

TRUST AND DISTRUST ACROSS CONSTITUTIONAL LAW

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INTRODUCTION

Matters of trust¹ pervade constitutional law. Such matters are rarely discussed explicitly in the case law itself. But the intricacies, costs, benefits, and the proper limits of trust are implicitly central to constitutional law. This centrality should be acknowledged. But it should also be recognized that matters of trust in constitutional law do not stand alone as independent phenomena. As it turns out, the role of trust throughout constitutional law is inseparable from important questions of inequality, of both a descriptive and a normative character. We cannot understand important issues of trust without centrally addressing matters of equality and inequality.

Questions of public trust in governments, in political actors and institutions, and in the legal system have been conspicuously raised outside the case law. Thus, it has been said, for example, that “[i]t is beyond dispute that Americans’ trust in their national government has declined over the past 50 years.”² Broadly, since the 1960s, “[p]olitical trust, trust in government and democracy, has fallen steeply.”³ And these evolving judgments have been variously held across the political spectrum.⁴ Increasing societal distrust has now extended well beyond what we might broadly call our political and legal

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1. The term “trust” may refer either to trust in an affirmative, positive sense, or to trust in a broader sense encompassing not just affirmative trust, but distrust, mistrust, failure to trust, untrustworthiness, and sundry variations thereon. For attention to asymmetries between trust and distrust, see, e.g., Russell Hardin, *Distrust: Manifestations and Management*, in *DISTRUST* 3, 3–4 (Russell Hardin ed., 2004); Eri Bertsou, *Rethinking Political Distrust*, 11 *EUR. POL. SCI. REV.* 213, 213–14 (2019). We need take no position on these or many other conceptual issues. The sense in which “trust” is being employed below should be clear from the context.

2. Jack Citrin & Laura Stoker, *Political Trust in a Cynical Age*, 21 *ANN. REV. POL. SCI.* 49, 51 (2018); see Francis Fukuyama, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 150 (1995) (arguing, earlier, to similar effect). Trust in government by private parties is largely a matter of what is called vertical, as distinct from horizontal, trust. See J.S. Maloy, *Two Concepts of Trust*, 71 *J. POL.* 492, 493 (2009).

3. Kevin Vallier, *TRUST IN A POLARIZED AGE* 1 (2021).

4. See *id.*

institutions.⁵ Certainly, the public opinion surveys confirm the gradual erosion of trust in these various respects.⁶

We need take no position herein on the reality of any of these trends. Our initial point is merely that in generally avoiding explicit discussion of matters of trust, the case law fails to address a centrally significant cultural phenomenon.

The study of trust and distrust in general has resulted in a number of potentially useful insights. The discussion below does not depend upon any controversial definition or analysis of the idea of trust. But it is helpful to bear in mind some of the major claims and controversies regarding trust and distrust in general as the discussion below unfolds.

Thus, it is often helpful to think of trust, in general, in terms of a triadic relationship. On this pattern of analysis, there is, first, a person or group that does or does not do the trusting, to one degree or another.⁷ There is then a person, group, institution, or perhaps even an abstract entity that is trusted, to whatever degree.⁸ And then finally, there is some subject, issue, domain, or other respect in which the trust in question is extended.⁹ A parallel three-part analysis can be done for the idea of distrust as well.¹⁰

Much of what is important about trust requires thoughtful elaboration of one or more of these three elements. Thus, we will often care about worthiness to be trusted, or literal trustworthiness.¹¹ And we will then want to find low cost ways of learning who is trustworthy, of cheaply signaling our own trustworthiness,¹² and of signaling as well that we are aware that others are not

5. See *id.*; Thomas H. Sander & Robert D. Putnam, *Still Bowling Alone? The Post-9/11 Split*, 21 J. DEMOCRACY 9, 10 (2010) (“In the early 1960s, more than half of all Americans said that they trusted others; fewer than a third say the same thing today”).

6. See, e.g., LEE RAINIE ET AL., PEW RSCH. CTR., TRUST AND DISTRUST IN AMERICA 1, 10 (July 22, 2019), www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/ (noting especially lower levels of trust among younger survey respondents); PEW RSCH. CTR., AMERICANS’ VIEWS OF GOVERNMENT: LOW TRUST, BUT SOME POSITIVE PERFORMANCE RATINGS 1, 6 (Sept. 14, 2020), www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/. This gradual increase in distrust in government and other institutions is not confined to the United States. See, e.g., Geoffrey Hosking, *The Decline of Trust in Government*, in TRUST IN CONTEMPORARY SOCIETY 77, 77 (Masamichi Sasaki ed., 2019).

7. See, e.g., Daniel Weinstock, *Building Trust in Divided Societies*, 7 J. POL. PHIL. 287, 293 (1999).

8. See, e.g., *id.*; see also NIKLAS LUHMANN, TRUST AND POWER 103 (Christian Morgner & Michael King trans., 2017) (1973) (referring to “trust in general systems mechanisms”).

9. See, e.g., Weinstock, *supra* note 7, at 293.

10. See Hardin, *supra* note 1, at 9; see also Katherine Hawley, *Trust, Distrust and Commitment*, 48 NOÛS 1, 1 (2014) (“[T]rust is primarily a three-place relation, involving two people and a task.”).

11. See, e.g., Karen Jones, *Trustworthiness*, 123 ETHICS 61, 62 (2012).

12. See *id.*

merely depending on, but trusting, us.¹³ Knowledge that one is being trusted may lead either to one's greater responsibility,¹⁴ or instead toward exploitive behavior.¹⁵ The interdisciplinary literature then goes on to suggest that trust and distrust may have multiple and diverse causes,¹⁶ and may vary in the scope of their subject matter and the scope of their recipients.¹⁷ Trust will also vary in its fervor or intensity,¹⁸ as well as in its degree of justifiability.¹⁹ Distrust in particular may reflect lack of confidence in a party's supposedly benevolent intentions,²⁰ or in that party's sheer competence to achieve a sufficiently

13. See *id.* The trust may be about attitudes, hopes, and expectations as well as sheer calculations of interest. See Paul Faulkner, *Finding Trust in Government*, 49 J. SOC. PHIL. 626, 626–30 (2018).

14. See, e.g., Jonathan Anomaly, *Trust, Trade, and Moral Progress: How Market Exchange Promotes Trustworthiness*, 34 SOC. PHIL. & POL'Y 89, 90 (2017).

15. See, e.g., Sameer Bajaj, Book Review, 131 ETHICS 411, 411 (2021) (reviewing KEVIN VALLIER, *MUST POLITICS BE WAR? RESTORING TRUST IN THE OPEN SOCIETY* (2019)) (noting that “the value of a system of trust cannot alone sustain the system. This is because individuals will be tempted to free ride off the trustworthy [or the trusting] behavior of others”).

16. One obvious candidate for a cause of distrust, beyond expressed hostility and incompetence, would be perceived corruption, or at least corruption beyond a certain scale and persistence. See, e.g., Gabriella R. Montinola, *Corruption, Distrust, and the Deterioration of the Rule of Law*, in *DISTRUST* 298, 299 (Russell Hardin ed., 2004). The “causes” of apparent trustworthiness vary, in moral and pragmatic dimensions. See Carolyn McLeod, *Trust*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/trust> (rev. ed. Aug. 10, 2020).

17. Thus, one “may trust the government to collect its revenues without trusting it to spend them wisely.” Simon Blackburn, *Trust, Cooperation, and Human Psychology*, in *TRUST AND GOVERNANCE* 28, 30 (Valerie Brathwaite & Margaret Levi eds., 1998). One might trust the government to forecast tomorrow's weather, but not to ascertain truth in the realm of metaphysics and religion. See Andrew Koppelman, *Endorsing the Endorsement Test*, 7 CHARLESTON L. REV. 719, 721 (2013). Or one might trust specialized governmental scientists on matters of core technical expertise, but not on matters of equity, fairness, or even the calculus of policy costs and benefits. See, for background, Tom Nichols, *The Death of Expertise*, FEDERALIST (Jan. 17, 2014) <https://thefederalist.com/2014/01/17/the-death-of-expertise>. As well, trust may be inclusive, or else narrow and exclusive, with reference to the trusted group. See *infra* Part II.

18. See, e.g., Hardin, *supra* note 1, at 3 (“Like trust, distrust is also a matter of degree.”).

19. See, e.g., ONORA O'NEILL, *A QUESTION OF TRUST* 4 (2002) (“We may need trust, but trusting often seems hard and risky. Every day we read of untrustworthy action by politicians and officials, by hospitals and exam boards, by companies and schools.”). And of course, there are basic problems of general untrustworthiness of legal institutions with respect to unequal and subordinated groups, as discussed in Part II below.

20. See, e.g., Hawley, *supra* note 10, at 1 (“[T]rust involves expectations about both competence and willingness . . .”); Trudy Govier, *Distrust As a Practical Problem*, 23 J. SOC. PHIL. 52, 52 (1992) (“Distrust between individuals and groups exists when there is a lack of confidence between them, when they are suspicious of each other's intentions or abilities to do things which are expected or required.”).

acceptable result.²¹ Trust and distrust may also be more or less self-perpetuating.²²

Often, as we see in the constitutional cases below,²³ a crucial question will be whether, in a given context, trust is deserved or otherwise appropriate. In the abstract, certainly, trust can be of great social value. Trust may lead to importantly reduced transaction costs, including costs of negotiating, monitoring, and enforcement,²⁴ as well as promoting valued relations among persons, and increased personal and social fulfillment in general.²⁵

Thus, “it is often said that trust is ‘the lubricant of society.’ Everyday life would be impossibly difficult if we could not trust others to do what they will do, at least to some extent.”²⁶ An elaborate contract, or system of contracts, might be considered as a costly substitute for a mutually trusting relationship. But even an elaborate contract still normally involves at least a displaced form of trust, now in the form of trust in processes of mediation, arbitration, litigation, and enforcement.²⁷

Put negatively, “[l]iving in a low-trust society dispirits because human beings thrive when they have trusting relationships.”²⁸ Relationships based on trust provide meaningfulness and fulfillment in themselves.²⁹ Trusting relationships may also be a necessary condition for the flourishing of various sorts of higher order relationships as well.³⁰

The other side of the question, however, acknowledges the occasions on which trust is undeserved, or otherwise inappropriate, and perhaps devastating, if not catastrophic. As the constitutional case law³¹ occasionally illustrates, “there are contexts where distrust is fully warranted and serves valuable

21. See the authorities cited *supra* note 20.

22. Thus, it has been argued that “[t]oo much monitoring may have the . . . result that individuals feel they are not trusted and thus become less trustworthy.” James Walker & Elinor Ostrom, *Conclusion*, in *TRUST AND RECIPROcity* 381, 386 (Elinor Ostrom & James Walker eds., 2003). This raises broader issues of the optimal degree of monitoring, accountability, and transparency in government operations. See O’NEILL, *supra* note 19, at 4.

23. See *infra* Part II.

24. See, e.g., JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 335 (rev. ed. 2015). This is also a recurring theme of Fukuyama, *supra* note 2.

25. See, e.g., Annette Baier, *Trust and Antitrust*, 96 *ETHICS* 231, 231 (1986) (citing SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 31 (Pantheon Books ed., 1978)).

26. ELSTER, *supra* note 24, at 335.

27. See, e.g., Brian Skyrms, *Trust, Risk, and the Social Contract*, 160 *SYNTHESE* 21, 21 (Jan. 2008).

28. Scott Yenor, *Despair in a Decadent Republic*, LIBERTY FUND (July 13, 2020) <https://lawliberty.org/book-review/despair-in-a-decadent-republic> (book review).

29. See *id.*

30. See, e.g., G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 268, at 288 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821) (justified political trust as potentially passing over into an educated insight into matters of state, solidarity, and freedom).

31. See *infra* Part II.

functions. Sometimes distrust seems so obviously warranted that trust would amount to gullibility or stupidity.”³²

Warranted, or at least arguably warranted, distrust underlies important features of the original federal Constitution in general. Distrust, at one level or another, universally or of one group or another, is reflected in the original constitutional structure and substance. Consider, for example, the Framers’ concern “to break and control the violence of faction,”³³ understood as referring to all groups seeking to undermine the legitimate rights of others or the public interest.³⁴ Thus, for example, the inevitable risks to the broader public interest from the endless contest between debtors and creditors, at least in the eyes of the Framers.³⁵

Rather than seeking, perhaps largely in vain, to promote the reciprocal trustworthiness of debtors and creditors, the Framers emphasized structural constraints on the likelihood and gravity of factional damage to the public interest.³⁶ Thus, famously, “the *causes* of faction cannot be removed; . . . relief is only to be sought in the means of controlling its *effects*.”³⁷

Thus, the Framers did not much anticipate, or seek to attain, increased trustworthiness among either the governors or the governed. To at least some degree, it was thought the harms of faction-based breaches of the public trust could be limited by structural mechanisms such as federalism,³⁸ republican limits on democracy,³⁹ the separation of powers,⁴⁰ and checks and balances.⁴¹

At the most fundamental level, ordinary persons, whether governing or governed, thus do not reliably bear the trustworthiness of the angels.⁴² Classically, Madison asked rhetorically whether government itself is not an adverse reflection on human nature.⁴³ Thus, “[i]f men were angels, no

32. Govier, *supra* note 20, at 53. Hegel’s defense of the value of political trust clearly assumes that the trust in question is justified. See Hegel, *supra* note 30; see also Stephen Houlgate, *Right and Trust in Hegel’s Philosophy of Right*, CAMBRIDGE UNIV. PRESS (Apr. 4, 2016), <https://www.cambridge.org/core/journals/hegel-bulletin/article/right-and-trust-in-hegels-philosophy-of-right/594D71486E9923CD1B99012EFD6A3AE> (“Hegel is well aware that not all states and their institutions merit trust, but in his view a life without trust in institutions is a life without true freedom.”).

33. THE FEDERALIST NO. 10, at 40 (James Madison) (Terence Ball ed., 2004).

34. See *id.* at 41.

35. See *id.* at 42, 46.

36. See *id.* at 43.

37. *Id.*

38. See THE FEDERALIST NO. 51, at 255 (James Madison) (Terence Ball ed., 2004).

39. See THE FEDERALIST NO. 10, *supra* note 33, at 44.

40. See THE FEDERALIST NO. 51, *supra* note 38, at 252–53.

41. See *id.*

42. See *id.* at 252.

43. See *id.*

government would be necessary.”⁴⁴ And “[i]f angels were to govern men, neither external nor internal controuls on government would be necessary.”⁴⁵

It can be argued, certainly, that the limited scope of power initially exercised by the federal government⁴⁶ itself reduced the importance of trust and distrust under the Constitution.⁴⁷ As the stakes of various sorts of federal government action have risen over the past several decades,⁴⁸ so, presumably, has the importance of trust, and of decisions to trust or distrust.

In general, and whether recognized or not, various sorts of trust and distrust relationships have been central to more particularized constitutional cases across the board. Below, we make explicit the trust issues latent in a range of major constitutional cases.

I. TRUST AND DISTRUST AS IMPLICITLY CENTRAL TO THE CONSTITUTIONAL CASE LAW

A. *The Contracts Clause Cases*

The Federalist Papers themselves attest to a concern for the adverse effects of factionalism in general,⁴⁹ but in particular, to the effects of the political machinations of debtor and creditor groups.⁵⁰ Consider, therefore, the text of the Contracts Clause⁵¹ of the federal Constitution to the effect that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”⁵² This

44. *Id.* Actually, entirely trustworthy, and even self-sacrificial persons would need a government at least in the form of a conspicuous coordinator of benevolent but otherwise uncoordinated impulses. See John M. Finnis, *Law as Co-ordination*, 2 *RATIO JURIS* 97, 98 (1989).

45. THE FEDERALIST NO. 51, *supra* note 38, at 252. Attention to both internal and external controls on government actors usefully illustrates the broader point that trust and distrust can have “horizontal” as well as hierarchical or “vertical” dimensions. See Faulkner, *supra* note 13, at 626. Constitutional distrust may involve current power inequalities among federal branches of government, as well as more clearly hierarchical contexts of distrust, as in federal versus state, or government versus private groups or citizens.

46. Compare, for example, the original and the current practical importance, in ordinary daily life, of the congressional power to regulate interstate commerce. See, e.g., the homegrown marijuana regulation case of *Gonzales v. Raich*, 545 U.S. 1 (2005).

47. See Russell Hardin, TRUST AND TRUSTWORTHINESS 165 (2002) (“[T]he deliberately designed weakness of the early U.S. national government under the Constitution of 1787 that . . . disabled it from making policies that would have created massive distrust in that government . . .”).

48. See the historical federal spending tables as compiled by the Office of Management and Budget. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *Historical Tables*, whitehouse.gov/omb/historical-tables (last visited Jan. 6, 2021).

49. See THE FEDERALIST NO. 10, *supra* note 33.

50. See *id.* at 42.

51. U.S. CONST. art. I, § 10, cl. 1.

52. *Id.*

apparently broad language was classically tested in *Home Building & Loan Ass'n v. Blaisdell*,⁵³ in the depths of the Great Depression.

The majority in *Blaisdell* permitted limited, temporary, conditional relief to Minnesota residents seeking extension of their redemption period, in order to avoid mortgage foreclosures during a time of officially declared emergency.⁵⁴ Justice Sutherland's dissenting opinion, though,⁵⁵ looked to history and to any ascertainable intent of the constitutional Framers.⁵⁶ On Justice Sutherland's view, the Contracts Clause "was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress."⁵⁷ The intent of the Contracts Clause was thus said to be "to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency."⁵⁸

For our purposes, we need not determine whether the relief permitted in *Blaisdell* was constitutionally justified,⁵⁹ or sound public policy.⁶⁰ The point is instead that questions and contexts of distrust are—despite the absence of explicit case law reference—central to the Contracts Clause, to its presumed intentions, and to the litigation in *Blaisdell*. There is, of course, an element of trust in many contracts involving future performance.⁶¹ But at least on the judgment of Justice Sutherland, the Contracts Clause reflects a judgment on the part of the drafters that in times of severe economic hardship, state legislatures cannot be trusted to not modify important contractual provisions in the name, rightly or not, of the public interest.⁶²

Structurally, this amounts to a sustained distrust on the part of many creditors, as a class, of state legislatures, subject as such legislatures is to debtor groups and their allies asserting a different view of the public interest.⁶³ And structurally, debtors and creditors are unequals, even if differently unequal in economic and in democratic political power. On this understanding, the Contracts Clause was intended to serve as an obstacle to, if not to effectively

53. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

54. *See id.* at 444–48. For general background, see John A. Fliter & Derek S. Hoff, *FIGHTING FORECLOSURE: THE BLAISDELL CASE, THE CONTRACT CLAUSE, AND THE GREAT DEPRESSION* (2012). *See generally* BENJAMIN F. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938).

55. *See Blaisdell*, 290 U.S. at 448 (Sutherland, J., dissenting).

56. *See id.* at 453–65.

57. *Id.* at 453.

58. *Id.* at 465.

59. *See id.* at 447 (majority opinion).

60. *See id.* at 447–48.

61. *See* Skyrms, *supra* note 27.

62. *See Blaisdell*, 290 U.S. at 444–45.

63. *See id.* at 449 (Sutherland, J., dissenting). Note that the Depression-era revision to federal bankruptcy law was not enacted until four years later in 1938. *See* Chandler Act of 1938, ch. 575, 52 Stat. 840 (codified as amended in scattered sections of 11 U.S.C.).

prevent, anticipated breaches of trust between structurally unequal creditor and debtor groups.⁶⁴

B. *The Commerce Clause and Related Contexts*

Judicial trust and distrust of state and local legislatures and other actors is also a theme running, often implicitly, throughout the Dormant Commerce Clause cases.⁶⁵ Consider, for example, the imported baitfish prohibition case of *Maine v. Taylor*.⁶⁶ In this case, the Court declared that “any local discrimination against interstate commerce must be subjected to ‘the strictest scrutiny.’”⁶⁷ The Court noted as well the limited scope for appellate level review of trial court factfinding in such cases.⁶⁸

Strict scrutiny in other contexts, however, does not content itself with finding state interests that count not as compelling,⁶⁹ or overridingly important, but as merely legitimate, or non-invidious.⁷⁰ But the Court in *Maine* instead chose, perhaps sensibly, to ask whether Maine’s partly speculative⁷¹ and otherwise imperfect⁷² justifications for prohibiting baitfish importation were merely legitimate.⁷³ The crucial question was thus whether Maine’s justifications, including its appeal to unique⁷⁴ and fragile⁷⁵ local circumstances, amounted to “merely a sham or a ‘*post hoc* rationalization’”⁷⁶ for a largely protectionist statute.⁷⁷ This is essentially a question of judicial trust of a state legislature.

Thus, while purporting to apply a rigorous standard, the Court in fact applied a relatively trusting and deferential test. This might be explainable, at least in part, by a judicial disinclination to delve into the complications,

64. That there are significant power inequalities between debtor and creditor groups in different political, economic, and judicial venues turns out, on our approach, to be of central interest. See the remainder of Part II for a broader discussion of the crucial linkages between issues of trust and distrust on the one hand and relationships of inequality, of various sorts, on the other.

65. For a brief overview of a typical Dormant Commerce Clause analysis, see, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622–29 (1978).

66. *Maine v. Taylor*, 477 U.S. 131 (1986).

67. *Id.* at 145 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

68. See *id.* at 144–45.

69. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (racial equal protection); *Sable Commc’ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (content-based restrictions of speech).

70. See *Maine*, 477 U.S. at 148–50.

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.* at 151.

75. See *id.*

76. *Maine*, 477 U.S. at 149 (citing *Hughes*, 441 U.S. at 338 n.20).

77. See *id.* at 148–49.

uncertainties, and tradeoffs of Dormant Commerce Clause cases in general.⁷⁸ But there are certainly instances of more rigorous and critical judicial review of states' burdening the free flow of interstate commerce.⁷⁹

Consider, for example, the Court's less trusting response to the motives and intentions underlying the state regulation in *Hunt v. Washington State Apple Advert. Comm'n*.⁸⁰ In *Hunt*, North Carolina had, supposedly in order to prevent retail consumer confusion,⁸¹ prohibited Washington State apple-sellers from displaying the results of their own exceptionally rigorous apple-grading system on closed containers of apples.⁸²

The Court sensibly declared, in light of the record,⁸³ that "we find it somewhat suspect that North Carolina singled out only closed containers of apples . . . when apples are not generally sold at retail in their shipping containers."⁸⁴ This expression of distrust was, however, then diplomatically minimized. The Court thus concluded that "we need not ascribe an economic protection motive to the North Carolina Legislature . . ."⁸⁵ Instead, the Court merely found any assumed consumer protection benefits of the regulation to be outweighed by the burdens on, or discrimination against, interstate commerce.⁸⁶

Thus, whether formally relied upon or not, the Court's distrust of North Carolina's motives in adopting the regulation was expressed only in muted tones. All forms of judicial distrust of legislatures in Dormant Commerce Clause cases crucially involve some assumptions about power relationships and about distinct inequalities thereof. On a standard analysis, Washington State apple growers have far less influence in the North Carolina legislature than does a presumably well-organized in-state lobby of North Carolina apple growers.⁸⁷ Equally importantly, the costs of protectionist legislation of this sort to North Carolina apple consumers, as individuals, are not high enough to overcome the costs of North Carolina consumer organizing and lobbying.⁸⁸

78. These considerations may have played a role in the case of *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), involving the various environmental harms and costs of cardboard as distinct from plastic milk containers. *See id.* at 460–70.

79. *See, e.g., Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981); *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

80. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977).

81. *See id.* at 352, 353.

82. *See id.*

83. *See id.* at 351–52.

84. *Id.* at 352.

85. *Id.*

86. *See Hunt*, 432 U.S. at 353.

87. At a minimum, Washington State apple growers are physically distant, do not vote in North Carolina, may have to divide their lobbying efforts across many states, and do not significantly employ North Carolina residents.

88. The logic of such cases is classically laid out in MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971), as then pursued in MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982). The latter is revisited, re-interpreted, and revised in Todd Zywicki, *Rent-*

At bottom, then, judicial distrust of state legislation in the Dormant Commerce Clause area ultimately refers to inequalities among the affected persons in their political access, in their realistic abilities to meaningfully organize, and in their ability to influence the state legislature in question. In the absence of these underlying inequalities, questions of trust and distrust, including, ultimately, trust of ordinary state residential consumers in their own state legislatures, do not take on anything like their usual significance.

If we now set aside the state regulatory cases involving out-of-staters, we are still left with a number of cases in which the courts have inquired into and determined whether to distrust state legislatures. Historically, consider the Court's distrust of the state's purported health motivated maximum hours regulations in *Lochner v. New York*.⁸⁹ Based in part on what the Court considered an "unreasonable and entirely arbitrary"⁹⁰ account of the worker health rationale by New York, the Court majority chose to distrust such a legislative justification.⁹¹

Thus, the *Lochner* majority declared that the supposed implausibility of New York's legislative health rationale "[gave] rise to at least a suspicion that there was some other motive⁹² dominating the legislation than the purpose to subserve the public health or welfare."⁹³ Here again, and whether misplaced or otherwise unjustified, is judicial distrust of the machinations of state legislatures and of selected more and less powerful interest groups.

The eventual demise of *Lochner*, however, did not result in any broader abandonment of judicial distrust of state regulations favoring entrenched group interests at the expense of less powerful and less organized parties, and of the broader consumer interest. *Lochner* itself specifically refers as well to occupational testing and certification requirements imposed by the state.⁹⁴ As it happens, state occupational training and licensing requirements are frequently imposed,⁹⁵ and have often increased the wages of those persons who have obtained the necessary license.⁹⁶

Seeking, Crony Capitalism, and the Crony Constitution, 23 SUP. CT. ECON. REV. 77 (2016). On this sort of rent-seeking behavior in general, see, classically, Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974), and as updated and expanded in BRINK LINDSEY & STEVEN M. TELES, *THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY* (2017).

89. *Lochner v. New York*, 198 U.S. 45 (1905).

90. *Id.* at 62.

91. *See id.* at 62–63.

92. Presumably, to legislatively influence otherwise voluntary contractual bargaining between bakery workers and their employers. *See generally* PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998).

93. *Lochner*, 198 U.S. at 62–63.

94. *See id.* at 63.

95. *See* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013).

96. *See id.*

Occupational licensing requirements may, however, raise constitutional issues of equal protection, of due process, or of privileges and immunities as allegedly arbitrary barriers to occupational entry by relatively powerless outsiders.⁹⁷ The courts normally accord great deference to legislated occupational restrictions.⁹⁸ But if a court's distrust reaches a certain point, a proper deference requirement "does [not] require courts to accept nonsensical explanations for regulation."⁹⁹

Thus, along the dimension of judicial trust and distrust in such cases, a few courts have recently been willing to find some daylight between a state's purported and its actual motives. In particular, then-Texas Supreme Court Justice Don Willett cited the economist Milton Friedman in the context of occupational licensing.¹⁰⁰ On Friedman's account, "'the justification' for licensing is always to protect the public, but 'the reason' for licensing is shown by observing who pushes for it—¹⁰¹ usually those representing not consumers but vested, already licensed practitioners."¹⁰² The "daylight" between "justification" and "reason" in such cases is a measure of judicial distrust in the legislative and regulatory process, fueled by inequalities in various sorts of political and economic power.

In some cases, judicial distrust of government motive may be more or less well grounded, but not a sufficient basis for judicial intervention. Consider, for example, the Court majority's opinion in the federal Commerce Clause regulation case of *Hammer v. Dagenhart*.¹⁰³ In *Hammer*, Congress addressed what could be called a state-level race-to-the-bottom problem¹⁰⁴ with regard to the practice of child labor. The *Hammer* majority determined, whether reasonably or unreasonably, that Congress had intended "the denial of the facilities of interstate commerce to . . . manufacturers in the States who employ

97. See, e.g., the hand-made casket case involving the Louisiana Embalmers and Funeral Directors Act litigated in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); see also *Ladd v. Real Estate Comm'n*, 230 A.3d 1096 (Pa. 2020) (broker licensing requirements for working as a short-term property manager). For some judicial limitations on the distrust of legislative motive in *Castille*, see *Hines v. Quillivan*, 982 F.3d 266, 274 (5th Cir. 2020) (veterinary telemedicine case).

98. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

99. *Castille*, 712 F.3d at 226 (quoted in *Hines*, 982 F.3d at 274).

100. See *Patel v. Tex. Dep't of Licensing and Regul.*, 469 S.W.3d 69, 92, 104 (Tex. 2015) (Willett, J., concurring). The crucial cite is MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137–60 (1962). For a recent and more specific critique, see ANGELA C. ERICKSON, INST. FOR JUST., BARRIERS TO BRAIDING: HOW JOB-KILLING LICENSING LAWS TANGLE NATURAL HAIR CARE IN NEEDLESS RED TAPE (July 2016), [ij-org/wp-content/uploads/2016/07/Barriers-to-braiding-2.pdf](https://www.ij-justice.org/wp-content/uploads/2016/07/Barriers-to-braiding-2.pdf).

101. Of course, we would expect less consumer group lobbying in general, for reasons classically discussed by Professor Mancur Olson. See OLSON, *supra* note 88.

102. *Patel*, 469 S.W.3d at 104 (citing MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 240 (1980) (emphasis omitted)).

103. *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *rev'd*, *United States v. Darby*, 312 U.S. 100, 115–17 (1941).

104. For background, see John V. Orth, "The Race to the Bottom": *Competition in the Law of Property*, 9 GREEN BAG 47 (2005).

children within the prohibited ages.”¹⁰⁵ The statute was thus thought to be aimed at the production of items within a particular state.¹⁰⁶ More specifically, the congressional statute was thought to “not regulate transportation among the States,¹⁰⁷ but . . . to standardize the ages at which children may be employed . . .¹⁰⁸ within the States.”¹⁰⁹

Even if the *Hammer* majority was correct in distrusting the congressional claim of an intention to regulate interstate commerce, this judicial distrust need not have led to declaring the statute unconstitutional. In this case, the Court might have recognized that even if Congress was concerned more with local conditions of production than with the interstate flow of goods, the statute could still be constitutionally sound. Perhaps any congressional claim to be subjectively concerned about interstate commerce itself was false,¹¹⁰ and thus rightly distrusted. The courts could then still look to whether the regulation, in its actual operation and effects, sufficiently bore upon interstate commerce and was thus within the scope of congressional power.¹¹¹ Judicial distrust need not always determine the case outcome.

C. The Free Speech Cases

At the level of constitutional rights, the most important vector of trust and distrust is often between an individual or group, and government actors and institutions, at any level. In substantial measure, freedom of speech, for example, is a matter of a distrust of government actors and a distrust of the willingness of government actors to voluntarily expose and redress corruption and abuse of government functioning and of the democratic process. Freedom of speech, based on this fundamental axis of distrust, is thus said to provide a “check” on governmental impropriety and abuse of power.¹¹² As Professor

105. *Hammer*, 247 U.S. at 271.

106. *See id.*

107. As Justice Holmes concluded in dissent. *See Hammer*, 247 U.S. at 277, 281 (Holmes, J., dissenting).

108. The majority did not contest the general policy judgment that child labor typically constitutes a significant moral evil, subject to state-level regulation. *See Hammer*, 247 U.S. at 275.

109. *Id.* at 271–72.

110. Understanding the prisoner’s-dilemma quality of a classic race to the bottom is a matter of degree. For a more fully articulate expression of the problem, see Justice Cardozo’s opinion for the Court in the Spending Clause case of *Steward Mach. Co. v. Davis*, 301 U.S. 548, 587–88 (1937) (recognizing the impracticality of state-by-state attempts to adopt even universally desired unemployment compensation systems).

111. Consider, as well, an alternative hypothetical version of the 1964 Civil Rights Act in which Congress claimed to be concerned solely with the free flow of interstate commerce, and not at all with the moral and policy evil of racial discrimination within any given state jurisdiction. The statute could still have been upheld despite any such incredible claim as to intent. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and the companion case of *Katzenbach v. McClung*, 379 U.S. 294 (1964).

112. *See*, classically, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RSCH. J. 521 (1977). Among the major First Amendment cases reflecting distrust

Vincent Blasi observes, for example, “[b]ut for the tradition of a free press, the crimes and abuses of Watergate might never have been uncovered.”¹¹³

More broadly, “[t]he tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present.”¹¹⁴ Freedom of speech, motivated by distrust of government actors, is thus assumed to be essential to competent, non-corrupt, responsive representative democracy. And for our purposes, the relevant inequalities in power between private citizens, or even of individual government “whistleblowers,”¹¹⁵ and hierarchically superior government officials are clear.

Distrust of government motive and intention in restricting the speech of individual, often relatively powerless, actors recur throughout the free speech case law.¹¹⁶ And the Court has of late been especially attuned to the possibility that laws that are formally non-invidious, in the sense of being content-neutral on their face, may actually reflect less worthy motives and intentions of either the legislative drafters, or the later administrators, of the law in question.¹¹⁷

Classically, Justice Holmes recognized the special untrustworthiness of government officials who have only limited interest in exercising the virtue of reasonable and appropriate intellectual humility.¹¹⁸ Justice Holmes classically

of government claims to either innocence or competence, see the Pentagon Papers case of *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

113. Blasi, *supra* note 112, at 527.

114. *Id.* at 529. See also JOHN STUART MILL, *Considerations on Representative Government*, in *ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS* 181, 246, 255, 284 (Mark Philp & Frederick Rosen eds., Oxford University Press 2015) (1861). Mill follows, in this respect, the basic logic of John Locke. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 149, at 78; § 202, at 103 (C.B. MacPherson ed., Hackett Publishing Co., Inc. 1980) (1690). Both Locke and Mill typically, but not always, employ the idea of “trust” in this context in its slightly technical, derived sense of a fiduciary responsibility. Of course, even a technical trust involves the possibility of trust, and of its suspected or actual violation, in more familiar senses. And it also bears mention that in context, neither Locke, nor Mill, as the great champion of freedom of speech, is referring to individual citizen speech in the passages cited above.

115. Consider in particular, the risks of dismissal for individual government employees who address government agency incompetence or corruption under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For an extended critique on free speech grounds, see R. George Wright, *A Democratic View of Public Employee Speech Rights*, 70 *CATH. U.L. REV.* 347 (2021).

116. See, e.g., the allegedly mixed governmental motive case of *United States v. O'Brien*, 391 U.S. 367 (1968). This symbolic speech case, focusing on a prohibition of the intentional destruction of a draft card, involved a clearly legitimate justification for such a prohibition, as well as allegations of official political bias against, and hostility toward, expressions of disapproval of the Vietnam War, or of the military draft itself. See *id.* at 382–86.

117. See the local sign code case of *Reed v. Town of Gilbert*, 576 U.S. 155, 164, 167 (2015).

118. See *Abrams v. United States*, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting). For background on the judicial role of intellectual humility, see R. George Wright, *Epistemic Peerhood in the Law*, 91 *ST. JOHN'S L. REV.* 663 (2017).

declared that “[i]f you have no doubt of your premises¹¹⁹ or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”¹²⁰ As it turns out, though, this speech restriction problem is broader, and worse, than Holmes recognized.

Holmes’s mental image here seems to be of a potentially untrustworthy official, at any level, who adopts logical premises, and then reasons, soundly or unsoundly, to conclusions from those premises. One might question whether this formalistic image accurately reflects the decision making of contemporary speech-restrictive officials. But even if Holmes’s depiction is accurate, there remains an important question regarding trust and the scope of freedom of speech.

Briefly put, some officials may restrict speech in the belief that there is some reasonably ascertainable objective truth of the matter, and that those officials are closer to that objective truth than are those speakers that are to be punished or otherwise restricted. Much of classical, historic religiously-based and ideologically-based censorship of speech would have fit this pattern.¹²¹ Distrust of officialdom in this context by potential speakers led to historically familiar forms of private evasion.¹²²

But especially over roughly the last century, the idea of any reasonably ascertainable objective truth of ethical and political matters has tended to fall out of favor, with a wide range of alternative perspectives taking its place.¹²³ Government officials do not, of course, consciously adopt or reject metaethical theories in the abstract. But they tend, doubtlessly, to somehow reflect the broader academic and popular culture of the day.¹²⁴

119. Or if the official no longer regards premises as subject to any sort of objective truth testing. See R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235 (2019).

120. *Abrams*, 250 U.S. at 630.

121. See, e.g., the account of the *1557–1966 Index Librorum Prohibitum*, FORDHAM UNIV. INTERNET HIST. SOURCEBOOKS PROJECT (Jan. 20, 2020), sourcebooks.fordham.edu/mod/indexlibrorum.asp. Apparently, this Index included the works of John Stuart Mill. See *id.*

122. See, e.g., TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 6 (2d prtng. 1997); ARTHUR M. MELZER, PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING (2017); Paul J. Bagley, *On the Practice of Esotericism*, 53 J. HIST. IDEAS 231 (1992), as well as the strategies more broadly addressed in ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

123. See, e.g., the typologies offered in ANDREW FISHER, METAETHICS: AN INTRODUCTION (Routledge 2014) (2011); ALEXANDER MILLER, CONTEMPORARY METAETHICS: AN INTRODUCTION (2d ed. 2013) (2003); MARK VAN ROOJEN, METAETHICS: A CONTEMPORARY INTRODUCTION (2015).

124. Thus, without endorsing any technical form of intuitionism or of broad natural law, speech-related public policies may just seem obvious, intuitive, in no need of any justification, or simply useful for some similarly assumed further purpose. See generally JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 382 (Harcourt, Inc. 1964) (1953) (practical decision makers as influenced by academic scribblers).

For potential speakers, this general cultural trend presents a problem. On the side of encouraging increasing potential speaker trust in government, there is the theory that as government officials increasingly abandon the idea of pursuing and enforcing an objective truth, the perceived stakes for governors will tend to diminish over time. If, in the extreme case, it eventually becomes a matter of something like merely an official preference for vanilla and a dissident preference for chocolate, perhaps officials could be trusted not to respond with increasingly fervent, militant implacability. If the stakes are, objectively, minimal to non-existent, the motivational logic of speech-persecution by government would seem to largely collapse.

But on the side of increasing potential speaker distrust, there is the possibility that with the gradual disintegration of belief by officials in any objective ethical and political standards, there follows as well, a gradual disintegration of any objective ethical limits and constraints on official behavior. An official who believes in the possibility of objectively better and worse policies implicitly grants the possibility of personal fallibility, and of personal error, in an ultimately meaningful sense.¹²⁵ Officials with little interest in the idea of objective standards, however, thereby logically abandon any concern for objectively justifiable limits on their official behavior.

There will of course remain, for all governing officials, practical limits that are based in say, the sheer personal or group political interests the official may choose to adopt. Officials will not wish to act imprudently,¹²⁶ by their own chosen standards. Speakers might find the overall effect of public officials' abandoning any objective standards to be one of disinhibiting the impulses of dominant groups to restrict the speech of subordinated groups. If potential speakers reach or fear that conclusion, the obvious response by such speakers would be one of increasing distrust of the relevant officials.¹²⁷

D. *The Religion Clause Cases*

In a culture of increasing pluralism and fundamental disagreement in matters of religion,¹²⁸ we should expect questions of constitutional-level trust to arise, at least implicitly, with some frequency. And this is what we indeed find.

125. Fallibility in ethical, political, and other forms of judgment is of course a major theme of JOHN STUART MILL, *ON LIBERTY* 75–118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

126. Thus, for example, a particular speech restriction may seem abstractly desirable in an official's judgment, but premature under the circumstances.

127. Again, though, such calculations would have to factor in any likelihood of official repression of speech based on supposedly objective grounds. *See supra* notes 119, 122, and accompanying text.

128. *See, e.g.*, ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* (2010); *U.S. Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), [pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace](https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace). Under these circumstances, distrust in Religion Clause contexts is not limited to historically marginalized groups. *See* ROD DREHER, *LIVE NOT BY LIES: A MANUAL FOR*

In the Free Exercise Clause context, the case law after the *Smith* case¹²⁹ in 1990 has sought to distinguish trust-impairing government regulations, based on religious animus or other invidious motives, from regulations that can be treated as neutral rules of general applicability.¹³⁰ Thus, the *Smith* case majority was willing to enforce “a valid and neutral law of general applicability,”¹³¹ at least in the absence of exceptional circumstances,¹³² despite the rule’s presumably unintended burdening of the free exercise of religion.¹³³

One immediate problem, though, as we have learned from other areas of the law,¹³⁴ is that legislative animus, or invidious intent, may well be hidden behind formally neutral general rules.¹³⁵ Or, at least, so one or more religiously burdened parties may imagine, resulting in their quite genuine distrust of the enacting government.

Consider, for example, the recent case of *Roman Catholic Diocese of Brooklyn v. Cuomo*.¹³⁶ In particular, consider the tone, and not merely the logical substance, of Justice Gorsuch’s concurring opinion.¹³⁷ In the context of COVID-19 social distancing requirements, Governor Cuomo had chosen, in Justice Gorsuch’s view:

[T]o impose *no* capacity restrictions on certain businesses he considers “essential.” And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?¹³⁸

Thus, on Justice Gorsuch’s interpretation of the evidence, “[t]he only explanation for treating religious places differently seems to be a judgment that what happens there¹³⁹ just isn’t as ‘essential’ as what happens in secular

CHRISTIAN DISSIDENTS (2020); ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2017).

129. See *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

130. See *id.* at 879.

131. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)) (Stevens, J., concurring) (quotation marks omitted).

132. See *Smith*, 494 U.S. at 881–84.

133. See *id.* at 890.

134. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)) (inference or non-inference of legislative intent to invidiously discriminate on the basis of race).

135. See, e.g., the equal protection cases cited in *Smith*, 494 U.S. at 901.

136. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

137. See *id.* at 69 (Gorsuch, J., concurring).

138. *Id.* (Gorsuch, J., concurring).

139. What “happens” in religious places could, potentially, encompass psychological and social effects, perhaps not as easily obtained elsewhere, that are of a secular nature.

spaces.”¹⁴⁰ Thus, the possibility of distrust of the government decision making process, and more broadly, of the enacting government.

Of course, it might well be argued that the actual motivation underlying the order in question did not rest on a view of how essential religious gatherings are, by comparison with some or all secular gatherings. The intensity, duration, and intimacy of any social interaction, with respect to virus transmission, might outweigh perceived differences in how essential religious and secular activities might be thought to be.

In general, which entities should be regulatorily placed within some category, or else classified elsewhere, is in part a function of how granular the categorization process is intended to be, and of how sensitive that process should be to possible exceptional cases. There are certainly grounds for making legislative judgments as to proper levels of granularity and number of categories, and proper kinds of context-comparisons, quite apart from government animus toward particular groups.

A government might, in principle, thus detect policy-relevant differences among hundreds of kinds of both secular and religious entities. But the disadvantages of a rule with a hundred distinct classifications are as obvious as those of a rule that treats all facilities, religious and secular, as indistinguishable. Which particular religious facilities are most relevantly comparable with which kinds of secular facilities, narrowly or broadly described, will thus inevitably be a matter of judgment. Treating like cases alike, and unlike cases unlike,¹⁴¹ requires controversial judgments as to the most relevant and significant similarities and differences.¹⁴²

Thus, one might object to the classifications in the *Roman Catholic Archdiocese of Brooklyn* case on methodological and policy grounds, entirely without invoking a claim of discrimination or animus on the basis of religion. But distrust in the realm of the Free Exercise Clause and the Establishment Clause need not be well-grounded in order to be real, intense, or widespread. And distrust of a government decision-maker in religious contexts can certainly precede, and contribute to the general background of, any new rule by that government decision maker.

It might be argued that in some Free Exercise, Establishment Clause, and other kinds of cases the objectors cannot plausibly claim to be outsiders, subordinate groups, or less than equal, in the relevant respects, to the crucial decision-making groups.¹⁴³ There may be many cases in which groups that are

140. *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

141. See ARISTOTLE, *Book V*, NICOMACHEAN ETHICS 87–99 (Roger Crisp 2d ed., Cambridge University Press 2014) (~350 BCE).

142. See *id.*

143. See, e.g., *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring); *Fulton v. City of Philadelphia*, 922 F.3d 140, 153–44 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021) (licensed private religious foster care agency and enforcement of the City’s policy of requiring non-discrimination on grounds of sexual orientation); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (local Christian adoption agency and sexual orientation non-discrimination requirement).

harmed by, and groups that are favored, by an official rule can both plausibly claim to hold less than equal power in a relevant respect, on their own criteria. Power inequalities in this sense can be reasonably disputed, rather than obvious and incontestable. In some cases, these relative status disputes may actually be central to the merits of the case. Whether one feels alienated, or an outsider, or less than equal, may reflect not only the present regulation, but pre-existing distrust.

Perhaps even more important, though, is that claims as to power inequalities need not be well-grounded, or even widely plausible, in order to be genuine, unfeigned, and of practical importance. Degrees of trust and distrust reflect the perceptions of the groups concerned, rather than some more presumably accurate set of perceptions not actually held by the parties in question.¹⁴⁴ Trust may thus be deserved, but not extended, or undeserved, but extended nonetheless.¹⁴⁵

The dynamics of distrust, and of actual and perceived relevant power inequalities, are on display in many of the Establishment Clause cases. Consider, for example, the familiar Christmas holiday display case of *Lynch v. Donnelly*.¹⁴⁶ *Lynch* involved the display of publicly owned holiday-related items on privately owned land in a downtown retail shopping district.¹⁴⁷ Among, but not exhaustive of, the display items were “a Santa Claus house,¹⁴⁸ reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree,¹⁴⁹ carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads ‘SEASONS GREETING,’ and [a] creche at issue here.”¹⁵⁰

With regard to longevity, the creche scene in question had been annually displayed for 40 years.¹⁵¹ As to conspicuousness, the figures of the infant Jesus,

144. These circumstances may involve what has historically been referred to as false consciousness. *See, e.g.*, HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 32 (2d ed. 1991). And a group may distrust a regulation, whatever the motives behind the regulation, that actually advances the group’s crucial interests over the long term.

145. *See id.*; Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 312 (1987) (distinguishing between “justified and unjustified alienation” in the Endorsement context).

146. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

147. *See id.* at 671.

148. One might well wonder whether a Santa Claus figure, based presumably on Saint Nicholas, should be treated as an at least partially sectarian, or non-universally endorsed, religious figure, as opposed to being part of an uncontroversial background to a religiously distinctive creche.

149. *See id.* One might also think of a Christmas tree as adding, to some degree, to the distinctively religious elements of the display, as opposed to neutralizing, or diluting, such religious elements.

150. *Lynch*, 465 U.S. at 671.

151. *See id.* A long history presumably tends to reduce the likelihood that a display is a conscious strategic move in an ongoing contemporary culture war. On the other hand, the entrenched status of a display may itself foster distrust and alienation.

Mary, Joseph, angels, shepherds, sojourning magi, and accompanying animals ranged in height from five inches to five feet.¹⁵²

Let us set aside the question of whether the Santa Claus and the Christmas tree could be perceived as sectarian rather than as religiously neutral. Perhaps equally religious displays can be unequal in how threatening they are. And let us also assume that the display was intended to promote, and had the primary effect the promoting, a generally festive holiday ambience, and attracting children and their parents to do holiday shopping in the downtown commercial retail district. In fact, the City's announced intention was "to celebrate the Holiday and to depict the origins of that Holiday."¹⁵³ But this announced purpose, while downplaying any commercial intent, may also seem to some observers to push the limits of what should count as a secular purpose.

Under the *Lynch v. Donnelly* circumstances, it would certainly be reasonable for a religious non-adherent to wonder whether the inclusion of the creche scene, as merely one element of the overall display, is likely to be necessary to the City's furthering of any legitimate secular purpose, commercial or otherwise. Suppose all the presumably unobjectionable elements of the display were left in place. Would the absence of the creche itself undermine the holiday or commercial message? Or would the removal of the creche itself likely be so conspicuous and controversial as to undermine the City's intended purposes?

Suppose that the City had, during an initial stage of litigation, opted to remove the creche. How might reasonable and informed spectators respond to such a decision? Would they see such a move as motivated by a spirit of inclusiveness and the welcoming of non-believers, such as to contribute toward the building of reasonable trust? Or might they instead see a removal of the creche, under threat of litigation, as the City's merely strategic move, actually intended to maximize the religious impact of the display given a feared adverse judicial case outcome, thereby further enhancing distrust of the City and its motives?¹⁵⁴

In terms of doctrine, then, the question in *Lynch v. Donnelly* is whether the display must be religiously "narrowly tailored," or no more perceivably religious than is necessary to achieve a legitimate secular purpose.¹⁵⁵ Justice Brennan's dissenting opinion concludes, in this respect, that the City's legitimate secular interests "are fully served by the elaborate display of Santa Claus,¹⁵⁶ reindeer, and wishing wells that are already a part of [the] annual

152. *See id.*

153. *Id.* at 681.

154. Relatedly, "[n]o matter what subsequent steps are taken to dissociate the governmental unit from the . . . religious speech or symbol, the courts can always point to whatever endorsement may have occurred prior to that dissociation." Patrick M. Garry, *When Anti-Establishment Becomes Exclusion: The Supreme Court's Opinion in American Legion v. American Humanist Association and the Flip Side of the Endorsement Test*, 98 NEB. L. REV. 643, 671 (2020).

155. *See Lynch*, 465 U.S. at 694, 699 (Brennan, J., dissenting).

156. Assuming perhaps that Santa Claus is not perceived as, or at least not claimed by challengers to be, a religious figure.

Christmas display.”¹⁵⁷ And this claim, however unavoidably speculative,¹⁵⁸ might have turned out to have been correct.

But realistically, any judgments, judicial or otherwise, as to complex legislative motives and purposes, and the likely effects of hypothetical changes in displays, will mean that trust and distrust will often drive the public’s perceptions and expectations. The further choice to bring, settle, or not bring an Establishment Clause challenge in a given case may then have its own ramifications for trust and distrust among the relevant parties.¹⁵⁹

E. The Equal Protection Clause Cases

The themes of trust and distrust, given the perceptions and the realities of relevant power inequalities, pervade many areas of constitutional law.¹⁶⁰ But these themes play out nowhere more importantly than in the Equal Protection Clause cases.

In the equal protection cases, distrust among the parties is again often mutual, if not equal in scope, justifiability, or intensity. Distrust may stem from the face of a policy, from its announced or perceived intent, from the practical consequences of a policy, or from the administration of the policy. Any relevant historical background may be crucial.

Consider first Justice Thurgood Marshall’s concurring opinion in the peremptory jury challenge case of *Batson v. Kentucky*.¹⁶¹ Justice Marshall reported that “[a]n instruction book used by the prosecutor’s office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate ‘any member of a minority group.’”¹⁶² Justice Marshall also recognized the possibility of unconscious bias, beyond sheer dishonesty, in accounting for racialized peremptory challenges.¹⁶³ If even unconscious racial

157. *Lynch*, 465 U.S. at 699–700 (Brennan, J., dissenting).

158. *See supra* text accompanying notes 152–53.

159. For instances of judicial, as distinct from objecting party, distrust of the government’s purported motive and intent in religious display cases, see, for example, the Ten Commandments on classroom walls case of *Stone v. Graham*, 449 U.S. 39, 40–42 (1980) (per curiam); *Glassroth v. Moore*, 335 F.3d 1282, 1296–97 (11th Cir. 2003) (citing *Stone*).

160. For example, matters of trust and distrust, and of power inequalities, have long been central in the Second Amendment arms context. The leading *Heller* case declares that “the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right . . . was codified in a written Constitution.” *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); *id.* at 598 (“fear that the Federal Government would disarm the people . . . was pervasive in Antifederalist rhetoric”) (quoted in *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010)). For discussion, see *Mance v. Sessions*, 896 F.3d 699, 712 (5th Cir. 2018) (per curiam) (Owen, J., concurring); *see also* John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-the-second-amendment.html.

161. *Batson v. Kentucky*, 476 U.S. 79, 102–04 (1986) (Marshall, J., concurring).

162. *Id.* at 104 (Marshall, J., concurring) (citation omitted).

163. *See id.* at 106 (Marshall, J., concurring). For further development, see *Miller-El v. Dretke*, 545 U.S. 231, 250–45 (2005).

bias is perceived to be frequent or systematic, grounds for distrust of the jury selection process will naturally be present.

Often, the judicial system has reacted to reasonable distrust in the peremptory challenge context by making matters worse. As African Americans express their obviously well-founded distrust of the jury selection process on voir dire, such expressions of systemic distrust are in effect held against them in the use of peremptory challenges, in Kafkaesque fashion.¹⁶⁴ Courts have thus held, on a perverse sort of logic, that “[a] prospective juror’s distrust of the criminal justice system is a race-neutral basis for his excusal.”¹⁶⁵

Potential jurors who are not African American or another minority might, to some degree, be aware of relevant racial biases, and thus themselves come to distrust the racial fairness of the system.¹⁶⁶ Treating distrust of the racial fairness of the system as therefore a racially neutral reason for exercising peremptory challenges,¹⁶⁷ however, is unrealistic. There is a difference between what we might call first-order experience of discrimination, and second-order such experience. To many Caucasians, awareness of the relevant biases comes at one remove, at a more abstract, distanced, derivative level.

These very different sorts of awareness are inextricably linked to differences in racial histories and experiences. At the extreme, the general Caucasian experience in the context of justice system biases is, ironically, that of actually receiving favorably discriminatory treatment. No symmetry of racial experiences is thus possible. To deny racial linkages and disparities in this context is to deny real differences in lived experience.¹⁶⁸ Suspicion and distrust in this context are thus hardly race-neutral grounds for the exercise of peremptory challenges.

The peremptory challenge context is of course merely an example of the role of mutual distrust, power disparities, and inequalities in the equal protection cases. Dimensions of distrust are also conspicuous in racial and ethnic equal protection cases such as, famously, *Korematsu v. United States*.¹⁶⁹ The World War II-era exclusion of persons of Japanese ancestry from designated military areas¹⁷⁰ required no individualized evidence of disloyalty.¹⁷¹ The exclusionary

164. See, e.g., FRANZ KAFKA, *THE TRIAL* (Mike Mitchell trans., Oxford University Press 2009) (1925).

165. *People v. Clark*, 261 P.3d 243, 291 (Cal. 2011) (citing California authority).

166. As one prosecutor explained the logic, an announced “distrust of the police,” and a refusal to listen to police officer witnesses invites a challenge based not on race or ethnicity, but “on that person’s personal views.” *State v. Holmes*, 221 A.3d 407, 416 (Conn. 2019). The court in *Holmes* upheld this approach to what should count as a race-neutral peremptory challenge. See *id.* at 421.

167. See the authorities cited *supra* notes 164–65.

168. See *id.*

169. *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943).

170. See *Korematsu*, 323 U.S. at 215–16.

171. See *id.* at 216.

orders were instead based solely¹⁷² on official distrust of unspecifiable members of a specific racial and ethnic group.¹⁷³ Official distrust in such cases inevitably invites a broader distrust in response.¹⁷⁴

Distrust, however, is more typically expressed and engendered without the unequivocally explicit classifications in *Korematsu*. Famously, the racial marriage case of *Loving v. Virginia*¹⁷⁵ involved a state statute that in some respects¹⁷⁶ involved formal equality.¹⁷⁷ The racially hostile assumptions underlying the statute were nonetheless clear from history and circumstances.¹⁷⁸ Creative state rationalizations may have little impact on distrust that is grounded in accumulated cultural experience.

Relatedly, inequalities on the basis of gender may also reflect historical attitudes and arrangements that cannot plausibly be negated by even the most ingenious after-the-fact official rationalizations. In *United States v. Virginia*,¹⁷⁹ the Commonwealth of Virginia sought to defend the traditional single-sex status of the Virginia Military Institute as part of an official effort to promote diversity in educational opportunity.¹⁸⁰ The Court found such rationalizations to be implausible.¹⁸¹ In general, creative but anachronistic justifications of officially sanctioned inequalities do not tend to enhance trust on the part of the historically disfavored parties.

As well, distrust may reflect not any objection to a facially non-discriminatory policy itself, but instead, perceptions of the administration of the policy as, in practice, evidently biased against subordinated groups. Thus in the classic racial and ethnic discrimination case of *Yick Wo v. Hopkins*,¹⁸² the focus was not on the text of the building fire safety policy, or even on the intent of its enactors,¹⁸³ but on the apparent, and statistically quite unlikely, racial and ethnic disparities in granting administrative variances and exemptions from a restrictive general rule.¹⁸⁴ Distrust on the part of subordinated groups, importantly, is not confined to contexts, such as in *Yick Wo*, in which the

172. *See id.* at 217.

173. *See id.* at 218–19 (repeatedly citing official suspicion of group-membership based disloyalty). For background discussion, see Dean M. Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72 (1996).

174. Consider also the likely reciprocal distrust engendered by immigration “survey” practices that may reasonably be perceived as coercive and designed to intimidate, as in *INS v. Delgado*, 466 U.S. 210 (1984) (factory sweep by INS agents, with agents stationed at all exits).

175. *Loving v. Virginia*, 388 U.S. 1 (1967).

176. *See id.* at 11 (noting the statutory concern only for marriages involving white persons).

177. In the trivial sense that both black and white partners could be subject to penalty in any given case. *See id.* at 9–10.

178. *See id.* at 9–11.

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

180. *See id.* at 534–40.

181. *See id.* at 534–36.

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

183. *See id.* at 373.

184. *See id.* at 373–74.

statistical patterning of outcomes practically rules out any explanation based in random chance.¹⁸⁵ Distrust can certainly be founded on less egregious patterns of rule enforcement.

Group distrust may be based as well on any invidious consideration that might help explain the official adoption of a policy. The Court has recognized a number of such considerations in the context of potentially inferring racially discriminatory intent underlying a given policy.¹⁸⁶ In *Village of Arlington Heights*,¹⁸⁷ the Court recognized that legislatures are often motivated by several distinct values and purposes in adopting legislation.¹⁸⁸ Courts, and by extension, private parties may, in potentially inferring official hostility, look to a rule's impact in practice.¹⁸⁹ Patterns of enforcement, as in *Yick Wo*,¹⁹⁰ may also suggest hostile intent.¹⁹¹ History, including prior government policies, may certainly be revealing.¹⁹² Contemporary events and circumstances may also be relevant in assessing possible legislative hostility,¹⁹³ as may substantive¹⁹⁴ and even procedural¹⁹⁵ departures by the enacting government from the typical legislative practice.

The *Village of Arlington Heights* case thus provides a partial¹⁹⁶ catalog of the considerations that a subordinated group in particular might take into account in determining the appropriate degree of trust, or distrust, to extend to a particular government policy, toward a government agency itself, or even to the overall governmental regime.¹⁹⁷

More generally, questions of official animus are plainly central to trust and distrust at the constitutional level. Lack of trust that is based on well-meaning, but incompetent, official performance¹⁹⁸ is certainly understandable. But lack of trust based on perceived official or popular animus, or group-based hostility,¹⁹⁹ is typically deeper and more visceral. Incompetence, if not corruption, may seem either curable or incurable. But sheer general animus

185. For background, see MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS (2d ed. 2010).

186. See *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977).

187. See *id.*

188. See *id.* at 265–66.

189. See *id.* at 266.

190. See *supra* text accompanying notes 181–83.

191. See *Arlington Heights*, 429 U.S. at 266.

192. See *id.* at 267.

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.* at 268.

197. For recent applications of the *Arlington Heights* factors, see, e.g., *N.C. State Conf. NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020); *Ramos v. Wolf*, 975 F.3d 872, 896–97 (9th Cir. 2020); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1225–26 (11th Cir. 2020); *Mensie v. City of Little Rock*, 917 F.3d 685, 689 (8th Cir. 2019).

198. See *supra* note 20 and accompanying text.

199. See O'NEILL, *supra* note 19 and accompanying text.

may seem, ordinarily, to be less subject to change.²⁰⁰ As the recent cases²⁰¹ and the academic commentary²⁰² tend to recognize, questions of official animus are often difficult to fully analyze, let alone effectively address. In a few contexts, accusations of animus may expose untrustworthiness, and may also, justifiably, or unjustifiably, engender further distrust.²⁰³

CONCLUSION

A constitutional regime's basic stability and effectiveness depends upon appropriate trust and distrust. Trust by relevant parties, of deserving recipients, in proper contexts and degrees, is required for governmental efficiency, for meaningful social solidarity, and for general cultural flourishing.

Based partly on our own personal experiences with trust among private parties, we can all have some initial idea of what circumstances contribute to trust in the higher-level constitutional context. These circumstances include a lack of corruption, "procedural fairness, (economic) performance, inclusive institutions, and socialization."²⁰⁴ When these circumstances obtain, and when deserved trust exists, the constitutional order and the broader legal and political culture are generally better off.

As we have seen, issues of trust and distrust in the constitutional cases are inseparable from relationships of inequality among the relevant parties. But the empirical research as to relationships between trust and distrust on the one hand,

200. We can imagine, in theory, genuine repentance, accompanied by a dramatic voluntary act of substantial and genuine self-sacrifice, thereby restoring trust. But this process of dramatic self-sacrifice and thereby restored trust seems relatively rare.

201. See, e.g., among the recent cases, *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–21 (2018); *id.* at 2433–40 (Sotomayor, J., dissenting) (regarding perceived official hostility on the bases of national origin and religion); *Lowe v. Walbro LLC*, 972 F.3d 827, 835–36 (6th Cir. 2020) (alleged animus on the basis of age); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 945 F.3d 83 (2d Cir. 2019) (alleged religious animus case); *Naumovski v. Norris*, 934 F.3d 200 (2d Cir. 2019) (alleged sex-based animus case); *Hu v. City of New York*, 927 F.3d 81 (2d Cir. 2019) (alleged race-or-ethnicity-based animus case).

202. See, e.g., WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017); William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155 (2019); Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195 (2019); Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018); Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014); see also the recent exchange between Steven D. Smith, *Objective Animus?*, 71 FLA. L. REV. F. 51 (2020) and William D. Araiza, *Objectively Correct*, 51 FLA. L. REV. F. 68 (2020).

203. See *Trump*, 138 S. Ct. at 2392; *Lowe*, 972 F.3d at 827; *Congregation Rabbinical Coll.*, 945 F.3d at 83; *Naumovski*, 934 F.3d at 200; *Hu*, 927 F.3d at 81.

204. Tom W.G. van der Meer, *Political Trust and the "Crisis of Democracy,"* OXFORD RSCH. ENCYCLOPEDIAS (Jan. 25, 2017), <https://oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-77>. See also *supra* note 15 and accompanying text.

and the various forms of inequality on the other,²⁰⁵ is unclear in its implications. Inequalities of power, in one form or another, are clearly often central to relationships of trust and distrust.²⁰⁶ But inequality, as either a cause, or as an effect, of trust or distrust is currently under debate.

Thus it has been argued that “trust depends upon a supportive political culture and especially on a base of economic equality.”²⁰⁷ But it is also claimed that “we have little evidence that a country which increases its level of redistribution will become more trusting.”²⁰⁸ Perhaps a key line of causation is that “people need to trust the government [in order] to support more government.”²⁰⁹ But it is also claimed that “large increases in political trust . . . have negligible effects on support for redistribution.”²¹⁰

In the absence of a broad, inclusive trust, it should hardly be surprising that narrow, exclusive, and limited trust relationships ordinarily assume a greater role.²¹¹ In some cases, these more narrow and perhaps parochial trust

205. For discussion of the important basic diverging approaches to distributive inequalities in resources, opportunities, well-being, rights, utility, and other dimensions, see R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQ. 1 (2016). For an economic overview, see Edward L. Glaeser, *Inequality*, (July 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=756889.

206. See, e.g., Katherine Jane Hawley, *Trust, Distrust, and Epistemic Injustice*, in ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 69, 69 (Ian J. Kidd et al. eds., 2017); Alexa Weiss et al., *Trust in Everyday Life*, 121 J. PERSONALITY & SOC. PSYCH. 95 (2021); Russell Hardin, *Distrust: Manifestations and Management*, in DISTRUST 13 (Russell Hardin ed., 2004). Ordinarily, we would expect that A’s dominance over B would reduce the likelihood of B’s betraying, in any detectable way, any genuine trust that A reposes in B. Thus, one possible, if broadly undesirable, political strategy, other than cultivating trust through genuinely trustworthy behavior, is to seek dominance.

207. ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 218 (2002); see also Bo Rothstein & Eric M. Uslaner, *All for All: Equality, Corruption, and Social Trust*, 58 WORLD POL. 41, 42 (2005); Eric M. Uslaner & Mitchell Brown, *Inequality, Trust, and Civic Engagement*, 31 AM. POL. RSCH. 1, 2 (2003) (“Inequality leads to lower levels of trust.”).

208. KEVIN VALLIER, *TRUST IN A POLARIZED AGE* 183 (2021).

209. Marc J. Hetherington & James A. Husser, *How Trust Matters: The Changing Political Relevance of Political Trust*, 56 AM. J. POL. SCI. 312, 312 (2012). On this assumption, “[t]rust’s impact . . . should be influential for those policies concentrating benefits on a political minority while imposing perceived or real costs on a majority.” Marc J. Hetherington & Suzanne Globetti, *Political Trust and Racial Policy Preferences*, 46 AM. J. POL. SCI. 253, 254 (2002); see also Thomas J. Rudolph & Jillian Evans, *Political Trust, Ideology, and Public Support for Government Spending*, 49 AM. J. POL. SCI. 660, 669 (2005) (“[D]eclining trust may . . . erode public support for distributive spending.”).

210. Kyle Peyton, *Does Trust in Government Increase Support for Redistribution? Evidence from Randomized Survey Experiments*, 114 AM. POL. SCI. REV. 596, 600 (2020). Perhaps the degree to which redistribution is earmarked explicitly for one or more identifiable groups, among other credible potential recipients, may have some effect on resulting trust.

211. See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1460 (2005) (referring to exclusionary and discriminatory narrow trust affiliations); Claire A. Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1720 (2006) (“[P]reestablished interpersonal trust relationships can stand in the way of those seeking a more open and egalitarian society.”);

relationships may be largely defensive in character. In other cases, though, the narrower and more parochial expressions of trust may instead reflect an unjustified failure of empathy or solidarity.²¹²

Despite the complications and uncertainties, though, important lessons can be drawn from reflecting on trust and distrust in the constitutional cases. The various forms of distrust and inequality in constitutional contexts manifest what Professor Michael Sandel has described as our “separate ways of life.”²¹³ Our largely separate ways of life in turn reflect, and perpetuate, basic inequalities.

As a first step toward an enhanced degree of appropriate trust, governments would do well to demonstrate reduced levels of apparent corruption, and greater degrees of general efficiency, competence, and broad benevolence.²¹⁴ On that basis, some greater degree of broader public trust might then be possible. With that broader trust, a greater sense of solidarity, or of broad community,²¹⁵ might then also be possible. And solidarity, or genuine community, is often itself a deep, meaningful, and fulfilling manifestation of basic equality among persons.²¹⁶

Uslaner & Brown, *supra* note 207, at 4 (“Particularized trust is in-group trust at the expense of out-group trust.”); Eric M. Uslaner, *Producing and Consuming Trust*, 115 POL. SCI. Q. 569, 590 (2001) (“[W]hen trust is in short supply, . . . we [may] withdraw into our communities and become particularized trusters.”).

212. See Peyton, *supra* note 210. Actually, there is no guarantee that the loss or absence of broader trust must result in narrower but vigorous trust relationships. While some forms of trust are unavoidable, a life with minimal levels of trust in others is also possible.

213. MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT’S BECOME OF THE COMMON GOOD?* 226 (2020). The problem is not entirely one of mere increasing polarization, but the increasing “distance” among the various poles, and the increasing intensity, implacability, and fervor of the parties across any political spectrum. The specific terms of any increased deserved trust then take on increasing importance.

214. See *Trump*, 138 S. Ct. at 2420–21; *id.* at 2433–40 (Sotomayor, J., dissenting); *Lowe*, 972 F.3d at 835–36; *Congregation Rabbinical Coll.*, 945 F.3d 83; *Naumovski*, 934 F.3d 200; *Hu*, 927 F.3d 81; see also *supra* text accompanying note 203.

215. For background, see SEBASTIAN DE GRAZIA, *THE POLITICAL COMMUNITY: A STUDY OF ANOMIE* (3d ed. 1966); ROBERT A. NISBET, *THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM* (reprint ed. 1969); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). Consider also the French Revolutionary triadic concern not just for liberty and equality, but for broad fraternity as well. See MARQUIS DE CONDORCET, *The Sketch for an Historical Picture of the Progress of the Human Mind*, in *POLITICAL WRITINGS* 1, 100 (Steven Lukes & Nadia Urbinati eds., 2012).

216. See Andreas Teuber, *Simone Weil: Equality as Compassion*, 43 PHIL. & PHENOMENOLOGICAL RSCH. 221, 224 (1982); see also WILLIAM MORRIS, *NEWS FROM NOWHERE AND OTHER WRITINGS* 231, 253 (Clive Wilmer ed., 1993) (defining equality as fraternity). One practical problem in enhancing deserved trust of governments is that governments, unlike some private parties, do not typically engage in trust-building activities such as providing guarantees of performance, or posting performance bonds, or adopting truly merit-based pay, or allowing for the taking of security interests in cases of potential government policy failure, or providing security deposits. Nor does there seem to be any inclination toward reforms of this sort.