determining which expressions go too far. The endorsement test is the only defensible approach for drawing that line that has repeatedly been applied by the Court. As a matter of substance, moreover, the endorsement test acceptably reflects the constitutional concern with government messages that enact structural injustice, even if it does so with some imprecision.

Regardless of whether the endorsement test is good law in nonestablishment doctrine, the parallel question in discriminatory permissions cases is properly whether an objective and informed observer would conclude that the challenged permission will be widely read as signaling the state's approval of discrimination against the victims of structural injustice. An affirmative answer to that question of social meaning is what the Court points to in cases like *Reitman v. Mulkey* and *Anderson v. Martin* when it concludes that the challenged enactment "encourages" discrimination. And it is what the Court or individual Justices mean when they conclude that the state has "authorized" or placed its "authority" behind prohibited discrimination. Pernicious social meaning is what makes some state permissions subject to judicial invalidation; it is the pivot on which the discriminatory permissions doctrine turns.

B. THE SOCIAL MEANING OF RELIGIOUS ACCOMMODATION

This brings us to the objection that the discriminatory permissions doctrine, as we have drawn it, may describe a viable strand of constitutional law, but one that is inapt to laws like Mississippi's H.B. 1523.[228] The argument runs something like this: H.B. 1523 and other laws exempting religious-motivated persons from antidiscrimination laws are aimed at preventing persons from having to make a choice between honoring their deeply held beliefs and legal liability. They do not carry a social meaning of hostility to members of the LGBTQ community or to same-sex marital partners. They signal respect for religious conscience rather than approval of discrimination.

There are some religious accommodations of which this benign interpretation is true. But not all, and certainly not H.B. 1523. Begin by recognizing that the social meaning of a permission to discriminate cannot be read off the face of a challenged enactment. In *Reitman v. Mulkey,* for example, California's Proposition 14 was cast in the language of the rights of property owners to dispose of property as they

228. *See* H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. §§ 11-62-3–19 (2020)).

wished.[229] Racial discrimination went unmentioned in the language of the amendment to the California constitution, but the circumstances surrounding its enactment made clear that it was a direct response to California's antidiscrimination law.[230] California's attempt to shroud Proposition 14 in the language of property rights, along with its entrenchment of the discriminatory provision in state constitutional law, may even have amplified its message of approval.

H.B. 1523 itself exudes malign social meaning. Mississippi enacted its "Protecting Freedom of Conscience from Government Discrimination Act"[231] in the historical context of the movement for marriage equality that culminated in *Obergefell*.[232] It is hard in context not to see the law as a manifestation of resistance to the Supreme Court's decision to make marriage equality the law of the land. Mississippi enacted H.B.1523 in the absence of any state antidiscrimination law that would have required the provision of goods or services to same sex wedding celebrants. Indeed, Mississippi is one of only five states that has no state public accommodation law at all.[233] This background inflects the social meaning of the enactment.

Think back for a moment to our discussion of state legislative efforts to ameliorate structural injustice.[234] When a state carves out narrow exceptions from its public accommodation law for a landlord renting out two rooms in her own house, or for churches and private clubs, it can hardly be said to be signaling approval of discrimination. The situation is analogous to Congress creating a conscientious objector exemption from the military draft: The government that imposed a mandatory draft and went to war could hardly be read as morally opposed to that war simply because it allowed some room for conscientious objection. So too, a state working to bar discrimination cannot be read to encourage that discrimination simply because it allows narrow exemptions that connect to sites of heightened autonomy like churches, and more generally, the close private associations that are routinely exempted from such laws. Mississippi, in contrast, has distinguished itself by disregarding private discrimination and structural

229. 387 U.S. 369, 369 (1967).

230. *See id.*

231. *See* H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. §§ 11-62-3–19 (2020)).

232. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

233. *See State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/3WPZ-HZH9] ("Five states—Alabama, Georgia, Mississippi, North Carolina and Texas—do not have a public accommodation law for nondisabled individuals.").

234. *See supra* Part II.A.

injustice. Its special permission to those who oppose same-sex marriage as a matter of conscience was not only gratuitous (except for local civil rights laws). It also constituted an especially clear invitation for Mississippians to act out hostility to same-sex marriage.[235]

Another indication of H.B. 1523's social meaning is the "unusual"[236] nature of the law. It isolates for special treatment a few specific religious beliefs rather than protecting religious commitments in general. And the beliefs it singles out—marriage is reserved for a man and woman; sex should not occur outside of marriage; and biologically-assigned sex is objective and immutably linked to gender—are of a substantive piece. That makes perfectly good sense if the law is read as endorsing religious beliefs that share a deep aversion to nontraditional sexuality, rather than as solely protecting those who hold those beliefs from municipal threats.[237]

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235. The Act in the end may not be only symbolic in effect, as indicated by the One Night in Jackson story with which we began this Article. While H.B. 1523 was pending in the Mississippi legislature, the City of Jacksonville moved to protect LGBT citizens in its antidiscrimination law. Anna Wolfe & Sarah Fowler, *Jackson Council Adds LGBT Protections to Law*, CLARION-LEDGER (June 14, 2016), https://www.clarion-ledger.com/story/news/local/2016/06/14/jackson-council-passes-anti-discrimination-provision/85903510 [https://perma.cc/45LK-SWQM]. H.B. 1523 overrides those protections against discrimination. *See* H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. §§ 11-62-3–19 (2020)). And, of course, general common law may help a couple in circumstances like the ones we have imagined. Still, much of the harm done by H.B. 1523 remains symbolic. For just that reason, the first attempt to challenge H.B. 1523 floundered on standing grounds. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017).

236. United States v. Windsor, 570 U.S. 744, 768 (2013) ("'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" (quoting Romer v. Evans, 517 U.S. 620, 633 (1996))); *id*. at 770 ("In determining whether a law is motived by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration. DOMA cannot survive under these principles . . . . DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.") (quoting Romer v. Evans, 517 U.S. 620, 633 (1996))).

237. *See* Samantha Allen, *The Muted Fight Against HB 1523, the Most Anti-LGBT Law in America*, DAILY BEAST (Nov. 1, 2017), https://www.thedailybeast.com/the-muted-fight-against-hb-1523-the-most-anti-lgbt-law-in-america [https://perma.cc/3EXE-YMBC] ("[H.B. 1523] specifically protects three religious beliefs—that marriage can only be heterosexual, that gender cannot be changed, and that premarital sex is immoral—and allows business owners to deny service to LGBT people based on those beliefs. It is more than just a license to discriminate; it is almost a specific invitation to do so.").

And while the religious beliefs that H.B. 1523 endorses are undoubtedly sincerely held by some people who only seek to live their lives virtuously and harbor no personal animus to members of the LGBTQ community, it is an unfortunate aspect of the situation that the beliefs in question generally have their roots in religious texts and theological propositions that regard same-sex sexual intimacy as sinful. Singling these beliefs out for official valorization is all but inseparable from an endorsement of discrimination. When a state undertakes to accommodate specific religious views, the content of which casts deep aspersions on members of a vulnerable group in a particular context, the state signals its sympathy with those views. Imagine, for example, that in the wake of *Loving v. Virginia*,[238] a state had enacted a law that read just like Mississippi's H.B. 1523, but it immunized behavior stemming from a conscientious belief that marriage should not extend to partners of different races. Could that state do much more by way of signaling its denigrative view of Black citizens, its opposition to interracial marriage, and its sympathy with efforts to undermine any couple which chose to love and wed across race lines? So too with regard to the actual Mississippi law and its support for opposition to same-sex marriage. This is not to say that discrimination on the basis of LGBTQ status is equivalent to racial discrimination in every respect, but only that unusually specific state accommodations from antidiscrimination laws have similar expressive valences in the two contexts.

There is one final respect in which H.B. 1523 relates to structural injustice and carries indelible social significance. The high-water mark of concern for religious commitment has been the federal Religious Freedom Restoration Act (RFRA),[239] and state laws that emulate it.[240] Common to these is the provision that a private request for a religious accommodation will be denied if the state's regulation is narrowly tailored to a compelling interest. But Mississippi's law, on its face, insists that the protected religious beliefs are to prevail as against all other concerns in the contexts where the law applies. Not even the government's interest in, say, protecting those subject to structural injustice, securing the rights of contract, or shielding persons from the infliction of intentional emotional harm can overbalance a private interest in exercising these specific religious beliefs. There is no balancing, no attempt to find reasonable limits. In this respect, the law has a decisive power that is reminiscent of the Colorado law struck down in *Romer v. Evans.* Like that law, H.B. 1523 is absolute.

238. 388 U.S. 1 (1967).

239. 42 U.S.C. § 2000bb.

240. *See* Allen, *supra* note 237.

This is not to say that all specific accommodations of religion that may permit discrimination against the victims of structural injustice will constitute discriminatory permissions. We have already observed that carve outs from antidiscrimination laws on behalf of churches, other close associations like clubs, and persons renting rooms in their otherwise private premises are not at all likely to signal approval of discrimination. And we can imagine more general efforts by states to accommodate religion that would not necessarily be fairly regarded as a discriminatory permission.

Suppose that today a state enacts legislation whose text exactly matches that of the federal RFRA. There is no legislative history or background circumstance that suggests any particular motive, other than general concern for religious freedom. Imagine too that the state otherwise protects LGBTQ people through comprehensive civil rights statutes. Would that state RFRA constitute a discriminatory permission? When Indiana enacted a state RFRA during the runup to *Obergefell,* its effort was met with considerable opposition from supporters of LGBTQ rights.[241] The Indiana RFRA's proposed text was *not* identical to the federal version but instead seemed tailored to protect religious objectors from the reach of civil rights laws.[242] In response to the outcry against the proposal, the state legislature reshaped the law to exclude civil rights protections from its reach.[243] We assume, however, that our imagined RFRA does not carry the cultural freight of being timed and tailored in a way that telegraphs opposition to marriage equality. Would an objective observer deem it to carry a social meaning endorsing discrimination? The answer is unclear, and might well depend on a close reading of other facts surrounding the enactment of the state RFRA.

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241. Michael Barbaro & Erik Eckholm, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), https://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html [https://perma.cc/3DQ4-D4XZ].

242. Micah Schwartzman, Nelson Tebbe & Robert Tuttle, *Indiana's New Law Allows Discrimination. That Was the Point.*, SLATE (Mar. 30, 2015), https://slate.com/human-interest/2015/03/gov-mike-pences-characterization-of-indianas-new-religion-law-is-wrong.html [https://perma.cc/28AJ-QSGZ] (reporting that Indiana's new law departs from the federal RFRA and that Governor Mike Pence declared "that the purpose of the law was to bolster First Amendment rights").

243. Wesley Lowery, *Gov. Pence Signs Revised Indiana Religious Freedom Bill into Law*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/04/02/gov-pence-signs-revised-indiana-religious-freedom-bill-into-law [https://perma.cc/68YL-JWXS] ("[L]awmakers unveiled new language . . . that explicitly stated that no 'provider . . . may deny service to anyone on basis of sexual orientation, race, religion or disability.'"). This is important to municipal ordinances in Indiana and the recent lawsuit challenging the exclusion as denying religious freedom.

At the end of the day, it is possible that the social meaning of our hypothesized state RFRA with regard to discrimination against members of the LGBTQ community would not be determinate. There might be signs pointing towards the likelihood of a malign understanding, but only weakly; and there might be signs favoring a social understanding that centered on the protection of religious choice. Possibly, members of the community would honestly divide in their understanding of the social meaning of our imagined state RFRA. The discriminatory permissions doctrine does not depend on the highly improbable circumstance that virtually all members of the community will read a given state permission as approving discrimination; neither can it be triggered by an understandable but narrowly limited set of exceptionally vigilant responses on behalf of social justice. The test is whether an objective and informed observer would see a state permission to discriminate as carrying with it a social meaning that the state approves of discrimination against victims of structural injustice. Failing an affirmative answer to that question, a judge should leave the RFRA intact.[244]

There are however, three important caveats. First, we have been considering an imagined situation in which a state has comprehensive civil rights laws that protect members of the LGBTQ community. In the case of a state that does not provide such protection, the social meaning of a new RFRA may tilt toward a view of that permission as discriminatory. Second, the mere fact that a RFRA is contentious does not mean that its social meaning is necessarily obscure or multivalent. Mississippi's H.B. 1523 was controversial.[245] But, for reasons that we have canvassed, its social meaning is unmistakable to persons on both sides of the debate. Third, remember that the discriminatory permissions doctrine marks out a special circumstance in which state permissions are not only unconstitutional, but subject to judicial invalidation. State law is everywhere, and states are widely responsible for the worlds that their laws support. While the discriminatory permissions doctrine leaves off where the state has not actively supported—

244. In the view of one of us, *all* RFRAs are unconstitutional when they single religion out for preferential treatment. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448–49 (1994) ("As we have argued elsewhere, there is no constitutional justification for the privileging of religion . . . ."). But we neither advance nor rely on that view in this Article; the discriminatory permissions doctrine only takes issue with a RFRA when and to the extent it both gives permission to, and signals the state approval of, discrimination against victims of structural injustice.

245. Though this was perhaps not as controversial as was warranted. *See* Allen, *supra* note 237 ("Mississippi's HB 1523, despite being covered by most major media outlets, hasn't broken through the national conversation . . . .").

or in the language of the Court, authorized—discrimination, state legislatures and Congress itself should see themselves as constitutionally obliged to remedy structural injustice. So understood, Indiana's decision to reshape its new RFRA to insulate civil rights laws was not only politically expedient, but an instance of the state living up to its constitutional responsibility.[246]

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When governmental behavior renders citizens unequal or reinforces their inequality, the judiciary may and must intervene, even when the proximate agents of exclusion are private actors. Visible state permissions to discriminate against protected classes sometimes endorse the discrimination that they permit; and when they do, they are unequivocally unconstitutional. When set against a backdrop of structural injustice, a backdrop to which the government at one unhappy time was an active contributor, the signals sent by the state in its lawmaking are capable of doing great harm.

It remains to be seen how our proposal would operate in practice. How would it handle actual disputes—including not only the hypotheticals we offered at the outset, but a variety of real cases now facing the nation? Suggesting some answers is the task of Part IV.

IV. RELIGIOUS ACCOMMODATIONS AND LGBTQ RIGHTS

We have come to the point where we can step back and ask what our analysis means for the clash between religious traditionalism and LGBTQ equality, and in particular for the scenarios we presented at the outset as instantiations of that clash.

We can begin by noting the legal setting in which these conflicts between equal membership and religious beliefs play out is largely lacking a federal constitutional voice on behalf of equality. The presumptive state of American public law is that while governments are constitutionally bound by antidiscrimination norms, they are not obliged to protect against discrimination by businesses or other nongovernmental actors. This presumption is reflected in the permissibility of the "right to exclude" in property law, it informs the at-will employment rule, and it reinforces the widespread intuition that retail businesses normally can refuse service for any reason or no reason, so long as they obey civil rights statutes. While we are in the habit of looking to federal courts as the primary source of constitutional value

246. *See* Lowery *supra* note 243 (explaining how Indiana lawmakers revised the controversial bill to appease critics).

in our political system, their role with regard to efforts to counter structural injustice has been relatively slight.

Much of the heavy lifting with regard to the amelioration of structural injustice has been done by Congress and state and local lawmakers, especially the latter two.[247] Public accommodation laws in forty-five states and thousands of municipalities protect citizens from private discrimination on the basis of race, gender, ethnicity, national origin, marital status, age, disability, pregnancy, and a few other characteristics that render citizens vulnerable to subordination.[248] It is easy to lose sight of the degree to which social justice in the United States depends not on the Constitution and the intervention of federal courts, and not even on federal legislation, but rather on the civil rights laws of state and local governments.

We have paid a price for the absence of federal constitutional oversight. Five states have no statewide public accommodation statutes at all.[249] And the "culture wars" surrounding LGBTQ rights unsettle matters further.[250] Many jurisdictions do not include LGBTQ citizens in their comprehensive civil rights laws.[251] Moreover, the jurisdictions that do protect LGBTQ rights face new challenges because resistance to those rights is justified by claims of religious freedom grounded directly or indirectly—by way of conscience clauses granting exemptions from antidiscrimination laws, and state religious freedom restoration acts—in state constitutions or the federal Constitution.[252]

It is time to bring the Fourteenth Amendment and its commitment to equal citizenship back into the picture. That has been our project in this Article.

Let us consider how the discriminatory permissions doctrine will work in cases where the requirements of free and equal citizenship clash with claims of religious license to discriminate.

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247. *See State Public Accommodation Laws*, *supra* note 233 (providing data on the states whose lawmakers have passed public accommodations laws).

248. *Id.*

249. *Id.* (listing Alabama, Georgia, Mississippi, North Carolina and Texas as the five states with no statewide public accommodations law).

250. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 637–38 (2016) (surveying state public accommodations laws and noting that religious exemptions are uncommon, except with respect to gay rights).

251. *State Public Accommodation Laws*, *supra* note 233 (reporting that only twenty-five jurisdictions currently prohibit discrimination based on sexual orientation).

252. Sepper, *supra* note 250, at 635 (noting that as of 2016, twenty-one states had RFRAs and twelve additional states introduced but did not pass such acts).

A. First Amendment Defense Acts and Conscience Clauses

We can begin with our Jackson, Mississippi hotel owner who invokes H.B. 1523 to defend against the lawsuit by the excluded newlyweds. In our analysis above, we offer strong support for the conclusion that H.B. 1523 is a discriminatory permission that violates the Equal Protection Clause.[253] We need not rehearse that conclusion here. H.B. 1523 provides a helpful example of the sort of pernicious permission to discriminate that the Court has consistently denounced in cases spanning nearly a century.

It is important to note, however, that it is H.B. 1523 that is unconstitutional, not the discriminatory conduct of the hotel. That means that the Constitution gives courts the responsibility and authority to invalidate the statute. Legal redress against the hotel needs to find another legal source.

There is a source readily at hand, namely the city's ordinance that bans discrimination in public accommodations and provides for both fines and injunctions against offending private enterprises.[254] This is not an unusual circumstance. State and local antidiscrimination statutes existed in *Reitman* and *Romer* as well. When the statewide discriminatory permissions in those cases were struck down, the preexisting antidiscrimination provisions regained their efficacy.[255] Municipal laws banning discrimination in public accommodations may often be present, even in states where there is no statewide provision doing this work.

Were the hotel in our story to be located outside the city limits of Jackson, the newlyweds would still have their common law claims against the hotel. They could argue that their reservation of the honeymoon suite was contractually binding on the hotel, and possibly that the in-person refusal to accommodate them constituted a tort.[256]

Finally, we should note that while the Supreme Court has in recent terms shown a marked sympathy for the interests of religious groups and religiously-motivated individuals, a law like Jackson's antidiscrimination ordinance remains secure from religious exemptions. Even in *Fulton v. City of Philadelphia*, where the Court faulted the City

253. *See supra* Part III.B.

254. Jackson, Miss., Code of Ordinances § 86-302 (2016); *id*. at §§ 86-305–06 (providing for legal and equitable remedies).

255. *Reitman*, 387 U.S. at 381 (affirming the lower court's decision to strike down California's discriminatory permission statute); *Romer*, 517 U.S. at 635 (striking down Colorado's discriminatory permission statute).

256. We are not taking a position on the validity of these common law claims; we merely mean to note their availability.

for not granting Catholic Social Services an exemption from its anti-discrimination policy when—in the Court's understanding—the City made available some exemptions from that policy, the Court made it clear that governments have a weighty interest in protecting members of the LGBTQ community from discrimination.[257] The clear implication is that neutral and generally applied public accommodation statutes can prohibit religiously inspired discrimination. This is surely the correct view.

Mississippi's statute is not alone. Arguably, it belongs in a category of laws known as "conscience clauses," or exemptions that lift specific regulatory burdens on traditional religious or moral actors, not only in healthy care contexts but more widely as well.[258] A spate of such laws has been enacted that permit agencies that place children in foster care or adoption to act on their religious beliefs, and still others are under consideration.[259] Michigan's 2015 law is typical.[260] Does Michigan's child placement conscience clause constitute a discriminatory permission?

The answer is less obvious. Michigan's statute was enacted in 2015, in the context of *Obergefell*. So the religious beliefs that the legislature accommodates seem perfectly clear and quite particular. That the accommodation is phrased more generally than the one in Mississippi seems relevant but not decisive, on this reading. Under discriminatory permission analysis, the question is whether the permission

257. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (discussing "the interest of the City in the equal treatment of prospective foster parents and foster children" and calling this interest "a weighty one").

258. *See, e.g.,* Appellants' Brief at 4–5, Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017) (No. 16-60477), https://adfmedialegalfiles.blob.core.windows.net/files/BryantOpeningBrief.pdf [https://perma.cc/756T-8QX5] (comparing H.B. 1523 to "conscience clauses"); *Snapshot: LGBTQ Adoption and Foster Care Parenting in Mississippi*, FAM. EQUAL. COUNCIL, https://www.familyequality.org/wp-content/uploads/2019/03/25-Mississippi-Snapshot.pdf [https://perma.cc/E5JR-XHKX] ("[I]n 2016, the Mississippi state legislature passed a sweeping 'conscience clause' law.").

259. For a list of state statutes cited, *see supra* note 19.

260. MICH. COMP. LAWS § 722.124e(2) ("[A] child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs . . . ."); *see also* MICH. COMP. LAWS § 710.23g; MICH. COMP. LAWS § 722.124f; St. Healthcare L. Libr. P 400.5A (C.C.H.), 2016 WL 3000946 (regulation). We are assuming here that Michigan's public accommodations laws, or its licensing requirements, would prohibit a child placing agency from excluding a transgender applicant. *Cf.* Dumont v. Lyon, 341 F. Supp. 3d 706, 715 (E.D. Mich. 2018) (noting that state contracts prohibit child-placing agencies from discriminating on the basis of sexual orientation and gender identity, *inter alia*). Note that, on one reading, the Michigan "conscience clause" only applies to agencies that do not receive public funding under a contract with the state. MICH. COMP. LAWS § 722.124e(7)(b).

carries with it a message that approves the discrimination. More precisely, we have suggested that the test ought to be whether an informed, objective observer would find that the social meaning of the Michigan statute included approval of religion-based discrimination against same-sex married couples by child placement agencies. If the answer to that question is yes, this is a discriminatory permission, and therefore unconstitutional.

We think it likely that a careful look at the facts on the ground in Michigan would lead to the conclusion that the social meaning of the state statute does indeed make it a discriminatory permission and constitutionally invalid, though the question is close. It is interesting if not decisive that a district court found that the state was implicated in exclusion because the LGBTQ plaintiffs sufficiently alleged that the state "caused [their] injuries by authorizing and failing to prevent the agencies' discrimination"[261] and that the state had "'encouraged' or 'influenced' the challenged conduct."[262]

Things get more complicated still when we turn to state religious freedom restoration acts.

B. RELIGIOUS FREEDOM RESTORATION ACTS

State RFRAs generally will pose harder cases than conscience clauses like Mississippi's or Michigan's. The federal RFRA set out to "restore" the compelling state interest test after it was eliminated by *Employment Division v. Smith*.[263] Most state RFRAs were passed in the late 1990s, soon after the Supreme Court invalidated the federal RFRA

261. *Dumont*, 341 F. Supp. 3d at 744.

262. *Id.* at 747.

263. *See* 42 U.S.C. § 2000bb(a)(4)–(5) (1993) ("The Congress finds that . . . in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."); *id.* at (b)(1) ("The purposes of this chapter are . . . to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

as applied to the states.[264] They largely followed the federal RFRA in form and purpose.[265]

But in some states, RFRA bills were proposed only in the mid-2010s, after it became clear that *Obergefell* was imminent.[266] Some of these were widely criticized, as we have noted. For example, Arizona's proposed amendment to expand the scope of its RFRA was vetoed by Governor Jan Brewer in 2014.[267] Addressing the controversy, the governor reassured supporters by saying, "I understand that long-held norms about marriage and family are being challenged as never before," but she added that the bill "has the potential to create more problems than it purports to solve."[268]

By contrast, Indiana actually did enact a RFRA in 2015.[269] As we have explained, Indiana drew criticism—not only from civil rights activists, but also from the NCAA and corporations like Apple and Salesforce.com.[270] Some scholars who supported the federal RFRA came out against the Indiana version because its context indicated that its purpose was to weaken civil rights protections for LGBTQ people, especially in cities like Bloomington and Indianapolis, which had local ordinances that specifically protected gay men and lesbians against discrimination in public accommodations, employment, and housing.[271] Other scholars pointed out features of the text that differed from the federal model, suggesting that the law was designed to

264. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). About sixteen states enacted RFRAs at that time, ten of those between 1998 and 2000. Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 475–77 (2010) (using a table to list the sixteen states that passed RFRAs between the years 1993 and 2009).

265. Lund, *supra* note 264, at 475–76 ("[T]he enacted state RFRAs operate much like the federal RFRA did before Boerne, requiring state and local laws that impede religious exercise to be justified by a compelling interest."). A few states altered the substantial burden threshold. *Id.* at 477 (demonstrating through a table that Rhode Island, New Mexico, and Missouri have a required threshold showing of restrictions on religious liberty).

266. *State Religious Freedom Restoration Acts*, *supra* note 32; Obergefell v. Hodges, 576 U.S. 644 (2015).

267. Weinger & McCalmont, *supra* note 36 ("Arizona Gov. Jan Brewer announced Wednesday that she has vetoed SB 1062, the controversial bill that has been criticized as discriminatory towards gays and lesbians, saying the measure, 'has the potential to create more problems than it purports to solve.'").

268. *Id*.

269. IND. CODE § 34-13-9-8 (2015).

270. *See supra* Part III.B; Barbaro & Eckholm, *supra* note 241 (reporting that Indiana's RFRA drew criticism from Apple and Salesforce.com executives and even drew "expressions of dismay from the N.C.A.A.").

271. Letter from Columbia L. Sch. Pub. Rts./Priv. Conscience Project to Indiana

block antidiscrimination claims.[272] Bowing to pressure from these sources among others, Governor Mike Pence signed an amendment that made the new law inapplicable in most civil rights cases.[273]

Almost simultaneously, Arkansas proposed a state religious freedom law that also met strong opposition. Governor Asa Hutchinson even revealed that his son had signed a petition asking him to reject the bill.[274] Arkansas subsequently altered its RFRA bill so that its text exactly matched the federal RFRA, which had a less troublesome provenance. Although that change did not quell all criticism—after all, the timing of the law still sent a message about its purpose—it did ease opposition enough for the measure to be enacted.[275]

Though several other states have considered passing RFRAs since 2015, only a few have done so.[276] Presumably, state legislatures have faced political headwinds similar to those experienced in Indiana and Arkansas. Conceivably, even RFRAs whose texts are identical to the federal law have taken on a social meaning—with LGBTQ rights at its center and with women's reproductive freedom in view—that, although contested, tips toward indicating that the laws are designed as bulwarks against core civil rights protections in employment, public accommodations, and housing. That is, they may well have been opposed on an equal protection theory like the one we are describing, though the question was never reviewed by any court.

To see how a concrete state RFRA controversy might go, imagine the following: A small funeral home in Louisville, Kentucky fires an

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Legislature the Proposed Religious Freedom Restoration Acts, (Feb. 27, 2015), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf [https://perma.cc/GZB4-YKN7] (providing thirty signatures, many from Indiana University law professors, that denounced the state's RFRA).

272. Schwartzman et al., *supra* note 242 ("The Indiana RFRA departs from . . . the federal RFRA . . . . Indiana's RFRA expressly provides that a person can assert a 'claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding.'").

273. IND. CODE § 34-13-9-0.7 (2015).

274. Mollie Reilly, *Arkansas Governor Asa Hutchinson Signs Amended Religious Freedom Bill*, HUFFPOST (Apr. 2, 2015), https://www.huffpost.com/entry/asa-hutchinson-arkansas-rfra_n_6995826 [https://perma.cc/AGV6-KN49] ("In a Wednesday press conference announcing his opposition to the initial version of the bill, Hutchinson said his son had asked him to veto the legislation.").

275. *Id.* ("[T]he Republican-controlled state legislature passed a new version of the bill at the governor's request, amending provisions that would have allowed businesses to discriminate against LGBT customers.").

276. *See State Religious Freedom Restoration Acts*, *supra* note 32 (noting that South Dakota and Montana enacted RFRAs in 2021).

employee who has transitioned from male to female.[277] The owner's rationale for the termination is that the worker has stopped adhering to the company dress code for men. The fired employee brings suit, claiming discrimination on the basis of gender in violation of employment laws in Louisville.[278] The owner responds by explaining that he runs his business according to Christian beliefs, including the rule that people should dress in conformity with their biological sex at birth, and that those beliefs are protected by Kentucky's RFRA.[279]

Here, it is possible to imagine an argument that the Kentucky RFRA is an unconstitutional permission to discriminate. To begin with, Kentucky enacted its RFRA in 2013, during the pendency of litigation that led to *Obergefell*.[280] At the same time, major cities in Kentucky and elsewhere were considering legislation that would protect members of the LGBTQ community from discrimination.[281] An informed observer might be justified in concluding that Kentucky enacted its RFRA precisely in contemplation of laws like the Louisville antidiscrimination ordinance upon which the fired employee is relying, and that the state strongly resisted the changes in cultural norms that were being thrust upon it from all sides. Under authorities like *Reitman*, *Romer*, and *Peterson*, that alone *conceivably* could be enough to apply the Equal Protection Clause and to reject the funeral home's defense based on the state RFRA.

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277. We are assuming that the funeral home has fewer than fifteen employees, and so is not covered by Title VII. This example is based on the facts of *Harris Funeral Homes*, which was decided along with *Bostock*. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

278. Daniel Reed, *All Citizens of Kentucky Are Equal, Except Some Are More Equal Than Others: The Constitutional Deficiencies of the Kentucky RFRA*, 54 U. LOUISVILLE L. REV. 331, 338 (2016) ("Major cities of Kentucky including Louisville, Lexington, Covington, and Vicco all have local ordinances that ban discrimination based on sexual orientation and gender identity.").

279. In the actual case involving Harris Funeral Homes, the Sixth Circuit reversed the trial court's ruling that the employer was exempt from employment discrimination laws because of the federal RFRA. *Harris Funeral Homes*, 884 F.3d at 560 (reversing the district court's grant of summary judgment on the unlawful termination and discriminatory clothing-allowance claims). We imagine this case in Kentucky because that state is located in the Sixth Circuit and has a state RFRA. 2013 KY. ACTS § 446.350. The state RFRA sets up the tension between religious freedom and equality law that we are exploring.

280. *See* Reed, *supra* note 278, at 331 (explaining that the Kentucky General Assembly passed its RFRA, House Bill 279, in 2013).

281. *See id.* at 338 (noting that Louisville, Lexington, Covington, and Vicco had local ordinances banning discrimination based on sexual orientation).

In support of this conclusion, it should be noted that Kentucky enacted its RFRA in the face of concerns about civil rights. The legislature considered and rejected an amendment that would have made the statute inapplicable to antidiscrimination disputes.[282] Moreover, Governor Beshear vetoed the bill partly out of concern for equality, saying "the measure calls into question the scope and efficacy of many laws regarding public health and safety as well as individual civil rights."[283] Having been put on notice of these concerns, the legislature overrode the governor's veto and passed the measure into law.[284]

Also reinforcing the discriminatory permission view of Kentucky's RFRA is its text, which departs from the federal model in several respects. It requires the government to prove a compelling interest by "clear and convincing evidence," a high standard that does not appear in the federal RFRA.[285] Moreover, the Kentucky statute specifies that the term "burden" includes not just regulation, but also the denial of a government benefit and "exclusion from programs or access to facilities."[286] Each of these differences strengthens the state version relative to its federal counterpart. And although the statute

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282. The amendment provided that "'[t]his section does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law or local civil rights ordinance.'" Reed, *supra* note 278, at 337 (quoting H.B. 279, 13 Reg. Sess. (Ky. 2013)).

283. *Id.* at 338 (quoting STEVEN L. BESHEAR, VETO MESSAGE FROM THE GOVERNOR OF THE COMMONWEALTH OF KENTUCKY REGARDING H.B. 279 OF THE 2013 REGULAR SESSION, (Mar. 22, 2013)).

284. Tom Loftus, *Ky. Legislature Overrides 'Religious Freedom' Veto*, USA TODAY (Mar. 26, 2013), https://www.usatoday.com/story/news/nation/2013/03/26/kentuckylegislature-overrides-religious-freedom-veto/2023489 [https://perma.cc/WS2V-4PWC] ("The Kentucky legislature voted Tuesday night to override the governor's veto of a controversial 'religious freedom' bill.").

285. The statute provides:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

2013 KY. ACTS § 446.350. *Cf.* 42 U.S.C. § 2000bb-1(b) (1993) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."); *id.* at § 2000bb-2(3) ("[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion . . . .").

286. 2013 KY. ACTS § 446.350.

has not been applied in a published decision, it has been cited by an employer seeking relief from employment discrimination laws.[287]

So an objective observer would have reason to think that the Kentucky RFRA carries with it approval of discrimination, based on this evidence. Yet there is a reasonable argument on the other side. Conceivably, state legislators rejected the safe harbor for civil rights laws not because they wished the statute to override such laws, but because they thought the amendment was unnecessary. After all, the Kentucky RFRA, like its cognates elsewhere, allows the government to impose a substantial burden on religious freedom if it demonstrates a compelling interest that is narrowly tailored. And most judges assume that civil rights laws are driven by government interests of the highest order.[288] Those interests include guaranteeing equal economic opportunity, eliminating caste stratification, and condemning unfair behavior in commercial interactions.[289] Unless that consensus is unsettled, civil rights enforcement can only fail strict scrutiny because of a lack of narrow tailoring. And in the actual case on which our hypothetical is based, the district court ruled that the government could simply require employers to allow all employees to dress in a gender-neutral way.[290] According to the court, the government need not take the more drastic step of requiring employers to allow employees to dress according to their gender identity.[291] But that solution is puzzling and wrongheaded—and it ignores altogether the employee's wish to change her name so that it matched her gender identity. Accordingly, the Sixth Circuit reversed the finding that RFRA protected the em-

287. Reed, *supra* note 278, at 339–40 ("While currently there are no published Kentucky cases that have been brought under the Kentucky RFRA, the statute has recently been cited by a company to support discrimination on the basis of religion.").

288. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014) ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . ."); *id.* at 733 ("The Government has a compelling interest in providing an equal opportunity to participate in the work force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

289. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627 (2015) ("Antidiscrimination law has multiple purposes. Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.").

290. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 863 (E.D. Mich. 2016) ("If the compelling governmental interest is truly in removing or eliminating gender stereotypes in the workplace in terms of clothing . . . the EEOC's manner of enforcement in this action (insisting that Stephens be permitted to dress in a stereotypical feminine manner at work) does not accomplish that goal.").

291. *Id.*

ployer—it held not only that the employer was not substantially burdened, but also that the employment discrimination laws were narrowly tailored to a compelling interest.[292]

So legislators in Kentucky might well have thought—or be reasonably understood to have thought—that their RFRA was unlikely to frustrate equality laws, even without textual changes to the original bill. That would support a conclusion that the import of the Kentucky RFRA is not to authorize discrimination, but instead to protect the religious interests of state citizens.

Our own sense is that the Kentucky RFRA may well constitute a discriminatory permission within the meaning of the principle we have been excavating. But *if* a court concluded that the social meaning of the state law was sufficiently ambiguous, contested, or multivalent, then it would be justified in applying the religious exemption as written.

CONCLUSION

States have a constitutional duty to protect their citizens from the systematic and sustained failures of equal membership which they helped to create, and which they actively sustain by maintaining structures of law that permit and enforce private discrimination against the victims of those failures. That does not mean, however, that federal courts can order states to take up cudgels against inequality. Ordinarily, we think that a simple failure by a state to protect against private discrimination on the basis of a particular characteristic is not judicially actionable. In the face of weighty concerns about countervailing individual rights, federalism, and separation of powers, courts are ill-suited to the enterprise of constructing a state campaign against private discrimination.

When a state goes further, however, and actively permits systematic discrimination and in the course of doing so signals its approval of that discrimination, courts may and must step in to enforce equal protection, even where the most proximate exclusion happens at the hands of private individuals and entities. When a state puts the weight of its authority behind subordination, it places itself in flagrant opposition to its constitutional obligations. Courts exercise their core powers when they invalidate such discriminatory permissions.

This is not a radical claim of constitutional reach and judicial authority. What we have called the discriminatory permissions doctrine

292. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 585–97 (6th Cir. 2018) (detailing the court's analysis and holding of the RFRA issue).

has been consistently supported by the Supreme Court in a string of cases dating back to a period when the Court was in other respects far from hospitable to claims of equal membership. But this thread of judgment has been submerged and it surfaces in a new way today, when civil rights statutes lag behind social stratification. Although the judiciary has limited jurisdiction, it has appreciable authority to act against the background of structural threats to democratic cooperation and self-governance. Until civil rights statutes close that gap, courts will remain essential if limited guarantors of democratic efficacy and belonging.