

THE SUPREME COURT'S GASLIGHT DOCKET

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The U.S. Supreme Court's new conservative supermajority is gaslighting the American public. This Article takes a systematic look at key cases from the Court's October 2021 Term through the lens of gaslighting. It describes these cases as being part of what it dubs the Court's "gaslight docket," a descriptor that provides a useful and potentially unifying theoretical framework for analyzing and understanding the Court's recent onslaught of rights-diminishing precedents.

*The concept of gaslighting gained cultural purchase in the 1944 film **Gaslight**. Since then, the concept has been the subject of academic and theoretical inquiry. This Article identifies gaslighting in both oral arguments and written decisions of the Court's civil rights cases. It reveals that this gaslighting is transsubstantive, spanning cases involving voting rights, race discrimination, affirmative action, reproductive rights, LGBTQ rights, and the First Amendment's religion clauses.*

Because gaslighting has epistemic dimensions knowledge production and gaslighting are connected gaslighters instill epistemic doubt in their victims as a way to have the gaslighter's production of knowledge "count" and to dismiss as unfounded other understandings of the world. The U.S. Supreme Court is an especially powerful "knower" indeed, it is given the position of ultimate "knower" of the meaning and application of the Constitution. With each case it decides, the Court produces legal knowledge in the form of rules that must be followed in similar subsequent cases.

The results of the October 2021 Term were astounding. Across multiple substantive areas, the Court issued decidedly anti-equality and antidemocratic decisions that threaten the promise of equal citizenship for women, people of color, and LGBTQ people. In so doing, the Court elevated the interests of the white Christian nationalist movement, declaring that those interests are not coequal with the interests of marginalized groups but instead are interests that will be treated as "most favored" by the Court.

After describing the academic literature on gaslighting, the Article applies the gaslighting analytical frame to a sampling of recent Supreme Court civil rights cases. It argues that the gaslighting framework does important work in revealing an alarming trend of privileging white Christian nationalist ideals at the expense of the rights of marginalized communities. It explains why the gaslighting framing matters for civil rights advocates across causes and proposes ways in which movement lawyers and movement judges can expose this oppressive move by the Court, learn from it, and counter it.

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INTRODUCTION

In 2022, the U.S. Supreme Court completed its first full term with a conservative supermajority.¹ The results were astounding. Across multiple substantive areas, the Court issued decidedly anti-equality and antidemocratic decisions that threaten the promise of equal citizenship for women, people of color, and LGBTQ people. In so doing, the Court elevated the interests of the white Christian nationalist movement,² declaring that those interests are not coequal with the interests of marginalized groups but instead are interests that will be treated as “most favored” by the Court.³

There is a plethora of scholarly and popular media commentary about the Supreme Court’s “shadow docket”—a docket on which cases are heard in an expedited fashion without oral argument or the fulsome briefing submitted for cases resolved on the Court’s

1. See Stephen Jessee, Neil Malhotra, & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public*, PROC. NAT’L ACAD. SCIS. June 2022, at 3, <https://www.pnas.org/doi/epdf/10.1073/pnas.2120284119> [<https://perma.cc/6V76-ZMUK>].

2. I use this descriptor as a term of art and adopt American journalist Katherine Stewart’s definition of Christian nationalism as “not a religious creed but . . . a political ideology. It promotes the myth that the American republic was founded as a Christian nation.” See KATHERINE STEWART, *THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM* 4 (2020). I agree with Stewart, who describes the movement as nationalism “because it purports to derive its legitimacy from its claim to represent a specific identity unique to and representative of the American nation.” *Id.* at 5. It is a “‘Christian nationalism’ in deference to the movement’s own understanding of this national identity, which it sees as inextricably bound up with a particular religion.” *Id.* Finally, I agree with and adopt Stewart’s sentiment that “I do not mean to suggest that Christian nationalism is representative of American Christianity as a whole. Indeed, a great many people who identify as Christians oppose the movement, and quite a few even question whether it is authentically Christian in the first place.” *Id.* I add “white” to Stewart’s “Christian nationalism” descriptor because the movement grew out of opposition to racial desegregation and because its current political and judicial agendas are imbued with white supremacist norms. See generally David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court’s Superordination of Whiteness*, 120 MICH. L. REV. 1629 (2022). See Christopher Wiggins, *Leaked Emails Show GOP Lawmaker, Anti-Trans Activists Discuss Holy War*, ADVOCATE (Mar. 23, 2023, 11:24 AM), <https://www.advocate.com/news/north-dakota-anti-trans-emails> [<https://perma.cc/JA2N-WAQ4>] (“Recently leaked emails reveal an alarming coalition of far right-wing extremists, Christian nationalists, anti-trans lobbyists, and elected officials in cahoots, using language rooted in religion to paint Americans at war with the LGBTQ+ community.”).

3. See generally *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 110–11 (2022).

ordinary docket.⁴ The shadow docket is a vehicle through which emergency cases may be resolved without the ordinary briefing or oral argument.⁵ It is a faster and much less public process than the Court's ordinary docket. Its more frequent use in recent years to decide hotly contested legal questions, which in the past were resolved through the more legally robust and public-facing regular docket,⁶ has concerned First Amendment scholars and progressive advocates alike.⁷

This Article describes what it dubs the Court's "gaslight docket," which it contends provides a useful and potentially unifying theoretical framework for analyzing and understanding the Court's recent onslaught of rights-diminishing precedents.

The concept of gaslighting gained cultural purchase in the 1944 film *Gaslight*.⁸ Since then, the concept has become the subject of academic and theoretical inquiry.⁹ This Article identifies gaslighting in the Supreme Court's civil rights cases in both oral arguments and written decisions. It reveals that this gaslighting is transsubstantive, spanning cases involving voting rights, race discrimination, affirmative action, reproductive rights, LGBTQ rights, and the First Amendment's religion clauses.

Section I provides a summary of the academic literature on gaslighting and advocates for the application of a gaslighting analytical frame to U.S. Supreme Court cases. Section II applies the gaslighting analytical frame to a sampling of recent Supreme

4. See, e.g., STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023); William Baude, Foreword, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015); see also Mark Joseph Stern, *Congress Finally Scrutinizes One of SCOTUS's Most Disturbing Practices*, SLATE (Feb. 18, 2021, 6:53 PM), <https://slate.com/news-and-politics/2021/02/supreme-court-shadow-docket-house-hearing.html> [<https://perma.cc/4DS5-LYJC>]; Nina Totenberg, *The Supreme Court and 'The Shadow Docket'*, NPR (May 22, 2023, 5:00 AM), <https://www.npr.org/2023/05/22/1177228505/supreme-court-shadow-docket> [<https://perma.cc/9R8C-TU8Z>]; Jimmy Hoover, *The Supreme Court Is on Recess, but the Shadow Docket Never Sleeps*, NAT'L L.J. (July 28, 2023, 5:25 PM), <https://www.law.com/nationallawjournal/2023/07/28/the-supreme-court-is-on-recess-but-the-shadow-docket-never-sleeps/?slreturn=20231012131612> [<https://perma.cc/UH2M-5K95>]; Zachary B. Wolf, *How Congress Lost Control of the Supreme Court*, CNN (May 13, 2023, 8:15 AM), <https://www.cnn.com/2023/05/13/politics/supreme-court-shadow-docket-what-matters/index.html> [<https://perma.cc/XKV2-SWWX>]; Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, ABA J. (Aug. 20, 2020, 9:20 AM), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny> [<https://perma.cc/Y5JG-CT78>].

5. Stern, *supra* note 4.

6. See Lawrence Hurley, Andrew Chung & Jonathan Allen, *The 'Shadow Docket': How the U.S. Supreme Court Quietly Dispatches Key Rulings*, REUTERS (Mar. 23, 2021, 6:29 AM), <https://www.reuters.com/article/legal-us-usa-court-shadow-video-idUSKBN2BF16Q> [<https://perma.cc/Q76P-UQVG>].

7. See, e.g., Harry Isaiiah Black & Alisha Bannon, *The Supreme Court "Shadow Docket"*, BRENNAN CTR. FOR JUST. (July 19, 2022), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket> [<https://perma.cc/3RUY-RGSM>]; *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket*, *Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Stephen I. Vladeck, Charles Allen Chair in Federal Courts, University of Texas School of Law), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [<https://perma.cc/T8CA-LZUZ>]; see also *Emergency Docket 2022-23*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/emergency/emergency-docket-2022/> [<https://perma.cc/T84C-C5PZ>] (last visited Apr. 5, 2024).

8. See, e.g., Rosemary Erickson Johnsen, *On the Origins of "Gaslighting"*, L.A. REV. OF BOOKS (Mar. 9, 2017), <https://lareviewofbooks.org/article/on-the-origins-of-gaslighting/> [<https://perma.cc/VTG5-T6MG>]; GASLIGHT (Metro-Goldwyn-Mayer 1944).

9. See *infra* Section I.

Court civil rights cases, which this Article contends are representative and illustrative of the Supreme Court's gaslight docket. After engaging in this descriptive work, Section III argues the gaslighting framework does important work to reveal an alarming trend of privileging white Christian nationalist ideals at the expense of the rights of marginalized communities. It explains why the gaslighting frame matters for civil rights advocates across causes and proposes ways in which movement lawyers and movement judges¹⁰ can expose this oppressive move by the Court, learn from it, and counter it.

I. WHAT IS GASLIGHTING?

The term “gaslighting” became part of the American lexicon in 1944, with the release of the psychological thriller film titled *Gaslight*.¹¹ The film's storyline involves a plot by a husband to steal jewels that were bequeathed to his young wife. His plot includes persistent manipulation and lies, in an effort to make his wife think that she has descended into madness; he hopes that she will be institutionalized so that he will have unfettered access to the jewels. Part of his scheme involves turning down the gaslights in the couple's home each time he sneaks to the attic to look for the jewels. When the wife complains about the dimming lights, the husband tells her that it is her imagination—the lights are not dimming at all.

Since the film's debut, gaslighting has come to be understood as manipulation and lies intended to make the victim doubt their capacity, attitude, and/or reality.¹² Gaslighting has also been defined as “a tactic in which a person or entity, in order to gain more power, makes a victim question their reality.”¹³ It functions through the making of false statements by the gaslighter.¹⁴ It is a means of both “psychological and practical control”¹⁵ and can be deployed against single individuals, against groups, and even against an entire nation.¹⁶

It has also become a colloquial, pop-culture term.¹⁷ In 2016, the American Dialect Society voted it the “MOST USEFUL/MOST LIKELY TO SUCCEED” word of the

10. See Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 669–670 (2022) (describing movement judges as those who “develop their democracy-affirming jurisprudence in solidarity with mass social movements” and “work[] toward abolition constitutionalism,” a concept he describes as one that “considers . . . historical principles in conjunction with the means of their implementation and calls on judges to consistently examine the consequences of applying various means to ensure they are rights- and democracy-affirming.”).

11. See Erickson Johnsen, *supra* note 8.

12. See generally Eric Beerbohm & Ryan W. Davis, *Gaslighting Citizens*, 67 AM. J. POL. SCI. 867 (2021); G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFFALO L. REV. 1037, 1088 (2020).

13. Paul-Mikhail Catapang Podosky, *Gaslighting, First- and Second-Order*, 36 HYPATIA 207, 209 (2021) (quoting Stephanie A. Sarkis, *11 Red Flags of Gaslighting in a Relationship*, PSYCH. TODAY (Jan. 22, 2017), <https://www.psychologytoday.com/au/blog/here-there-and-everywhere/201701/11-red-flags-of-gaslighting-in-a-relationship> [https://perma.cc/2EJW-KW9S]).

14. Sinha, *supra* note 12, at 1088, 1091 n.148 (noting that gaslighting includes “repeated denial of true propositions for any number of reasons, including the perceived self-interest of the speaker—not necessarily for the specific purpose of, but at least incidentally, causing the listener to doubt his or her sanity or sense of reality”).

15. Podosky, *supra* note 13, at 207.

16. See *id.*; see also Sinha, *supra* note 12, at 1088–90.

17. See Elena Ruiz, *Cultural Gaslighting*, 35 HYPATIA 687, 687 (2020).

year.¹⁸ While many of the popular culture references to gaslighting focus on interpersonal gaslighting,¹⁹ it also exists at a structural level.²⁰ In its structural iteration, it is a “devastating distraction from oppression.”²¹ For example, gaslighting can work to obscure structural racism:

In America, widespread anti-Black violence is often paired with structural gaslighting. Racism, after all, thrives when blame for its outcomes are misattributed. When Black families are refused loans in criminally discriminatory housing schemes, their credit is blamed. When youth of color are disproportionately stopped and frisked, they are told the process is random and for their safety.

And when Black people are killed by police, their character and even their anatomy are turned into justification for their killer’s exoneration. . . . One analysis . . . found that fewer than half of law-enforcement-related deaths were reported [and that]. . . police actions were further minimized by the use of diagnostic codes that incorrectly labeled the cause of death as “accidental” or “undetermined” rather than police-related. For centuries, our systems have relied on this psychological torture—a host of mental gymnastics—to deny the truth of what Black people have always known. The cause of death is racism.²²

Finally, gaslighting has become the subject of transdisciplinary academic and professional inquiry. Scholarly engagement with the concept of gaslighting in the fields of philosophy, politics, and psychology has revealed a number of principles about the behavior, its contours, and its impact.

A. Psychology

The initial utility of the gaslighting concept was seen in the field of psychology, in the context of intimate interpersonal relationships, most often in opposite-sex relationships in which men used gaslighting to control their female intimate partners and trap them in toxic relationships.²³ Gaslighters intend that their manipulation and deceit will cause their victims to doubt their own realities, senses, and beliefs.²⁴ By denying the

18. Press Release, American Dialect Society, 2016 Word of the Year Is *Dumpster Fire* (Jan. 6, 2017), <https://americandialect.org/wp-content/uploads/2016-Word-of-the-Year-PRESS-RELEASE.pdf> [<https://perma.cc/Y6Q9-SAW6>].

19. See, e.g., Sarah Regan, 28 *Examples of Gaslighting + Phrases To Look Out For*, from *Relationship Experts*, MINDBODYGREEN (June 2, 2023), <https://www.mindbodygreen.com/articles/examples-of-gaslighting> [<https://perma.cc/C2P8-BMDS>].

20. See, e.g., Nora Berenstain, *White Feminist Gaslighting*, 35 *HYPATIA* 733, 734 (2020).

21. Ann Crawford-Roberts, Sonya Shadravan, Jennifer Tsai, Nicolás E. Barceló, Allie Gips, Michael Mensah, Nichole Roxas, Alina Kung, Anna Darby, Naya Misa, Isabella Morton & Alice Shen, *George Floyd’s Autopsy and the Structural Gaslighting of America*, *SCI. AM.* (June 6, 2020), <https://blogs.scientificamerican.com/voices/george-floyds-autopsy-and-the-structural-gaslighting-of-america/> [<https://perma.cc/2357-UHA7>].

22. *Id.*

23. See, e.g., *What is Gaslighting?*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/what-is-gaslighting/> [<https://perma.cc/25D5-B2J2>] (last visited Apr. 5, 2024); Delaney Rives Knapp, Note, *Fanning the Flames: Gaslighting as a Tactic of Psychological Abuse and Criminal Prosecution*, 83 *ALB. L. REV.* 313, 314–15 (2020).

24. *What is Gaslighting?*, *supra* note 23.

reality of negative aspects of the relationship, the victim distrusts her feelings, which are telling her to leave her partner, and she remains in the abusive relationship.²⁵

In the psychology context, framing the perverse dynamics at work in a manipulative interpersonal relationship as “gaslighting” was helpful to expose the dynamic to its victims and to the professionals counseling those victims.²⁶ Having a term to describe this phenomenon was constructive, because having language to name what is happening empowers victims to claim the right to be free of such psychological abuse.²⁷ This lesson about gaslighting from psychology—the importance of naming something before being able to lay blame and make claims—also informs the kind of legal gaslighting described below.

B. Philosophy

There is a rich literature on gaslighting in the field of philosophy. Philosophers have observed that while one goal of gaslighting is to cause its victim to doubt her own perceptions and beliefs, that is not the only goal.²⁸ Rather, the gaslighter also seeks to eradicate even the chance that his victim will question, contradict, or quibble with him.²⁹ The gaslighter thus wishes that his victim comes to endorse the gaslighter’s beliefs and positions.³⁰

In aspiring to have his victim agree with *and adopt* his beliefs and position, the gaslighter’s manipulation is thus an epistemological project. He seeks to rob the victim of her³¹ sense of confidence and autonomy in knowing the world around her; he next works to replace the victim’s own sense of and trust in what constitutes knowledge, with his own ways of knowing and believing.³² As a result, successful gaslighting may sabotage the victim’s capacity to be a self-trusting knowledge creator—to make pronouncements about the world or about experiences in the world.³³ When this happens, the victim must rely on the gaslighter’s construction of knowledge of the world as the victim’s own. For, when one loses trust in one’s own ability to validate one’s experience of the world around them, one’s assertions about the world become meaningless or irrelevant. This is a troubling and dangerous dynamic—the victim has lost her epistemic

25. See, e.g., Aaron Edward Brown, *This Time I’ll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate Partner Violence*, 50 COLUM. HUM. RTS. L. REV. 159, 171–72 (2019).

26. See, e.g., *Gaslighting 101 FAQs To Unpack the Truth About Gaslighting*, INTEGRATIVE PSYCH., <https://integrativepsych.co/new-blog/2022/3/1/gaslighting-101-faqs-to-unpack-the-truth-about-gaslighting> [<https://perma.cc/J49W-CRL9>] (last visited Apr. 5, 2024); Emma Pitts, *Dimming Reality: The Harsh Impact of Gaslighting in Romantic Relationships*, DESERET NEWS (Aug. 12, 2023, 11:00 PM), <https://www.deseret.com/2023/8/12/23794050/gaslighting-in-romantic-relationships-abuse> [<https://perma.cc/AL83-5LEU>].

27. See Shannon B. Dermer, Shannon D. Smith & Korenna K. Barto, *Identifying and Correctly Labeling Sexual Prejudice, Discrimination, and Oppression*, 8 J. COUNSELING & DEV. 325, 327 (2010).

28. See Beerbohm & Davis, *supra* note 12, at 868.

29. See *id.*

30. *Id.* (citing Kate Abramson, *Turning Up the Lights on Gaslighting*, 28 PHIL. PERSPS. 1, 3 (2014)).

31. Victims of gaslighting are more often women than men. See, e.g., Abramson, *supra* note 30, at 3.

32. See Beerbohm & Davis, *supra* note 12, at 868 (citing Abramson, *supra* note 30).

33. See *id.*

ability and confidence in herself as a “knower” because “the practice of assertion carries in tow a claim to a kind of authority.”³⁴

With assertive authority to create knowledge about the world comes power—to both create what is accepted as the reality around us as well as to diminish the victim’s epistemic authority. This, in turn, downgrades the victim’s position from one who is a subject empowered to create and share knowledge and into one who is an object of the gaslighter’s created knowledge.³⁵ In sum, the victim becomes epistemically dependent on the gaslighter.³⁶

The difference between run-of-the mill deceit and gaslighting lies largely in the difference between first-order evidence and higher-order evidence.³⁷ First-order evidence is evidence that goes to the truth or falsity of a proposition.³⁸ Manipulation of first-order evidence makes up the everyday grist of many politicians, who twist the truth or tell outright untruths. But attacks on first-order evidence do not challenge the listener’s capacity to form beliefs or rationally assess such first-order evidence.³⁹ It is not gaslighting. When a listener who has gone along believing a falsehood perpetrated by a politician comes to realize that it is, in fact, false, they can arrive at this realization without coming to doubt their own epistemic authority. The “false beliefs might only say something about the tools you were using or the evidence you had” but will not imply inherently defective rational faculties.⁴⁰

Higher-order evidence, by contrast, touches on one’s *ability to assess* first-order evidence.⁴¹ Higher-order attacks thus go to the core of one’s identity, undermining one’s confidence in one’s judgment, beliefs, processes, and abilities.⁴² Such attacks are gaslighting:

[I]f you learn that your particular belief-forming process was defective, then you have reason to treat the evidence differently than you otherwise would in virtue of facts about you, rather than facts about first-order evidence alone. The gaslighter “claims that the target’s judgments lack credibility” as a result of a “defect in her.”⁴³

The philosophy of language considers gaslighting to be a sociolinguistic event,⁴⁴ in the sense that gaslighting uses language prone to cause the victim to question their ability to interpret the world accurately.⁴⁵ The doubt in one’s interpretive capacity touches on both the ability to interpret facts correctly and the ability to evaluate situations

34. *Id.*

35. *See id.*

36. *Id.*

37. *Id.*

38. Daniel Whiting, *Higher-Order Evidence*, 80 ANALYSIS 789, 789 (2020).

39. *See* Beerbohm & Davis, *supra* note 12, at 868.

40. *Id.* at 868–69.

41. *See id.*

42. *See id.*

43. *Id.* at 868 (citation omitted) (quoting Cynthia A. Stark, *Gaslighting, Misogyny, and Psychological Oppression*, 102 THE MONIST 221, 224 (2019)).

44. *See* Podosky, *supra* note 13, at 209.

45. *See id.*

accurately.⁴⁶ This interpretive fragility undergirds gaslighting: “For people to be gaslit, they must form negative attitudes about their attitude-forming mechanisms.”⁴⁷

Philosophy’s approach sheds light on the dynamics of gaslighting by using the concepts of “first-order” and “second-order” gaslighting.⁴⁸ In first-order gaslighting, the perpetrator and victim both agree that a particular concept is at issue; the dispute is whether the shared concept applies to a particular circumstance.⁴⁹ Sexual harassment may be used to demonstrate this idea.⁵⁰ First-order gaslighting occurs when the victim of alleged sexual harassment and the person with whom she is discussing her experience both agree that “sexual harassment” is the correct concept to use in assessing the allegedly harassing incident.⁵¹ The dispute is whether the conduct rises to the level of the shared concept of “sexual harassment.”⁵² Thus, the victim does not come to doubt her ability to choose an accurate concept with which to order and assess her lived experiences.

Second-order gaslighting, in contrast, involves a dispute over *which* concept applies to a particular situation.⁵³ When a gaslighting perpetrator expresses to his victim that the concept she invokes to make sense of a given situation is incorrect, she “come[s] to doubt her interpretive abilities, not merely her understanding of the event.”⁵⁴ Gaslighting thus aims to undermine one’s intellectual self-trust.⁵⁵ Again, sexual harassment provides an example: When a woman describes an incident as sexual harassment to a man and he responds, “That’s not sexual harassment. It’s so trivial,” that is an instance in which the two do not agree on the applicable concept.⁵⁶

By causing the victim to doubt her capacity to rationally react to first-order evidence, the central feature of gaslighting “is the idea that its victim[’s] rational faculties have been captured in a distinctive way.”⁵⁷ Gaslighting thus causes its victim to doubt her own epistemic authority, to question her position as someone whose assertions merit epistemic weight.⁵⁸ Successful gaslighting therefore hinges, at least in part, on the

46. *See id.*

47. *Id.*

48. *Id.* at 208. Podosky defines “first-order gaslighting” as occurring “only if (i) a gaslighter and the subject of gaslighting aim to coordinate on a presupposed shared concept, but where (ii) the gaslighter’s use of words is apt to cause the subject of gaslighting to doubt her interpretive abilities, and (iii) this is *not* due to the subject of gaslighting doubting the accuracy of her concept.” *Id.* at 215–16.

49. *See id.* at 213.

50. *See id.* at 208, 213.

51. *Id.*

52. *Id.*

53. *Id.* Podosky again uses sexual harassment to illustrate the idea.

54. *Id.* at 209. Podosky defines second-order gaslighting as occurring “only if (i) a gaslighter and the subject of gaslighting *do not* aim to coordinate on a presupposed shared concept and where (ii) the gaslighter’s use of words is apt to cause the subject of gaslighting to doubt her interpretive abilities (iii) *owing* to the subject of gaslighting doubting the accuracy of her concept.” *Id.* at 216–17.

55. *See id.* at 209.

56. *Id.* at 208.

57. Beerbohm & Davis, *supra* note 12, at 868.

58. *Id.* (“Whether you enjoy authority within a practice of assertion depends on your judgments about your own capacities. Although you might doubt your beliefs, you will not be driven to question your authoritative standpoint as long as your confidence in your belief-forming capacities remains intact.”).

interplay of identity and marginalization: “[W]hether a gaslighting speech act would challenge my epistemic agency depends on indexical facts—who *I am* affects how the utterance affects me.”⁵⁹

Those with marginalized identities—such as women, people of color, and LGBTQ people—whose sanity, ability, and humanity have long been questioned, policed, and punished, are often uniquely susceptible to gaslighting.⁶⁰ As Professor Paige Sweet explains, “‘gaslighting is effective when it is rooted in social inequalities, especially gender and sexuality, and executed in power-laden intimate relationships.’ Intersecting inequalities may amplify these effects, suggesting that ‘women of color, poor women, immigrant women,’ and others may be especially vulnerable to gaslighting.”⁶¹

One harm of gaslighting is “testimonial injustice.”⁶² This occurs when the gaslighting listener declares a speaker not credible because of identity prejudice about the speaker.⁶³ This situation is compounded when the listener is in a position of power, which gives such gaslighters unique leverage; their gaslighting is amplified by their authority in ways that “demand they be treated with unjustified degrees of credence.”⁶⁴

Recognizing and focusing on second-order gaslighting brings to the forefront of our analysis what might otherwise be considered unintentional gaslighting and makes it explicit as a form of injustice.⁶⁵ By centering *conceptual* disputes, second-order gaslighting provides a lens for considering Supreme Court gaslighting. For example, where advocates of the right to abortion see and “know” a fundamental right to privacy and bodily autonomy that protects choices about reproductive health care, the Court disputes that conceptual foundation.⁶⁶

Philosophers also contend that gaslighting can be structural, creating and maintaining status hierarchies that are hidden to most observers by the gaslighting itself.⁶⁷ This Article contends below that the Supreme Court gaslighting is disproportionately directed to those groups that are structurally and interpersonally vulnerable due to their position within unequal status regimes.

59. *Id.* at 869.

60. *Id.*

61. *Id.* (quoting Paige L. Sweet, *The Sociology of Gaslighting*, 84 AM. SOCIO. REV. 851, 852, 856 (2019)).

62. Abramson, *supra* note 30, at 17 (quoting MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 21 (2007)).

63. *See id.*

64. *Id.* at 21.

65. *See* Podosky, *supra* note 13, at 217 (“[W]hen a gaslighter challenges a concept, the challenge *implicitly* carries the assumption that the concept in question is wrong, and needs improvement. . . . [T]his does not involve an explicit intention to cause another to doubt their interpretive abilities.”).

66. *See, e.g.,* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

67. *See* Berenstain, *supra* note 20, at 734.

C. *Politics*

While gaslighting first appeared in the psychological literature beginning in the late 1960s,⁶⁸ more recently, some commentators⁶⁹ and political scientists have asserted that it is useful to consider gaslighting a political phenomenon.⁷⁰ In this context, gaslighting is not an interpersonal dynamic. Instead, it “operates as a higher-order attack” that poses a unique threat and imperils democratic citizenship.⁷¹ This is an example of the gaslighting phenomenon moving from the personal realm to a larger, systemic realm.⁷² Professors Eric Beerbohm and Ryan Davis have explained the phenomenon in this way: “A political actor wrongly induces a group of citizens to limit the exercise of their belief-forming and revising capacities in ways that serve the political ends of the gaslighter, in order to [make] the group[] epistemically reliant on the gaslighter.”⁷³

Another scholar defines political gaslighting as “trafficking in dubious or outright false information about matters of public significance by a politician or political apparatus when the speaker knows or should reasonably know that the information is likely to be incorrect, and the audience has a reasonable basis for doubting the speaker’s claims.”⁷⁴ Intention to make the listener doubt their own sanity is not required. Rather, a gaslighter just needs to “be engaged in the trafficking of misinformation recklessly if not knowingly, and with the suggestion that the information is or could well be true.”⁷⁵

Political gaslighting is similar to interpersonal gaslighting in that its victims “do not just defer to elites on a single issue, but will follow them across a wide variety of issues without much regard for accuracy.”⁷⁶ It further overlaps with interpersonal gaslighting in its aspiration to eradicate the victim’s unique viewpoint.⁷⁷ Put another way, the gaslighter seeks to blunt the victim’s “perspective from which evidence and observations are collected, and from which judgments about the world and intentions about how to act are issued.”⁷⁸

Political gaslighting differs from interpersonal gaslighting, though, in that it need not cause its victims to doubt their own epistemic capacity.⁷⁹ In fact, highly partisan individuals are apt to be particularly confident in their epistemic ability to experience and perceive the world.⁸⁰ Instead, political gaslighting “involve[s] both undermining *and*

68. See, e.g., Russell Barton & J.A. Whitehead, *The Gas-Light Phenomenon*, 293 THE LANCET 1258 (1969).

69. See, e.g., James L. Hoberman, *Why ‘Gaslight’ Hasn’t Lost Its Glow*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/21/arts/gaslight-movie-afterlife.html> [<https://perma.cc/7J6J-JVTF>].

70. See, e.g., Beerbohm & Davis, *supra* note 12, at 867.

71. *Id.*

72. *Id.* at 869.

73. *Id.* at 870.

74. Sinha, *supra* note 12, at 1092.

75. *Id.* at 1093.

76. Beerbohm & Davis, *supra* note 12, at 870 (“In the edge case, the gaslit citizen’s point of view is ushered off the deliberative stage of democratic politics altogether.”).

77. *Id.*

78. *Id.* at 870–71.

79. See *id.*

80. See *id.* at 870 (“Perhaps paradoxically, those partisans who are most susceptible to manipulation also display the most confidence in their political beliefs.”).

inflating a target's self-confidence" by political elites, whose signals are adopted and embraced by adherents.⁸¹ This seemingly paradoxical result stems from the fact "that partisan identity strongly influences attitudes, and that partisans will simply follow elite signals."⁸²

A concrete example helps to illustrate this idea. After then-President Donald Trump's inauguration, he and his spokespeople repeatedly proclaimed that the size of the crowd at the inauguration was the biggest in history, notwithstanding photographic evidence that it was not.⁸³ Nonetheless, fifteen percent of Trump voters rejected such evidence and erroneously identified the smaller crowd as larger than it was.⁸⁴ While the photographic evidence might have served to undermine Trump supporters' self-confidence in their belief about the size of the inauguration crowd, Trump could capitalize on the shared partisan identity of the supporters to erase their individual observations and beliefs. In its place, he inserted his misstatement of facts.⁸⁵ Because of their "tribal allegiances" to him, his supporters were manipulated to such an extent that they adopted his position as their own *and* resisted reconsideration of that position—even in the face of photographic evidence—to such an extent that they exuded confidence in holding that position.⁸⁶

Unlike interpersonal gaslighting, political gaslighting has a collective victim rather than a singular, individual victim.⁸⁷ That collective victim may be characterized as "the people" who are seeking a "common good" through the polity.⁸⁸ The political process assumes an open and candid give-and-take of ideas, which in turn demands a collection of citizens with epistemic confidence.⁸⁹ Political gaslighting thus derails recognition of the considered contributions of others, which "thwarts citizens from gathering normative and empirical data from each other, impairing their ability to forge a shared 'common good.'"⁹⁰

In sum, political gaslighting "compromises the shared perspective of citizens together" and "undermine[s] citizens' collective capacity to think from a shared point of view."⁹¹ The end result—the exclusion of a viewpoint from deliberation—creates a

81. See *id.* ("Because of their investment in what their respective elites say, partisans are especially susceptible to manipulation.").

82. *Id.*

83. See Patrice Taddonio, *How a Fight over Crowd Size Would Define Trump's Approach to the Presidency and the Truth*, PBS FRONTLINE (Jan. 13, 2020), <https://www.pbs.org/wgbh/frontline/article/how-a-fight-over-crowd-size-would-define-trumps-approach-to-the-presidency-and-the-truth/> [https://perma.cc/GK4Q-PZKR].

84. See Beerbohm & Davis, *supra* note 12, at 870 ("Politically engaged supporters were more than twice as likely as their unengaged counterparts to choose incorrectly.").

85. *Id.* at 869 ("Just remember, what you're seeing and what you're reading is not what's happening,' Trump advised one rally crowd." (quoting Aaron Rugar, *Trump Claims He Tried To Quell 'Send Her Back!' Chants. The Video Says Otherwise*, VOX (July 18, 2019), <https://www.vox.com/policy-and-politics/2019/7/18/20699598/trump-send-her-backchants-ilhan-omar-gaslighting> [https://perma.cc/P3KF-R7QT]).

86. See *id.* at 870.

87. *Id.* at 871.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

collective harm to the polity at large and particularized harms to marginalized groups. For when large swaths of the American polity detach from evidence and instead hitch their beliefs to those of the gaslighter, the reality of unequal status regimes may be obfuscated.⁹² Some contend that political gaslighting is synonymous with propaganda.⁹³

The effectiveness and pervasiveness of gaslighting hinges on its pedigree and on its maintenance.⁹⁴ When the gaslit belief has been promulgated by a political elite, that belief wields more power.⁹⁵ The same may be said for the Justices of the U.S. Supreme Court—their gaslighting is imbued and maintained by their elite pedigree and their singular power to determine which rights are fundamental and which rights are not. An additional dynamic is in play that may increase the likelihood and impact of political (and, arguably, the Supreme Court's) gaslighting: “Increasingly salient tribal loyalties among political groups may be priming citizens for potential gaslighters.”⁹⁶

Some gaslighters tell outright lies that are rebuttable with readily available facts.⁹⁷ Supplying these kinds of falsehoods is gaslighting at a “first-order level”⁹⁸—a choice that non-gaslighters may view as baffling. After all, why tell bald-faced lies that are easily exposed as such? But these kinds of lies do important gaslighting work at another level: they are “second-order” threats that cause us to question our own assessment of “evidence about our evidence.”⁹⁹

This second-order attack is one on the victim's epistemological ability—the ability to confidently create knowledge about the state of the world. Inciting doubt in the victim about their own epistemic agency empowers the gaslighter even further: it allows the gaslighter to convince the victim to reject the beliefs and facts of the gaslighter's opponents. Opponents are thus cast as nonagents of knowledge production, stripped of the status of evidence provider.¹⁰⁰

92. *See id.* at 872.

93. *See Sinha, supra* note 12, at 1043.

94. *See Beerbohm & Davis, supra* note 12, at 876.

95. *See id.*

96. *Id.*

97. *See id.* at 877. One example is President Trump asserting that the crowd at his inauguration was the largest in history. This was a bald-faced lie easily contradicted by photographic evidence and National Park Service data. *Id.* at 869–70.

98. *Id.* at 877.

99. *Id.*

100. *Id.*

D. Legal Gaslighting

There is a paucity of scholarship addressing legal gaslighting.¹⁰¹ In the context of U.S. law, scholars have focused on racial legal gaslighting.¹⁰² This kind of gaslighting involves the use of “racial spectacles,” which are “narratives that obfuscate the existence of a white supremacist state power structure.”¹⁰³ Such narratives have been centered in Supreme Court cases.

For example, in *Korematsu v. United States*, a Japanese American man challenged the constitutionality of an executive order that authorized the removal and incarceration of Japanese Americans during World War II.¹⁰⁴ While articulating a strict standard for review of racially based laws and policies, the Court’s majority opinion refused to characterize the policy as one that was racially discriminatory: “To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race.”¹⁰⁵

This was gaslighting. The U.S. government “perpetuated and normalized its actions through the use of euphemistic language” in ways that obscured the racial profiling that was occurring.¹⁰⁶ Such obfuscation undermines the epistemic agency of Japanese Americans, who undoubtedly experienced internment as race discrimination *because it was just that*: “To authentically explain what happened to Japanese Americans requires accurate vocabulary: exclusion, or forced removal, not evacuation; incarceration, not relocation.”¹⁰⁷ *Korematsu* was gaslighting because it perpetuated white supremacy while at the same time denying obvious race discrimination.¹⁰⁸

101. See, e.g., Alvin YH Cheung, *Legal Gaslighting*, 72 U. TORONTO L.J. 50 (2022) (discussing how authoritarian regimes use gaslighting to change legal norms or institutions); Aviam Soifer, *How the Supreme Court Distorted Text, Ignored History, and Gaslighted the Bold Promise of the Civil Rights Act of 1866: A Comcast Case Study*, 2 AM. J.L. & EQUAL. 208, 214–15 (2022) (analyzing the Court’s decision in *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020), and contending that, in holding against the African-American plaintiffs, the Court “simply shifted legal categories. It ignored the clear, protective language of the [civil rights] statute by moving the entire case from contract to tort law, which seems an innovative form of legal gaslighting in a textualist era”); see also Angelique M. Davis & Rose Ernst, *Racial Gaslighting*, 7 POL., GRPS., & IDENTITIES 761, 763 (2019).

102. See Davis & Ernst, *supra* note 101, at 765–69 (using caselaw to illustrate racial gaslighting as a tool of white supremacy). Davis and Ernst define racial gaslighting as “the political, social, economic and cultural process that perpetuates and normalizes a white supremacist reality through pathologizing those who resist.” *Id.* at 763 (emphasis omitted).

103. *Id.* at 763–64 (“The All Lives Matter colorblind-narrative is a racial spectacle . . . because it disguises the prioritizing of white lives.”).

104. 323 U.S. 214, 215–18 (1944), *overruled by* *Trump v. Hawaii*, 585 U.S. 667 (2018).

105. *Id.* at 223–24.

106. Davis & Ernst, *supra* note 101, at 766.

107. *Id.*

108. *Id.* (describing the framing and rhetoric surrounding the internment of Japanese Americans and the *Korematsu* case challenging that internment as reflecting “the political, social, economic, and cultural process of racial gaslighting [that] utilized racial spectacles to perpetuate and normalize a white supremacist state”).

E. *Pulling It All Together: Gaslighting as an Analytical Framework*

From the foregoing emerges a gaslighting analytical framework that is a useful and unifying heuristic for analyzing and understanding a variety of Supreme Court civil rights cases from the October 2021 Term. These cases cut across substantive legal doctrines and across many axes of marginalized identities. However, if these cases are considered individually, a silo effect ensues, which may obscure the troubling trend of Supreme Court gaslighting to serve white Christian nationalist ideals. Using gaslighting as an analytical frame, though, reveals that these cases are, in fact, related. Using gaslighting as a unifying theory helps us see the undercurrent of white Christian nationalism that connects these seemingly doctrinally unrelated cases.

This gaslighting frame includes the following principles. First, gaslighting is a structural phenomenon that maintains and perpetuates unequal status hierarchies.¹⁰⁹ Treating gaslighting as *only* or as *merely* an interpersonal phenomenon masks the work it does to uphold these unequal status regimes by “foreclose[ing] awareness of ongoing cultural processes through organized failures of understanding.”¹¹⁰ Relatedly, the act of gaslighting itself clouds its structural qualities.¹¹¹

Second, gaslighting need not be intentional or successful to be considered gaslighting.¹¹² It is enough that the behavior characterized as “gaslighting” is prone to make its target doubt their reality.¹¹³ With regard to second-order gaslighting, in particular, “when a gaslighter challenges a concept, the challenge *implicitly* carries the assumption that the concept in question is wrong, and needs improvement. . . . [T]his does not involve an explicit intention to cause others to doubt their interpretive abilities.”¹¹⁴ Regardless of the disciplinary characterization of gaslighting, “*all* gaslighting involves issues of epistemic status and trust.”¹¹⁵

Third, gaslighting might be best understood through the lens of social inequality.¹¹⁶ In our world in which unequal status hierarchies and subordination are the norm, “certain people are excluded from, or lack full participation in, the economy of epistemic relations: the social network in which we exercise our capacity as knowers.”¹¹⁷ This phenomenon is also known as “epistemic injustice,” and it reflects the notion that “identity-prejudice plays a substantive role in determining who is afflicted most by

109. See Ruiz, *supra* note 17, at 688–89 (noting that “gaslighting can all too easily be used as a diagnostic tool to refer to the effort of one *culture* to undermine another *culture*’s confidence and stability by causing the victimized collective to doubt [its] own sense and beliefs” (alteration in original) (paraphrasing Neal A. Kline, *Revisiting Once Upon a Time*, 163 AM. J. PSYCHIATRY 1147, 1148 (2006))).

110. *Id.*

111. See *id.* at 688 (“[T]here is nothing accidental about the popularization of the narrowed psychological understanding of gaslighting as interpersonal, emotional abuse.”); see also *id.* at 689 (“Gaslighting . . . is a . . . ruse that diverts critical attention away from structural epistemic oppressions . . .”).

112. See Podosky, *supra* note 13, at 208.

113. See *id.*

114. *Id.* at 217.

115. Andrew D. Spear, *Epistemic Dimensions of Gaslighting: Peer-Disagreement, Self-Trust, and Epistemic Injustice*, 66 INQUIRY 68, 75 (2019).

116. See Podosky, *supra* note 13, at 210–11.

117. *Id.* at 210.

epistemic exclusion. Such injustice exists in our structures and dictates the character of our epistemic lives.”¹¹⁸

Epistemic injustice can be conceptualized in two ways. First, it can be understood as a wrong perpetrated against someone as a “knower.”¹¹⁹ Second, it can be understood as an attack on its victim as an “epistemic subject.”¹²⁰ This second understanding of epistemic injustice sheds light on how gaslighting targets marginalized groups. A fully embodied, equally situated epistemic subject does not just interpret the world around them using a shared concept, they also “actively contribute[] to the pool of epistemic resources shared by members of a community of thinkers and speakers.”¹²¹ Like most other contexts, epistemic subjects exist within unequal status hierarchies. Epistemic injustice results when “dominantly situated epistemic subjects” fail to recognize the “knowledge contributions of marginalized individuals” or communities.¹²²

Finally, gaslighting may also be viewed as a project of epistemic political expansion that is akin to “epistemic territorial expansion.”¹²³ The concept of epistemic territorial expansion emerged from scholarly work on the cultural gaslighting of Native American communities.¹²⁴ It posits that epistemic territorial expansion is a kind of gaslighting because it “empowers members of dominant communities to claim epistemic space as their own, and only their own,” by deploying “epistemological frameworks that claim to derive from universal sets of metaphysical assumptions about the nature of knowledge.”¹²⁵ But in reality, the gaslighter’s frameworks and assumptions “are monocultural perspectives supported by structural power relations” which, in turn, “provide[] cover for institutions.”¹²⁶

These principles map well onto the project of white Christian nationalism and the Court’s treatment of the same. Although white Christian nationalism does not seek literal territorial expansion in the sense of occupying or stealing real property, its aims are analogous. The movement certainly seeks epistemic political expansion.¹²⁷ It “does not seek to add another voice to America’s pluralistic democracy”; instead, its goal is “to replace our foundational democratic principles and institutions with a state grounded on a particular vision of Christianity, answering to what some adherents call a ‘biblical world view’ that also happens to serve the interests of its plutocratic funders and allied political leaders.”¹²⁸

118. *Id.* at 211.

119. *Id.* at 218.

120. *Id.* at 210–11.

121. *Id.*

122. *Id.* at 218 (“The lesson is that the decision as to which epistemic resources a diverse community of thinkers and speakers ought to possess isn’t something that should be in the hands of a privileged few.”).

123. Ruiz, *supra* note 17, at 703.

124. *See id.* at 696, 701.

125. *Id.* at 703.

126. *Id.*

127. *See* STEWART, *supra* note 2, at 3.

128. *Id.* *See generally* Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District *A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC’Y (June 28, 2022), <https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/> [https://perma.cc/E56U-35F9] (“It does not take a Religion Clause scholar to see what has been going on at the Supreme Court over the last dozen years. Religion always wins. . . . And in almost every

II. SUPREME COURT GASLIGHTING

This Section illustrates the phenomenon of Supreme Court gaslighting by offering examples from several recent Supreme Court civil rights cases. The doctrinal breadth of these cases is consequential—it demonstrates that the Court is not targeting just one marginalized community, such as the LGBTQ community, in its gaslighting. Rather, its gaslighting targets multiple marginalized communities.

A. *The Backstory: The White Christian Nationalism Movement Arrives on the Scene*

Before diving into the Court's civil rights gaslight docket, some brief background on the white Christian nationalist movement is helpful to provide historical and political context. The emergence of a white Christian nationalist movement may not at first blush appear to involve the Court and the gaslighting discussed below. This Part explains how that history sets the stage for and is connected to what is happening in the Supreme Court today. While there is quite a lengthy and complex backstory to the gaslighting story, this Article only describes it to the extent necessary to situate what follows.

1. Settling In for the Long Haul: The White Christian Nationalism Movement Emerges

The backstory is one of a deliberate, long-term plan by white Christian nationalists whose goal was to create a “future in which its versions of the Christian religion and its adherents, along with their political allies, enjoy positions of exceptional privilege and power in government and in law.”¹²⁹ This agenda was set back in the 1970s, and the movement took the long view, knowing that it could take decades to achieve its vision.¹³⁰

Since that time, the movement has engaged in a coordinated campaign that has been chipping away at its goal of forming a Christian nation.¹³¹ As a result, “[t]his is not a ‘culture war.’ It is a political war over the future of democracy.”¹³² This story is not a simple one to tell, because the movement is not organized around or by a single institution. It is a “dense ecosystem of nonprofit, for-profit, religious and nonreligious media and legal advocacy groups.”¹³³

But all of this is, in fact, connected to the Court and to the Court's gaslighting: the central focus of the white Christian nationalist political agenda is getting particular kinds of people appointed to all courts, but particularly to the Supreme Court.¹³⁴ It is a key part

case the religion in the case is Christianity. The Christian Nationalists among us, and among the Justices, must be thrilled. For those of us who know and fear the consequences of a state dominated by a single faith, the Court's trajectory is chilling.”).

129. STEWART, *supra* note 2, at 4.

130. *See id.* at 9.

131. *See, e.g.*, PHILIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY 68–71 (2022).

132. STEWART, *supra* note 2, at 3.

133. *Id.* at 4.

134. *See, e.g.*, Katherine Stewart, *How Christian Nationalism Perverted the Judicial System and Guttled Our Rights*, NEW REPUBLIC (May 10, 2022), <https://newrepublic.com/article/166404/christian-right-roe-alito-abortion> [<https://perma.cc/Y676-ZUYQ>].

of the group's plan to shift the nation's laws in ways that embed and reflect one particular kind of Christian worldview.¹³⁵

The white Christian nationalist movement has succeeded in this—Justices Gorsuch, Kavanaugh, and Barrett are the payoff for the decades-long work behind the scenes. As the nationalist movement packs the Court with conservative Christians, its work in other areas also comes to fruition: it engages in coordinated amicus briefing campaigns, briefs that are written by the same groups and people who got the likes of Justices Gorsuch, Kavanaugh, and Barrett appointed to the Court in the first place.¹³⁶ These Justices are, in a sense, captured by the interest groups that got them to the Supreme Court and thus vote in ways that are aligned with those interest groups; they are beholden to what amounts to judicial lobbying.¹³⁷ The entities and people that are funding these briefs remain anonymous,¹³⁸ yet the “Roberts Court has handed down over eighty partisan Republican 5-4 decisions that benefit an easily identifiable Republican Party-donor interest.”¹³⁹

This Article contends that the Court's gaslighting is a means to get to these ends. The Court must gaslight because if it did not gaslight, particular civil rights cases and regulatory cases (such as those involving climate change and campaign finance) would not come out in favor of positions favored by white Christian nationalists. To reach its desired ends, the Court gaslights, through intellectual dishonesty, about how existing law applies, the application and power of stare decisis, and the facts of the cases. It is all connected, in ways that ultimately threaten our democracy.

2. White Christian Nationalism and the LGBTQ-Rights Movement

For many decades, beginning in the 1950s, traditional Christian anti-LGBTQ advocates deployed an explicitly homophobic rhetoric to criminalize, pathologize, and ostracize LGBTQ people.¹⁴⁰ This attacking narrative cast LGBTQ people as pedophiles seeking to recruit children into a gay “lifestyle,” as mentally ill, and as deviant.¹⁴¹ This

135. See, e.g., AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 6–8 (2015).

136. While it is unknown whether Justices Barrett, Gorsuch, and Kavanaugh identify as conservative Christian, they are often described as such. See, e.g., Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 27, 2022) [hereinafter Talbot, *Barrett's Long Game*], <https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game> [https://perma.cc/R8MT-J63H]; Yuvraj Joshi, *Opinion, Gorsuch May Be Supreme Court's Most Religiously Motivated Justice*, NBC NEWS (Mar. 13, 2017, 11:21 AM), <https://www.nbcnews.com/feature/nbc-out/opinion-gorsuch-may-be-supreme-court-s-most-religiously-motivated-n732726> [https://perma.cc/6XGQ-ABQN]; Tessa Bereson, *Inside Brett Kavanaugh's First Term on the Supreme Court*, TIME (June 28, 2019, 11:46 AM), <https://time.com/longform/brett-kavanaugh-supreme-court-first-term/> [https://perma.cc/6TFQ-84ZB].

137. See Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141, 151–58 (2021). Sheldon Whitehouse is a Democratic Senator from Rhode Island. See Sheldon Whitehouse, *United States Senator for Rhode Island*, <https://www.whitehouse.senate.gov/> [https://perma.cc/3DQW-4TQJ] (last visited Apr. 5, 2024).

138. See Whitehouse, *supra* note 137, at 153–58.

139. *Id.* at 157.

140. See Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 L. & INEQ. 67, 71–72, 74 (2018) [hereinafter Velte, *Religious Right*].

141. See *id.* at 72–73, 85.

hateful narrative had mainstream traction in the early days of the LGBTQ movement, because most people were still in the closet and fledgling LGBTQ groups met in secret.¹⁴²

Law and policy reflected and perpetuated this homophobic rhetoric: in the 1950s, the federal government fired over five thousand gay or suspected gay employees during what was known as the “Lavender Scare.”¹⁴³ In 1952, the American Psychiatric Association included homosexuality as a “sociopathic personality disturbance” in the first-ever version of its diagnostic handbook, the Diagnostic and Statistical Manual (DSM).¹⁴⁴ In 1986, in *Bowers v. Hardwick*, the Court upheld as constitutional a Georgia statute that criminalized same-sex sodomy.¹⁴⁵ The norms of this era were permissive when it came to explicitly homophobic and anti-LGBTQ rhetoric.¹⁴⁶

Those norms began to shift with the birth of the modern-day LGBTQ civil rights movement, which many mark as beginning with the 1969 riots at the Stonewall Inn.¹⁴⁷ As more LGBTQ people came out and society became more accepting, norms around rhetoric also shifted.¹⁴⁸ It became less socially acceptable to use explicitly homophobic rhetoric when talking about LGBTQ people or when lobbying for anti-LGBTQ laws and policies.¹⁴⁹ As a result, the white Christian nationalist movement shifted its anti-LGBTQ narrative, though not its goals.¹⁵⁰

Rather than outwardly attacking LGBTQ people as criminals, mentally ill, or deviant, the white Christian nationalist movement has altered the narrative in two ways. First, it moved the locus of the debate on substantive LGBTQ legal protections from the LGBTQ people themselves to children.¹⁵¹ This was particularly apparent during the march toward the 2015 case *Obergefell v. Hodges*, during which anti-marriage-equality advocates argued that children needed parents of both genders to properly model gender roles.¹⁵²

142. See Jason M. Shepard, *The First Amendment and the Roots of LGBT Rights Law: Censorship in the Early Homophile Era, 1958-1962*, 26 WM. & MARY J. RACE GENDER & SOC. JUST. 599, 614–15 (2020).

143. See Kyle C. Velte, *The Nineteenth Amendment as a Generative Tool for Defeating LGBT Religious Exemptions*, 105 MINN. L. REV. 2659, 2684 (2021) [hereinafter Velte, *Nineteenth Amendment*].

144. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38–39 (1952). The American Psychiatric Association did not remove this language until 1973. See *Panelists Recount Events Leading to Deleting Homosexuality as a Psychiatric Disorder from DSM*, PSYCHIATRIC NEWS, <http://www.psychiatricnews.org/pnews/98-07-17/dsm.html> [<https://perma.cc/5M8G-VT24>] (last visited Apr. 5, 2024).

145. 478 U.S. 186, 196 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

146. See Velte, *Religious Right*, *supra* note 140, at 71–76.

147. See *Stonewall Riots*, HIST., <https://www.history.com/topics/gay-rights/the-stonewall-riots> [<https://perma.cc/6J6F-9T3L>] (last updated June 23, 2023); see also Jasmine Foo, Note, “In Sickness and in Health, Until Death Do Us Part”: An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on *Obergefell v. Hodges*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 638, 642 (2016).

148. See Velte, *Religious Right*, *supra* note 140, at 85–86.

149. *Id.*

150. *Id.*

151. *Id.* at 77–78.

152. 576 U.S. 644 (2015); see also Appellant Proposition 22 Legal Defense and Education Fund's Opening Brief at 31, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006) (No. CPF-04–503943) (“Every child raised in a same-sex home has been deliberately made to be motherless or fatherless. . . . [T]here is no

Second, as LGBTQ civil rights laws were enacted, arguably culminating in the declaration of marriage equality in *Obergefell*, anti-LGBTQ rights advocates flipped the normative narrative by casting *themselves* as victims—victims of an increasingly secular society who are unfairly cast as bigots and therefore in need of aggressive protection of their religious freedom.¹⁵³ That aggressive protection, they argued, includes religious exemptions from antidiscrimination laws that prohibit discrimination based on sexual orientation and gender identity.¹⁵⁴ They also alleged that it includes the right to practice their religion in public in ways that contradict longstanding Establishment Clause jurisprudence.¹⁵⁵

This narrative has been endorsed by conservative Justices, including quite publicly by Justice Alito.¹⁵⁶ He recently agreed with and amplified this rhetoric in a speech given at a religious liberty summit hosted by Notre Dame Law School:

[W]e can't lightly assume that the religious liberty enjoyed today in the United States . . . will always endure. . . . [P]olls show a significant increase in the percentage of the population that rejects religion or thinks it's just not all that important. . . . There's also growing hostility to religion, or at least the traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors. The challenge for those who want to protect religious liberty in the United States . . . is to convince people who are not religious, that religious liberty is worth special protection. . . . And if [a judge interpreting a law] does not highly esteem, religious liberty, it can be shrunk all the way down to . . . freedom of worship[, which] means freedom to do these things that you like to do in the privacy of your home, or in your church or your synagogue or your mosque or your temple. But when you step outside into the public square, in the light of day, you had better behave yourself like a good secular citizen. That's the problem that we face. . . . And make no mistake about it unless the people can be convinced that robust religious liberty is worth protecting, it will not endure.¹⁵⁷

generally applicable, generally accepted social science evidence that children raised by a same-sex couple do as well as children raised by their own biological parents.”).

153. See, e.g., Margaret Talbot, *Justice Alito's Crusade Against a Secular America Isn't Over*, NEW YORKER (Aug. 28, 2022) [hereinafter Talbot, *Justice Alito's Crusade*], <https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over> [https://perma.cc/93LC-4A29].

154. See Velte, *Religious Right*, supra note 140, at 80–81.

155. See generally Lupu & Tuttle, supra note 128.

156. See, e.g., Samuel A. Alito, Jr., *Remarks to the 2020 Federalist Society National Lawyers Convention*, 45 HARV. J.L. & PUB. POL'Y 83, 96 (2021) (“You cannot say that marriage is a union between one man and one woman. Until very recently, that is what the vast majority of Americans thought. Now, it is considered bigotry. That this would happen after our decision in *Obergefell* should not have come as a surprise.” (footnote omitted)).

157. Josh Blackman, *2022 Religious Liberty Summit U.S. Supreme Court Justice Samuel Alito*, OTTER (July 28, 2022, 2:38 PM), https://otter.ai/u/x6q_WAB6BGMqQL_7kdcFhzNxy7M [https://perma.cc/4J6X-3HL3]; see also Alito, supra note 156, at 89, 92 (“It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right. And that marks a surprising turn of events. . . . For many today, religious liberty is not a cherished freedom. In their view, it is often just an excuse for bigotry, and it cannot be tolerated, even when there is no evidence that anyone has been harmed.”).

Justice Alito's comments reflect a "call to arms" to secure religious liberty¹⁵⁸ for white Christian nationalists. Acceptance of the narrative that white Christian nationalists have been unfairly cast as bigots and are victims in need of protecting has come to frame the Court's civil rights cases across issues—from LGBTQ rights cases, to reproductive rights, to racial justice cases, to environmental justice, to voting. Based on the decisions from the 2021 Term, Justice Alito is not alone among the Justices in believing that "religious liberty is in danger of becoming a second-class right."¹⁵⁹ But, arguably, what he *really* means is that white Christian nationalists are in danger of becoming second-class citizens and that he will seek to uphold their first-class status even if that means relegating *actually* marginalized individuals to second-class status.¹⁶⁰

B. *The Supreme Court's Gaslight Docket: An Overview*

Gaslighting has played a central role in the Court's embrace of the narrative of the white Christian nationalist movement and its use in substantive legal decision-making. Such gaslighting appears in cases that explicitly involve civil rights claims,¹⁶¹ in cases that present questions of the scope of the First Amendment's protection of religious freedom for traditional Christians,¹⁶² and in cases challenging the scope of agency authority to regulate climate change.¹⁶³

While those last two topics may not, on their face, seem to implicate "civil rights" they arguably do: white Christian nationalists are the wedding vendors who are seeking religious exemptions from state public accommodations law, so that they may refuse service to same-sex couples.¹⁶⁴ Denying the Environmental Protection Agency (EPA) the ability to regulate the emission of greenhouse gasses,¹⁶⁵ which in turn allows climate change to proceed unfettered, likely will disparately impact poorer communities and

158. Linda Greenhouse, *Alito's Call to Arms to Secure Religious Liberty*, N.Y. TIMES (Aug. 11, 2022), <https://www.nytimes.com/2022/08/11/opinion/religion-supreme-court-alito.html> [https://perma.cc/BEB2-8TVA].

159. Alito, *supra* note 156, at 95.

160. The religious liberty most often protected in this context by the Court is that of white Christians rather than those of non-Christian faiths. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Groff v. DeJoy*, 143 S. Ct. 2279 (2023); *c.f.*, *Dunn v. Ray*, 139 S. Ct. 661, 661–62 (2019) (denying a stay request by a Muslim inmate on death row that would have given him time to have an imam present to provide him with spiritual advice and comfort during his final moments of life). *But see* *Holt v. Hobbs*, 574 U.S. 352 (2015) (upholding Muslim inmate religious exercise to wear a short beard in violation of prison policy).

161. *See* *Fulton*, 141 S. Ct. at 1878; *see also* *infra* Part II.H.

162. *See, e.g.*, *Bremerton*, 142 S. Ct. at 2415–16; *see also* discussion *infra* Part II.E.

163. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2599–600 (2022); *see also* *infra* Part II.G.

164. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

165. *See* *West Virginia*, 142 S. Ct. at 2615–16.

communities of color.¹⁶⁶ These are all connected by the overarching goals of the white Christian nationalist political agenda.

Gaslighting has epistemic dimensions—knowledge production and gaslighting are connected. Gaslighters seek to have *their* status as a “knower” in the world privileged above that of other “knowers.”¹⁶⁷ Gaslighters thus instill epistemic doubt in their victims as a way to have *their* knowledge production “count” and to dismiss as unfounded the victim’s understanding of the world.¹⁶⁸ The U.S. Supreme Court is an especially powerful “knower”—indeed, it is given the position of ultimate “knower” with regard to the meaning and application of the U.S. Constitution. With each case it decides, the Court produces legal knowledge in the form of holdings that must be followed in similar subsequent cases.

It goes without saying that the stakes are high in the cases through which the Court creates legal knowledge for marginalized communities—will LGBTQ people attain marriage equality, or be relegated to second-class citizen status?¹⁶⁹ Do those who can become pregnant have self-determined privacy and autonomy rights to make their own decisions around having children, or will the state engage in a regime of forced birth?¹⁷⁰ Will politicians be held to the promise of antisubordination and equality embedded in the Reconstruction Amendments when setting new congressional districts and rules concerning who may vote and when, or will the Court take a cramped, ahistorical, and counterfactual view of those Amendments to allow such politicians to run roughshod over the franchise for people of color?¹⁷¹ Will antidiscrimination laws be applied in ways that reflect long-established First Amendment jurisprudence that accepts that the state has a compelling interest in eradicating sex, race, sexual orientation, and gender identity discrimination in the marketplace and deny requests for religious exemptions,¹⁷² or will the Court upend established doctrine and radically reform the First Amendment speech and religion clauses in ways that favor the interests of white Christian nationalists and further marginalize women, people of color, and LGBTQ people? Will longstanding, well-established principles of deference to administrative agencies¹⁷³ remain intact such that the United States may take meaningful action to stop climate change, or will the Court instead side with the fossil fuel industry and, in doing so, fundamentally rewrite law and deny facts?¹⁷⁴

166. See, e.g., Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 415 (2019).

167. See, e.g., Beerbohm & Davis, *supra* note 12, at 868.

168. *Id.*

169. See *Masterpiece Cakeshop*, 138 S. Ct. at 1723; *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

170. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (ruling that there is no constitutional right to abortion).

171. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding that the issue of partisan gerrymandering presented a political question “beyond the reach” of the federal judiciary).

172. See Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 7, 29–30 (2016) [hereinafter Velte, *All Fall Down*].

173. See, e.g., *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

174. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2599–2600 (2022).

All of these questions go to the Court's epistemic power to create legal knowledge and factual knowledge. Thus, gaslighting needs to occur on both factual and legal levels for the conservative supermajority to make good on its anti-equality agenda.¹⁷⁵

When the agenda of the Court's conservative supermajority includes the consolidation of its power,¹⁷⁶ it gives primacy to white Christian nationalist interests. In service of those interests, the Court has rolled back rights-enhancing protections, like those created by *Roe* and the Voting Rights Act, as well as regulatory regimes, through the creation of novel "theories" of law,¹⁷⁷ for which gaslighting arguably is a necessary tactic.

Why? Because the Court must convince its audience (the American people) that what we are seeing—the implicit or explicit reversal of rights grounded not in principled legal analysis but rather in rank partisanship, and an adherence to white Christian values and business interests, above other values—is not *actually* what is happening. To admit that an adherence to such values is what is actually happening would threaten the rule of law and the purported neutrality of the Court in fundamental ways that could destabilize the entirety of our system of government. Furthermore, Supreme Court gaslighting is necessary to convince the American people that what we "know"—that the Court's conservative supermajority is ignoring or rewriting the facts of some cases it decides—is not really what happened at all. Gaslighting is necessary because it functions to obscure the legal games and factual falsehoods that the conservative supermajority is peddling.

C. *The Supreme Court's Gaslight Docket: Illustrative Cases*

The cases that follow illustrate the Court's gaslighting across a variety of legal claims. Notwithstanding the different legal contexts, gaslighting trends emerge. One evident trend is the phenomenon of inflicting testimonial injustice—the gaslighter rejects as inaccurate the facts relayed by the victim and replaces those facts with the gaslighter's

175. In addition to the conservative Justices themselves and the white Christian nationalist movement, a third player involved in promoting this agenda should be mentioned: The Federalist Society.

Founded in 1982, the Federalist Society . . . is a group of conservatives and libertarians dedicated to reforming the current legal order. We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

About Us, FEDERALIST SOC'Y, <https://fedsoc.org/about-us> [<https://perma.cc/F5FM-CX94>] (last visited Apr. 5, 2024). It has been playing the long game of setting up the Court (as well as lower courts) for this particular moment of retrenchment by filling the judicial pipeline with anti-choice, pro-white-Christian nationalism potential nominees. See, e.g., Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/8RZW-5ZAM>] ("The Federalist Society has for years been singularly focused on building a farm team of judicial nominees who subscribe to a philosophy that is hostile to the advancement of social and economic progress in the country. Behind the scenes, during Republican Administrations, they are very engaged in identifying and recruiting for judges candidates who are ultra-conservatives—who are opposed to our rights and liberties across the board, whether it's women, the environment, consumer protections, worker protections." (quoting Nan Aron, President, Alliance for Justice.)).

176. See generally Lemley, *supra* note 3 (discussing the Supreme Court's recent concentration of power).

177. See generally *id.* (describing how the Court's cases in the 2020s reflect the abandonment of norms and the rollback of rights).

own, thus acting as an epistemic superior.¹⁷⁸ In many of the cases discussed below, the majority decision rewrites the facts in ways that call into doubt, if not erase, the epistemic agency of those who experienced the facts that led to the legal dispute. The gaslighting listener, the Court's majority, uses testimonial injustice to deem the claimants not credible.¹⁷⁹ Gaslighters in positions of actual power—like the conservative supermajority Justices—have unique leverage, and their gaslighting is amplified by their authority in ways that “demand they be treated with unjustified degrees of credence.”¹⁸⁰

Tactics of gaslighting observed in the political realm also contaminate the judicial realm and are apparent in the cases discussed below: (1) denying easily confirmable facts; (2) demanding the rejection of opposing evidence; (3) silencing the epistemic agency of marginalized groups, as part of a larger project; and (4) capitalizing on asymmetrical power dynamics, “including those created by intersectional inequality, in order to rule out certain deliberative viewpoints.”¹⁸¹

D. *The Supreme Court's COVID-19 Cases*

At the height of the COVID-19 pandemic, cities and states enacted restrictions on gatherings, regulations that were consistent with public health officials' calls to avoid such gatherings to curb the spread of the deadly virus.¹⁸² While most such regulations contained secular exemptions that allowed gathering in specific places, such as grocery stores and airports, exceptions were rarely made for churches.¹⁸³ The particularly robust restrictions in place in California prohibited gathering in churches.¹⁸⁴ Several cases in which churches challenged these restrictions were resolved on the Supreme Court's “shadow docket.”¹⁸⁵

Prior to Justice Barrett's appointment to the Court, in 2020, these COVID-19 gathering restrictions were upheld even against First Amendment religious exercise

178. See Abramson, *supra* note 30, at 15, 17.

179. See *id.* at 17.

180. *Id.* at 21.

181. Beerbohm & Davis, *supra* note 12, at 869.

182. See, e.g., Maggie Davis, Lauren Dedon, Stacey Hoffman, Andy Baker-White, David Engleman & Gregory Sunshine, *Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response*, 21 J. EMERGENCY MGMT. 19 (2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10170300/> [https://perma.cc/JU78-38AJ].

183. See, e.g., Mansee Khurana, *The Right To Worship: Church and State Clash Over Religious Services in the Coronavirus Era*, NBC NEWS (May 9, 2020, 3:07 PM), <https://www.nbcnews.com/politics/politics-news/right-worship-church-state-clash-over-religious-services-coronavirus-era-n1201626> [https://perma.cc/T7X5-8QN6].

184. See Kelsey Dallas, *This California Church Fought the State's COVID-19 Rules and Won At Least For Now*, DESERET NEWS (Aug. 18, 2022, 8:00 AM), <https://www.deseret.com/faith/2022/8/18/23310356/california-church-violated-covid-19-safety-rules-no-longer-pay-fine> [https://perma.cc/R49U-JXST].

185. See generally Brendan Pierson, *How COVID and Shadow Docket Exploded SCOTUS' Scope of Religious Freedom*, REUTERS (June 17, 2021, 4:33 PM), <https://www.reuters.com/legal/government/how-covid-shadow-docket-exploded-scotus-scope-religious-freedom-2021-06-16/> [https://perma.cc/XQ9B-PANZ]; Charles P. Pierce, *The Supreme Court's 'Shadow Docket' Is Looking Increasingly Shady*, ESQUIRE (Apr. 12, 2021, 4:37 PM), <https://www.esquire.com/news-politics/politics/a36099436/supreme-court-shadow-docket-california-churches-covid-19/> [https://perma.cc/JAD4-C4FP].

challenges. When she joined the Court, however, the balance of power shifted.¹⁸⁶ The Court's conservative Justices then had the votes needed to drastically shift First Amendment jurisprudence and to do so away from the glare of the public eye. And it did just that.¹⁸⁷

The conservative supermajority embraced what is known as the "most-favored-nation" (MFN) approach to analyzing regulations with secular exemptions.¹⁸⁸ This approach dictates that if there are any secular exemptions from a law or regulation then religious exemptions must also be granted unless the state can show that denying the religious exemption meets the strict scrutiny test.¹⁸⁹ This is an onerous legal test that requires the state to show a compelling interest in denying the religious exemption and to show that the challenged regulation is narrowly tailored to achieve that interest.¹⁹⁰ Religion is "most favored" because "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."¹⁹¹ In the words of Justice Gorsuch, "[e]xceptions for one means strict scrutiny for all."¹⁹²

The MFN approach reflects a radical revision of the First Amendment's Free Exercise Clause.¹⁹³ It is "an assertive and aggressive" approach to attain purported "equality" for white Christian nationalists in the secular marketplace.¹⁹⁴ It upends long-settled strict scrutiny doctrine in the context of public accommodations laws: in prior cases considering requests for First Amendment exemptions from public accommodations laws, the Court's strict scrutiny inquiry asked whether the State had a compelling interest in enforcing its public accommodations law.¹⁹⁵ Additionally,

186. See, e.g., Dahlia Lithwick, *Amy Coney Barrett Is Already Putting Her Mark on the Supreme Court*, SLATE (Dec. 22, 2020, 11:52 PM), <https://slate.com/news-and-politics/2020/12/religious-liberty-supreme-court-amy-coney-barrett-coronavirus-shadow-docket.html> [<https://perma.cc/Z6NF-8NSW>].

187. See generally *id.*

188. Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty, Part I: The New Law of Free Exercise*, REASON: VOLOKH CONSPIRACY (Aug. 15, 2022, 8:01 AM), <https://reason.com/volokh/2022/08/15/the-increasingly-dangerous-variants-of-the-most-favored-nation-theory-of-religious-liberty-part-i-the-new-law-of-free-exercise/> [<https://perma.cc/5N5A-ZC2R>] (calling the "most-favored-nation" theory as a judicial rule that the "denial of a religious exemption is presumptively unconstitutional if the state 'treats some comparable secular activities more favorably.'"); see also *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." (citation omitted)).

189. See *Tandon*, 141 S. Ct. at 1296.

190. See *id.* at 1296–97.

191. *Id.* at 1296.

192. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1929 (2021) (Gorsuch, J., concurring) (citing *Tandon*, 141 S. Ct. at 1296).

193. See Kyle C. Velte, *Postponement as Precedent*, 29 S. CAL. REV. L. & SOC. JUST. 1, 4, 10 (2019) [hereinafter Velte, *Postponement as Precedent*]; see also Koppelman, *supra* note 188.

194. Simson, *supra* note 2, at 1638.

195. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

established doctrine asked whether the state had a compelling interest in *eradicating discrimination* in the public square.¹⁹⁶ The Court's MFN approach turns that inquiry upside down by asking whether the State has a compelling interest in *denying an exemption* to the traditional Christian business owner who is seeking the exemption.¹⁹⁷

This revision constitutes legal gaslighting. It constitutes second-order gaslighting, because it centers a conceptual dispute, namely a fight over the concept of "First Amendment free exercise" and, more specifically, the place of "First Amendment free exercise" within society's status hierarchies.¹⁹⁸ In the COVID-19 cases, the conservative supermajority challenged the then-prevailing concept of First Amendment free exercise—that it is properly *limited* in the context of neutral and generally applicable laws—and, in so doing, the Court implicitly assumed "that the concept in question [was] wrong, and stands in need of improvement."¹⁹⁹ This is a kind of gaslighting.²⁰⁰

A gaslighter seeks to eliminate even the possibility that their victim will question or contradict the gaslighter's position on the controlling concept and/or the controlling facts. Creating a new doctrine from thin air, in a nine-paragraph, unsigned *per curiam* decision without the benefit of ordinary levels of briefing or oral argument, is an act of gaslighting. The shadow docket reflects the ideal conditions to eliminate the possibility of contradiction or pushback.

Thus, the doctrinal gaslighting is compounded by the fact that the MFN "doctrine" was cut from whole cloth by the conservative super majority on the shadow docket. Put another way, the creation of new doctrine as a means to white Christian nationalist ends—all the while failing to acknowledge doing so—exacerbates the gaslighting. Upending established First Amendment doctrine on the shadow docket can thus be described as a kind of covert gaslighting, which "typically occurs when a speaker makes

196. See *id.* at 623–24; see also *Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 538, 549 (1987).

197. See, e.g., *Fulton*, 141 S. Ct. at 1881 ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the organization seeking the religious exemption]."); see also Simson, *supra* note 2, at 1640 (discussing shadow docket MFN cases); Koppelman, *supra* note 188.

198. There was also first-order gaslighting in the COVID cases. In *Tandon v. Newsom*, the Court stated that "California treats some *comparable* secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." 141 S. Ct. 1294, 1297 (2021) (emphasis added). Justice Kagan's dissent challenges this first-order gaslighting by noting that although the majority presented these activities as comparable, they were not:

Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike. California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here. As the *per curiam*'s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons.

Id. at 1298 (Kagan, J., dissenting).

199. Podosky, *supra* note 13, at 217.

200. See *id.* ("[T]his does not involve an explicit intention to cause others to doubt their interpretive abilities" but is nonetheless gaslighting).

claims about a matter that few if any others have the requisite access to falsify” and which “can manipulate audiences both as to content and as to confidence.”²⁰¹

Further, it is gaslighting to craft a radically new doctrine without acknowledging the change, because it sows the seeds of epistemic self-doubt in the Court’s audience. The “nothing to see here” vibe from the shadow docket COVID-19 cases, particularly *Tandon v. Newsom*, has the potential to lead someone reading the decision to doubt their own understanding of the state of the world and the state of the law.²⁰² After all, wouldn’t the Court make an explicit announcement about this doctrinal sea change and do so in a case fully briefed and argued on the ordinary docket? The blasé, rushed, and less-public creation of the MFN “doctrine” is an example of sowing epistemic self-doubt in the Court’s audience—it is gaslighting.

The COVID-19 cases also provide an example of structural gaslighting—the creating and maintaining of status hierarchies that are hidden to most observers by the gaslighting itself.²⁰³ The impact of the COVID-19 cases is far-reaching, and it threatens civil rights by adopting a new “theory” of free exercise—one that centers, uplifts, and privileges white Christian nationalism. As Professor Nora Berenstain notes, this kind of structural gaslighting “is one of the ways oppressors maintain hegemonic ideologies and sabotage conceptual resources that might accurately theorize the nature of the oppression and promote resistance.”²⁰⁴ The COVID-19 cases are an example of this phenomenon in action. The Court unleashed a doctrine through which the white Christian nationalist movement was empowered to maintain and perpetuate its hegemonic ideologies.²⁰⁵ The Court’s doctrinal decisions in these cases, when coupled with their empowering impact on the white Christian nationalist movement, may “sabotage conceptual resources that might accurately theorize the nature of the oppression and promote resistance”²⁰⁶ by obscuring the fallacy of the dominant white Christian nationalist narrative, namely that the United States was founded to be and should continue to be a Christian nation.²⁰⁷ It “is thus deeply interwoven with intersecting structures of oppression and the willful ignorance that is required to maintain them.”²⁰⁸

These dynamics became apparent as the Court extended the MFN doctrine from the COVID-19 cases on the shadow docket and applied the doctrine in an LGBTQ-rights case on the ordinary docket.²⁰⁹ In *Fulton v. City of Philadelphia*, decided in 2021, the Court relied on the COVID-19 cases’ MFN doctrine to compel the city to grant a religious exemption from its nondiscrimination provision to a Catholic foster care

201. Sinha, *supra* note 12, at 1105.

202. 141 S. Ct. 1294.

203. See, e.g., Berenstain, *supra* note 20, at 734.

204. *Id.*

205. See, e.g., GORSKI & PERRY, *supra* note 131, at 6–7.

206. Berenstain, *supra* note 20, at 734.

207. See GORSKI & PERRY, *supra* note 131, at 4–5, 8–9.

208. Berenstain, *supra* note 20, at 734.

209. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

agency.²¹⁰ As explained below in Section H, that exemption allowed the agency to turn away same-sex couples seeking to be certified as foster parents.²¹¹

Finally, the shadow docket COVID-19 cases were also a power grab by the conservative supermajority—an increasingly common move by what has been called the “imperial Supreme Court.”²¹² Gaslighters in positions of actual power—like the conservative supermajority of the Court—have unique leverage; their gaslighting is amplified by their authority in ways that “demand they be treated with unjustified degrees of credence.”²¹³

E. Kennedy v. Bremerton School District

The 2022 case *Kennedy v. Bremerton School District* presented an Establishment Clause dispute.²¹⁴ A public high school football coach challenged his termination after being fired for kneeling on the fifty-yard line to pray after each game.²¹⁵ The school district believed that the coach’s public prayer under these circumstances violated the First Amendment’s Establishment Clause and fired him when he continued his public prayers after having been notified that such conduct was prohibited.²¹⁶

In an opinion by Justice Gorsuch, the Court’s conservative supermajority sided with the coach.²¹⁷ It held that firing the coach based on his prayers—described by the Court as “private” but by all who witnessed it as “public”—violated the First Amendment’s Free Exercise and Free Speech clauses, and that the Establishment Clause created no obstacle to allowing such *public* prayer.²¹⁸ The opinion is replete with gaslighting—from the framing of the case, to the facts, to the law.

1. Gaslighting in the Framing of the Case

The majority opinion framed the case as one in which “a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance” and as a case about “discrimination.”²¹⁹ This is gaslighting. It is also an example of the Court

210. *See id.* at 1873 (“The question . . . is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.”); *id.* at 1929 (Gorsuch, J., concurring) (“[T]he City’s power to grant exemptions from its nondiscrimination policy *anywhere* ‘undercuts its asserted interests’ and thus ‘trigger[s] strict scrutiny’ for applying the policy everywhere. Exceptions for one means strict scrutiny for all.” (second alteration in original) (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *id.* (No. 19-123))).

211. *Id.* at 1879 (majority opinion); *see also infra* Part II.H.

212. Lentley, *supra* note 3, at 97 (“[T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself. The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices’ own, but by undercutting the ability of any entity to do something the Justices don’t like. We are in the era of the imperial Supreme Court.”).

213. Abramson, *supra* note 30, at 21.

214. 142 S. Ct. 2407 (2022).

215. *Id.* at 2418–19.

216. *Id.* The school district advised the coach that he could pray in a “private location.” *Id.* at 2418.

217. *Id.* at 2415–16.

218. *See id.* at 2424–25.

219. *Id.* at 2433.

adopting and promoting the white Christian nationalist rhetoric of victimhood that has been deployed since *Obergefell*.²²⁰

Until this case, the enforcement of the Establishment Clause to preclude public prayer in schools was largely accepted as an instance in which such speech *should* and *could* be constrained to preserve the separation of church and state.²²¹ It is thus neither punishment nor discrimination by the state to find that public prayer is impermissible in some contexts—including on the facts of *Bremerton*, as held by the lower courts—because that is the outcome contemplated by the Establishment Clause itself.²²² Characterizing the case as one involving punishment and discrimination thus was gaslighting, because that framing might cause readers to doubt their own abilities to interpret the world around them, both factually and legally.

2. Gaslighting on the Facts

The majority and concurring opinions included a number of statements that the coach's prayer was "private" and that students did not join him or would not have felt coerced to join him. For example:

- "The contested exercise before us does not involve leading prayers with the team or before any other captive audience."²²³
- "He offered his prayers quietly while his students were otherwise occupied."²²⁴
- "When he engaged in this expression, he acted in a purely private capacity."²²⁵
- "There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension."²²⁶

220. See Velte, *Religious Right*, *supra* note 140, at 80–83.

221. See Lupu & Tuttle, *supra* note 128, at 5.

222. See *Bremerton*, 142 S. Ct. at 2441 (Sotomayor, J., dissenting) ("This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so."); *id.* at 2447 ("[A]s this Court has explained, while the Free Exercise Clause has 'close parallels in the speech provisions of the First Amendment,' the First Amendment's protections for religion diverge from those for speech because of the Establishment Clause, which provides a 'specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.' Therefore, while our Constitution 'counsel[s] mutual respect and tolerance,' the Constitution's vision of how to achieve this end does in fact involve some 'singl[ing] out' of religious speech by the government. This is consistent with 'the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.'" (second and third alterations in original) (citations omitted) (first quoting *Lee v. Weisman*, 505 U.S. 577, 591 (1992); then quoting *Bremerton*, 142 S. Ct. at 2416 (majority opinion); and then quoting *Lee*, 505 U.S. at 591–92)).

223. *Id.* at 2422 (majority opinion).

224. *Id.* at 2415.

225. *Id.* at 2434 (Alito, J., concurring).

226. *Id.* at 2430 (majority opinion).

- “[T]his case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive.”²²⁷

The “facts” as described by the majority defy the reality of what happened.²²⁸ The majority’s factual rendition is thus gaslighting because it deploys “a strategy of providing false or fabricated evidence” to its victims (the American people) that may undermine our “epistemic self-trust.”²²⁹

The actual facts paint quite a different picture, one that, if correctly relayed by the majority, likely would have compelled a different *legal* result. Members of the crowd rushed to the fifty-yard line to kneel and pray with the coach.²³⁰ Members of the opposing team sometimes joined the coach in prayer.²³¹ Many of the coach’s own players joined him in prayer.²³² Media outlets descended on the football stadium to record the crowds and the prayer.²³³ By all accounts *except* the majority’s account, the coach’s prayers were decidedly and unabashedly public (in fact, he defied the school board’s request that he pray in a private space).²³⁴ His prayers were more spectacle than quiet, private, and unobtrusive prayer.²³⁵ Moreover, some students and parents complained about feeling coerced to join in the post-game prayer and reported that they did so “solely to avoid separating themselves from the rest of the team.”²³⁶ In her dissent, Justice Sotomayor emphasized the Court’s acknowledgement, in prior cases, that the risk of religious coercion is greater in schools than in other government contexts.²³⁷ The majority ignored these precedents which would have created an obstacle to the legal outcome it sought.

227. *Id.* at 2431.

228. *See, e.g.,* Lemley, *supra* note 3, at 108 (“[T]he Court took the remarkable step of rewriting the facts of the case, ignoring what actually happened (as found by both the district court and the court of appeals and documented with photographs) and writing its own (false) set of facts to tell a more favorable story for the outcome it wanted to reach.”).

229. Spear, *supra* note 115, at 88–89.

230. *Bremerton*, 142 S. Ct. at 2438 (Sotomayor, J., dissenting).

231. *Id.* at 2416 (majority opinion).

232. *Id.*

233. *Id.* at 2437 (Sotomayor, J., dissenting).

234. *See id.* at 2417 (majority opinion).

235. *See id.* at 2437 (Sotomayor, J., dissenting).

236. *Id.* at 2440.

237. *Id.* at 2442 (“The State ‘exerts great authority and coercive power’ in schools as a general matter ‘through mandatory attendance requirements.’ . . . Children are particularly vulnerable to coercion because of their ‘emulation of teachers as role models’ and ‘susceptibility to peer pressure.’ Accordingly, this Court has emphasized that ‘the State may not, consistent with the Establishment Clause, place primary and secondary school children’ in the dilemma of choosing between ‘participating, with all that implies, or protesting’ a religious exercise in a public school.” (citation omitted) (first quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); then quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992); then quoting *Edwards*, 482 U.S. at 584; and then quoting *Lee*, 505 U.S. at 593)); *see also id.* at 2443 (“This Court has previously recognized a heightened potential for coercion where school officials are involved, as their ‘effort[s] to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject.’ . . . Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach’s approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face ‘immense social pressure’ from

The majority continued this gaslighting when addressing the issue of whether the coach was acting within the scope of his employment when he engaged in public prayer. The majority held that it was “unlikely” that the coach “was fulfilling a responsibility imposed by his employment” when he prayed on the fifty-yard line after games, because the district allowed coaches to engage in other “personal” conduct immediately after the game but before their coaching duties had fully concluded, such as chatting with family members or checking an email.²³⁸ The Court thus concluded that the coach’s prayer was “in his capacity as a private citizen.”²³⁹

Again, the record evidence—another way of saying the facts as experienced by those who were at the football games and thus engaged in the epistemic task of being “knowers” of their experience—indicates a very different picture.²⁴⁰ The “essential discursive characteristic of gaslighting [is] the constitution of an unrecognizable reality.”²⁴¹ Reading the Court’s recitation of the “facts” does just that—it constitutes a reality that is unrecognizable to everyone involved in the underlying dispute as it unfolded.

The gaslighting by the Court majority served an explicit purpose. Under controlling Establishment Clause jurisprudence, it was necessary that the facts were as the conservative supermajority *wished* they were in order to enable the Court to reach the legal outcome that it wanted—creating a new right for a public school teacher to pray publicly at a school-sponsored event. This doctrine-shifting outcome based on a mythologized version of the underlying facts elevated the rights of white Christian nationalism by finding in favor of the coach.²⁴² If the Court accepted the facts as they *actually* were, it could not have reached an outcome that squarely advanced the agenda of the white Christian nationalism movement.²⁴³

3. Gaslighting on the Law

But the Court went further than just gaslighting on the facts. It also gaslighted on the law and, in doing so, shored up the outcome. The following are examples of this legal gaslighting:

their peers in the ‘extracurricular event that is American high school football.’” (alteration in original) (first quoting *Lee*, 505 U.S. at 590; and then quoting *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000)).

238. *Id.* at 2425 (majority opinion).

239. *Id.* (“Nor is it dispositive that Mr. Kennedy’s prayers took place ‘within the office’ environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy’s speech and the circumstances surrounding it point to the conclusion that he did not.” (citation omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006))).

240. *Id.* at 2437 (Sotomayor, J., dissenting); see also, Danny Westneat, *The Myth at the Heart of the Praying Bremerton Coach Case*, SEATTLE TIMES (June 29, 2022), <https://www.seattletimes.com/seattle-news/politics/the-myth-at-the-heart-of-the-praying-bremerton-coach-case/> [https://perma.cc/CL8J-VX67].

241. Clint G. Graves & Leland G. Spencer, *Rethinking the Rhetorical Epistemics of Gaslighting*, 32 COMM’N THEORY 48, 49 (2022).

242. See Westneat, *supra* note 240.

243. See, e.g., Ian Millhiser, *The Supreme Court Hands the Religious Right a Big Victory by Lying About the Facts of a Case*, VOX (June 27, 2022, 1:52 PM), <https://www.vox.com/2022/6/27/23184848/supreme-court-kennedy-bremerton-school-football-coach-prayer-neil-gorsuch> [https://perma.cc/UT4Z-XP9T].

- The majority's statement that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."²⁴⁴

While the *Lemon* test has been criticized, it has never been overruled or completely abandoned.²⁴⁵ This statement to the contrary is second-order gaslighting, because by asserting that the *Lemon* test has been abandoned, the Court contests the *concept* proffered by the school district and the dissenting Justices. This assertion allows the Court to thus dismiss those making arguments under *Lemon* as simply having chosen the wrong concept under which to analyze the case. By accusing advocates and dissenters of having chosen the wrong concept (i.e., the wrong legal doctrine), the *Bremerton* majority casts those advocates and dissenters as non-agents of knowledge production. Those advocates and dissenters are thus stripped of their status as providers of knowledge, precedent, or evidence.²⁴⁶ In fact, if the Court had adhered to stare decisis and applied the not-yet-overruled *Lemon* test, the outcome it sought to reach would have been more difficult to justify.²⁴⁷

- The majority opinion states that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"²⁴⁸

Like the MFN approach announced for the first time in the COVID-19 cases, the "historical practices and understandings" theory represents a dramatically new approach.²⁴⁹ The *Lemon* test took a decidedly different approach to Establishment Clause questions, one that did not center historical understandings and practices. Instead, *Lemon* determined the constitutionality of a statute by asking whether the challenged statute (1) has "a secular legislative purpose," (2) has a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) fosters "an excessive government entanglement with religion."²⁵⁰ The radical shift in the law, effected in *Bremerton*, however, is hidden by the Court's gaslighting.²⁵¹ That gaslighting is instantiated through

244. *Bremerton*, 142 S. Ct. at 2427.

245. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), *abrogated by* *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *see also* Lupu & Tuttle, *supra* note 128; Mark Joseph Stern, *Supreme Court Lets Public Schools Coerce Students into Practicing Christianity*, SLATE (June 27, 2022, 4:19 PM), <https://slate.com/news-and-politics/2022/06/coach-kennedy-bremerton-prayer-football-public-school.html> [<https://perma.cc/R6C8-G2AX>].

246. *See* Beerbohm & Davis, *supra* note 12, at 877.

247. *See* *Bremerton*, 142 S. Ct. at 2446 (Sotomayor, J., dissenting) ("Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.").

248. *Id.* at 2428 (majority opinion) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

249. *See id.* at 2450 (Sotomayor, J., dissenting) ("[W]hile the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus." (citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring))).

250. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (first citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); and then quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

251. *See* Lupu & Tuttle, *supra* note 128 ("In [*Bremerton*], the Supreme Court effectively repudiated its Establishment Clause jurisprudence of the past 75 years . . . and left nothing in its wake to prevent the government

the majority's casual declaration that the *Lemon* test had been abandoned when it had not been, as well as through the understated manner with which it announced the new approach, which it never actually conceded was new.²⁵² Again, this duplicitous statement constitutes second-order gaslighting—it simultaneously introduces a new legal rule as if it has long existed *and* implies that any other concept proposed to resolve the matter is incorrect and thus epistemically suspect.

The parallels between the gaslighting in the COVID-19 cases and in *Bremerton* continue. As Justice Sotomayor noted in her *Bremerton* dissent, “It should not escape notice . . . that the effects of the majority’s new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented.”²⁵³ As was true with regard to the COVID-19 cases,²⁵⁴ the seismic shift in Establishment Clause doctrine—“the Court’s choice . . . to upset longstanding rules”²⁵⁵—is gaslighting.

- The majority opinion states, “And in no world may a government entity’s concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.”²⁵⁶

As noted in the prior subsection, the Establishment Clause violations alleged in *Bremerton* are anything but “phantom constitutional violations.”²⁵⁷ Instead, the federal courts below found that the undisputed facts of the case actually supported a finding of a violation of the Establishment Clause.²⁵⁸ To wildly mischaracterize the nature of the meritorious claim as “phantom” is gaslighting—it may cause listeners and readers to doubt their epistemic agency by causing them to question their lived understanding of

and its agents from using religion as an engine of policy. . . . Justice Gorsuch shrunk the Establishment Clause to a bar on undefined ‘historical practices and understandings.’ . . . [T]he Court has jettisoned the entire post-World War II constitutional project of maintaining a secular state.”). Lupu and Tuttle continue:

The Court . . . did not claim to overrule these doctrines. Rather, it asserted that they had already been overruled by various prior decisions Having swept aside the last sixty years of non-establishment law, what did the Court put in its place? Without elaboration or example, the opinion tells us that the Establishment Clause must be interpreted by reference to historical practices and understandings.

Id. (internal quotation marks omitted).

252. *Bremerton*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting) (“Here again, the Court professes that nothing has changed. In fact . . . the Court has never announced this as a general test or exclusive focus.” (citing *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring))).

253. *Id.* (citing *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2235 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting)); see also *id.* (“For now, it suffices to say that the Court’s history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals’ rights to religious exercise above all else? Today’s opinion provides little in the way of answers . . .”).

254. See *supra* Part II.D.

255. *Bremerton*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting).

256. *Id.* at 2432 (majority opinion).

257. *Id.*

258. *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1244–45 (W.D. Wash. 2020), *aff’d by* 991 F.3d 1004 (9th Cir. 2021), *rev’d by* 597 U.S. 507 (2022); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1023–24 (9th Cir. 2021), *rev’d by* 597 U.S. 507 (2022).

the facts and the law, while simultaneously undermining legal claims to the contrary by casting them as epistemologically unsound.

In sum, the majority opinion's recitation of the allegedly controlling legal principles is so far afield from the actual status of the law at the time the case was decided as to be gaslighting. Further, its recitation of the facts reads like fiction. The opinion rewrites First Amendment law while pretending that nothing has changed.²⁵⁹ The decision thus incorporates an "essential discursive characteristic of gaslighting," namely "the constitution of an unrecognizable reality."²⁶⁰ As highlighted by Justice Sotomayor in the dissenting opinion, "[t]he Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in [*Lemon*]. Both of these moves are erroneous and, despite the Court's assurances, novel."²⁶¹

F. *Dobbs v. Jackson Women's Health Organization*

In 1973, the Supreme Court held in *Roe v. Wade* that there is a constitutional right to an abortion.²⁶² *Roe* held that there is a fundamental substantive due process privacy right, grounded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁶³ In 1992, in *Planned Parenthood v. Casey*, the Court reaffirmed the central holding of *Roe*.²⁶⁴ In 2022, in *Dobbs v. Jackson Women's Health Organization*, the Court overruled fifty years of precedent using gaslighting techniques to craft its reasoning.²⁶⁵

Dobbs involved a Mississippi statute that banned abortion after fifteen weeks of gestation.²⁶⁶ The sole abortion facility in the state, along with a provider, challenged the law as unconstitutional under *Roe* and *Casey*.²⁶⁷ The gaslighting began during the oral argument and continued in Justice Alito's scathing and petulant opinion for the conservative supermajority.

1. The *Dobbs* Oral Argument

While there were numerous moments of gaslighting during the oral argument, two particular exchanges vividly illustrate the phenomenon.

a. *Gaslighting on the Burdens of Forced Pregnancy*

The first was an exchange between Justice Barrett and the attorney representing the abortion clinic discussing the burdens that fall upon women when they wish to terminate a pregnancy but are prohibited from doing so by state law.

259. See, e.g., Lemley, *supra* note 3, at 111 ("[*Bremerton*] ignored not only the text of the First Amendment but the facts of the case before it in order to throw out the bulk of the Establishment Clause.").

260. Graves & Spencer, *supra* note 241, at 49.

261. *Bremerton*, 142 S. Ct. at 2447 (Sotomayor, J., dissenting) (citation omitted).

262. 410 U.S. 113, 153 (1973).

263. *Id.*

264. 505 U.S. 833, 846 (1992).

265. 142 S. Ct. 2228 (2022).

266. *Id.* at 2242.

267. *Id.* at 2244.

JUSTICE BARRETT: Ms. Rikelman, I have a question about the safe haven laws. So Petitioner points out that in all 50 states, you can terminate parental rights by relinquishing a child after abortion

So it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy.

Why don't the safe haven laws take care of that problem? It seems to me that it focuses the burden much more narrowly. . . . [I]t doesn't seem to me to follow that pregnancy and then parenthood are all part of the same burden. . . .

[W]hy didn't you address the safe haven laws and why don't they matter?
ATTORNEY RIKELMAN: . . .

[W]e don't just focus on the burdens of parenting, and neither did *Roe* and *Casey*. Instead, pregnancy itself is unique. It imposes unique physical demands and risks on women and, in fact, has impact on all of their lives, on their ability to care for other children, other family members, on their ability to work. And, in particular, in Mississippi, those risks are alarmingly high. It's 75 times more dangerous to give birth in Mississippi than it—than it is to have a pre-viability abortion, and those risks are disproportionately threatening the lives of women of color.

JUSTICE BARRETT: . . . [A]s I hear this answer then, are you saying that the right as you conceive of it is grounded primarily in the bearing of the child, in the carrying of a pregnancy, and not so much looking forward into the consequences on professional opportunities and work life and economic burdens?

ATTORNEY RIKELMAN: No, Your Honor, I believe it's both, . . . and that is exactly how *Casey* talked about it. It talked about the two strands of cases that supported the right. One was the strand of cases supporting bodily integrity And the second was the strand of cases supporting decisional autonomy and specifically decisions related to childbearing, marriage, and procreation.²⁶⁸

Justice Barrett raised the question about safe haven laws again in an exchange with the attorney for the government:

JUSTICE BARRETT: [Y]ou talk about reliance interests and you quote some of the language from *Casey* about a woman's ability to participate in the social and economic life of the nation.

And I mentioned the safe haven laws to Ms. Rikelman, and it . . . seems to me I fully understand the reliance interests. There are the airy ones Justice Kagan was referring to and then there are the more—excuse me—specific ones about a woman's access to abortion as a backup form of birth control in the event that contraception fails so that she need not bear the burdens of pregnancy.

268. Transcript of Oral Argument at 57:6–59:4, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

But what do you have to say to Petitioners' argument that those reliance interests do not include the reliance interests of parenting and bringing a child into the world when maybe that's not the best thing for her family or her career?

GENERAL PRELOGAR: I think the state is wrong about that. And I—I think where the analysis goes wrong in reliance on those safe haven laws is overlooking the—the consequences of—forcing a woman—upon her the choice of having to decide whether to give a child up for adoption. That itself is its own monumental decision for her.

And so I think that there's nothing new about the safe haven laws . . . or at least nothing new about the availability of adoption as an alternative. *Roe* and *Casey* already took account of that fact.²⁶⁹

Justice Barrett's seemingly singular focus on *parenting* as the central (only?) burden that results from being forced to carry an unwanted pregnancy to term is gaslighting. Recall that designating something as gaslighting asks us to focus on what the gaslighting narrative disguises or obfuscates.²⁷⁰ Justice Barrett's suggestion that parenting is the only or most important burden that would result from banning abortion hides the reality that many women know too well—that pregnancy itself can be life-threatening, especially for poor women and women of color; that pregnancy increases the risk of intimate partner violence;²⁷¹ and that giving up a baby for adoption is often a traumatic event for the birth mother, the harms of which follow her throughout her life.²⁷²

Justice Barrett's seemingly singular focus on parenting as the burden of pregnancy may be viewed as an act of testimonial injustice that illustrates the interplay of identity, marginalization, and gaslighting. Specifically, her positionality (a U.S. Supreme Court Justice; white; Christian; and a woman and mother of seven children, including adopted children) renders her speech act as having a legitimacy, power, and effect that is structurally and linguistically superior to the speech acts of the poor, Black women of Mississippi whose lived experiences inform their understandings of the realities of carrying a pregnancy to term.²⁷³ In sum, the marginalization of the identities of Mississippi's poor, Black women renders their epistemic agency diminished (if not completely deprived) by Justice Barrett's gaslighting, while her assertions about the burdens of pregnancy are imbued with epistemic agency, authority, and power. The

269. *Id.* at 109:1–110:7.

270. See Davis & Ernst, *supra* note 101, at 765, 771.

271. See SHAINA GOODMAN, NAT'L P'SHIP FOR WOMEN AND FAMS., INTIMATE PARTNER VIOLENCE ENDANGERS PREGNANT PEOPLE AND THEIR INFANTS 1–3 (2021), <https://nationalpartnership.org/wp-content/uploads/2023/02/intimate-partner-violence-endangers-pregnant-people-and-their-infants.pdf> [<https://perma.cc/FP8J-B8YX>].

272. See, e.g., DIANA GREEN FOSTER, THE TURNAWAY STUDY: THE COST OF DENYING WOMEN ACCESS TO ABORTION 111–12, 175–76 (2020); see also Sarah Al-Arshani, *Conservatives Argue that Kids Should Be Adopted in Place of Abortion. But a Psychologist Says Adoption Can Be a 'Traumatic Event' for Everyone Involved*, INSIDER (July 9, 2022, 11:00 AM), <https://www.insider.com/conservative-adoption-abortion-argument-neglect-womens-traumatic-experiences-psychologist-says-2022-7> [<https://perma.cc/U448-M62C>].

273. See Talbot, *Amy Coney Barrett's Long Game*, *supra* note 136 (mentioning that Justice Barrett is the mother of seven children, two of whom are adopted).

chasmic gulf separating the maternal health outcomes of white and Black Mississippians,²⁷⁴ are not only reinforced, but will proceed apace. This is the consequence of Justice Barrett's gaslighting, which deployed an epistemological framework "that claim[ed] to derive from a universal set of metaphysical assumptions about the nature of knowledge," but in fact reflected "monocultural perspectives supported by structural power relations."²⁷⁵

Justice Barrett proposed at least one solution to the burden of parenthood: adoption.²⁷⁶ However, most women who carry unwanted pregnancies to term do not give the baby up for adoption.²⁷⁷ Justice Barrett's contention that safe haven laws are a cure for the burdens of pregnancy and childrearing is gaslighting, and it simply is not the case that adoption is a viable alternative to abortion *or* to pregnancy.²⁷⁸ Justice Barrett's suggestion to the contrary has the powerful potential to destabilize the epistemic trust that resides in people who may become pregnant as well as adoptees.²⁷⁹ It also "co-opt[s] [the] lives and [] stories" of those upon whom forced birth may be thrust.²⁸⁰

Justice Barrett's gaslighting may be understood through a lens of social inequality.²⁸¹ Women already experience the consequences of the unequal status hierarchies and subordination that are the norm in American society.²⁸² These status hierarchies demand that "certain people are excluded from, or lack full participation in, the economy of epistemic relations: the social network in which we exercise our capacity as knowers."²⁸³ Justice Barrett blithely suggests that parenting is the only burden of forced pregnancy, one that may be easily eliminated through adoption. This assertion is a reprisal of harmful and dominant pre-*Roe* narrative.²⁸⁴ That reprisal, via a woman in the powerful position of a U.S. Supreme Court Justice, excludes most women from the

274. See MISS. STATE DEP'T OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT 2016–2020, at 13 (2023), <https://msdh.ms.gov/page/resources/20200.pdf> [https://perma.cc/D8QK-95LB].

275. Ruiz, *supra* note 17, at 703.

276. Transcript of Oral Argument, *supra* note 268, at 58:9–19.

277. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2339 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("The reality is that few women denied an abortion will choose adoption. The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing.").

278. See, e.g., Michele Merritt, *The False Choice: Adoptee Voices in the Fight for Reproductive Freedom*, HARVARD L. SCH. PETRIE-FLOM CTR.: BILL OF HEALTH (May 9, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/09/the-false-choice-adoptee-voices-in-the-fight-for-reproductive-freedom/> [https://perma.cc/3JDX-R7XQ].

279. See, e.g., *id.*

280. Irin Carmen, *Amy Coney Barrett's Adoption Myths "They're Co-Opting Our Lives and Our Stories,"* N.Y. MAG: INTELLIGENCER (Dec. 3, 2021), <https://nymag.com/intelligencer/2021/12/amy-coney-barrett-adoption-myths.html> [https://perma.cc/VSH2-CSKR]; see also Merritt, *supra* note 278.

281. See Podosky, *supra* note 13, at 212–13, 219–21.

282. See, e.g., June Carbone & Naomi Cahn, *Unequal Terms: Gender, Power, and the Recreation of Hierarchy*, in 69 STUDIES IN LAW, POLITICS, AND SOCIETY 189, 195 (Austin Sarat ed., 2016) (noting the relationship between gender and growing inequality and calling for a theory of patriarchy that analyzes the remaining barriers to women's advancement).

283. *Id.* at 210.

284. See, e.g., Gretchen Sisson, *Barrett Is Wrong: Adoption Doesn't 'Take Care Of' the Burden of Motherhood*, WASH. POST (Dec. 3, 2021, 10:00 AM), https://www.washingtonpost.com/outlook/barrett-is-wrong-adoption-doesnt-take-care-of-the-burden-of-motherhood/2021/12/03/e5bd2f86-53d3-11ec-9267-17ae3bde2f26_story.html [https://perma.cc/C98R-FYEU].

“social network in which we exercise our capacity as knowers,”²⁸⁵ by eliminating other ways of knowing from the conversation—ways that make real the multitude of burdens associated with forced birth and adoption.²⁸⁶

b. Gaslighting on Stare Decisis

A central issue in *Dobbs* was whether the doctrine of stare decisis applied to preclude the reversal of *Roe*.²⁸⁷ While stare decisis is not ironclad, a court seeking to overturn prior precedent must justify such a move by satisfying a number of factors.²⁸⁸ During oral argument, Justice Kavanaugh attempted to analogize the overruling of *Roe* to the overruling of other historic cases:

JUSTICE KAVANAUGH: . . . And history helps think about stare decisis, . . . and the history of how the Court’s [sic] applied stare decisis, and when you really dig into it, the history tells a somewhat different story . . . , than is sometimes assumed.

If you think about some of the most important cases, the most consequential cases in this Court’s history, there’s a string of them where the cases overruled precedent. *Brown v. Board* outlawed separate but equal. [*Baker v. Carr*], which set the stage for one person/one vote. *West Coast Hotel*, which recognized the states’ authority to regulate business. . . . *Lawrence v. Texas*, which said that the state may not prohibit same-sex conduct. . . . *Obergefell*, which recognized a constitutional right to same-sex marriage.

In each of those cases . . . the Court overruled precedent. And it turns out, if the Court in those cases had . . . listened [to] . . . arguments in those cases, [urging the Court to] adhere to precedent . . . the country would be a much different place.

So I assume you agree with most, if not all, the cases I listed there, where the Court overruled the precedent. So the question on stare decisis is why, if . . . we think that the prior precedents are seriously wrong . . . why then doesn’t the history of this Court’s practice with respect to those cases tell us that the right answer is actually a return to the position of neutrality and—and not stick with those precedents in the same way that all those other cases didn’t?²⁸⁹

The list of cases ticked off by Justice Kavanaugh, cases that overruled established precedent, are fundamentally different than the overruling of *Roe* in *Dobbs*. Each of the cases overturned in Justice Kavanaugh’s list was rights-denying or equality-diminishing: *Plessy v. Ferguson* perpetuated white supremacy and approved of de jure segregation as “separate but equal.”²⁹⁰ Outlawing same-sex consensual, intimate conduct was held permissible in *Bowers v. Hardwick*, leading to the criminalization of same-sex sodomy, which in turn led to rampant discrimination in other areas of life, such as employment

285. See Podosky, *supra* note 13, at 210.

286. See, e.g., Sisson, *supra* note 284.

287. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2234 (2022).

288. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992), overruled by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

289. Transcript of Oral Argument, *supra* note 268, at 78:23–80:24.

290. 163 U.S. 537, 551 (1896) overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

and child custody.²⁹¹ *Adkins v. Children's Hospital of the District of Columbia* perpetuated labor exploitation when it struck down a minimum wage law for women and children.²⁹² In that opinion, the Court also cited *Lochner v. New York*—a case that declared unconstitutional a law setting a minimum wage for bakers.²⁹³ Finally, in *Colegrove v. Green*, the Court held that challenges to states' redistricting maps presented a nonjusticiable political question.²⁹⁴ In precluding federal courts from ruling on the constitutionality of gerrymandered political districts, the Court jettisoned the notion of one person, one vote and undermined the promise of a representative democracy.²⁹⁵

These are the cases that Justice Kavanaugh cited for his anti-stare decisis position in *Dobbs*, and the reversal of such cases was used to support the overruling of *Roe*. The fact that these overturned cases denied equality, gave white supremacy constitutional approval, disenfranchised people, criminalized LGBTQ people, and denied a living wage to women and children seems to be of no moment to Justice Kavanaugh.

But the rights-diminishing nature of these eventually overruled cases is the point. The equality-denying outcomes of those cases were a reason why stare decisis did *not* operate as an obstacle to their reversal. As a result, each of the overturning cases were rights-affirming and equality-enhancing: *Brown v. Board of Education* overruled *Plessy* and mandated equality by outlawing segregation in schools.²⁹⁶ In *Obergefell*, the Court granted the right to marry to same-sex couples.²⁹⁷ *Lawrence* overruled *Bowers* and recognized the right of LGBTQ people to engage in consensual intimate behavior.²⁹⁸ In *West Coast Hotel Co. v. Parrish*, the Court backed off of the reasoning of *Lochner* and *Atkins* to permit some regulation of the labor force—regulation that ameliorates unequal bargaining power and ensures a living wage.²⁹⁹ Finally, in *Baker v. Carr*, the Court reversed *Colegrove* to hold that challenges to gerrymandered political districts *do* present justiciable equal protection claims, a result that recognizes and protects the “one person, one vote” principle.³⁰⁰

Thus, rather than serving as persuasive analogies, the cases to which Justice Kavanaugh compared the overruling of *Roe* are instead distinguishable. Although analogies do not require an exact match, they do require similarity. Those similarities are absent in the analogy attempted by Justice Kavanaugh: the cases that he cites are rights-creating and rights-affirming, while the overruling of *Roe* in *Dobbs* was rights-denying.³⁰¹ Moreover, *Dobbs* represents the first time that a group of people had a

291. 478 U.S. 186, 196 (1986); see also Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1587–88 (1993).

292. See 261 U.S. 525, 555–57 (1923), overruled by *W. Coast Hotel Co. v. Parrish*, 57 S. Ct. 578 (1937).

293. 198 U.S. 45, 57–58 (1905), overruled by *Ferguson v. Skrupa*, 83 S. Ct. 1028 (1963).

294. 328 U.S. 549, 554–56 (1946), abrogated by *Baker v. Carr*, 369 U.S. 186, 202 (1962).

295. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

296. 347 U.S. 483, 493–95 (1954).

297. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

298. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

299. 300 U.S. 379, 392 & n.1, 398–400, (1937).

300. 369 U.S. 186, 209–10 (1962).

301. Even more noteworthy is that, because of state statutes that the Court was well aware of, millions of women immediately no longer had access to abortion in over a dozen states. See, e.g., NICOLE DUBE, JAMES ORLANDO & JESSICA SCHAEFFER-HELMECKI, CONN. OFF. OF LEGIS. RSCH., STATE ABORTION LAWS ENACTED

constitutional right—indeed, had it for five decades—and then the Court’s decision meant they no longer had that right.³⁰² Further, because of state statutes that the Court was well aware of, those people immediately lost access to abortion in over a dozen states.³⁰³

The comparison of *Roe*, which granted rights to bodily autonomy and privacy, to *Plessy*, which denied equal citizenship to African Americans and thus perpetuated white supremacy, is not just shallow, it is incoherent, intellectually dishonest, and insulting. But it is also gaslighting—by drawing baseless analogies, Justice Kavanaugh obscured the inapposite nature of the rights at issue in these cases, in ways that may create epistemic self-doubt in readers. Another result is structural gaslighting: overturning *Roe* based on gaslighting of law and facts keeps many women relegated to second-class economic status when pregnancy is forced upon them.³⁰⁴

2. *Dobbs* Majority Opinion

Justice Alito wrote the majority opinion in *Dobbs*. The following excerpts are illustrative of the gaslighting that permeates the opinion.

a. Citing Rights-Affirming Cases To Justify Overruling Roe, and Taking Away a Right

Justice Alito’s opinion echoes Justice Kavanaugh’s line of inquiry during oral argument. He states, “Some of our most important constitutional decisions have overruled prior precedents,”³⁰⁵ and for support, he cites, among other cases, *Brown, West Coast Hotel, Obergefell*, and *Lawrence*.³⁰⁶ For the reasons described above, this is gaslighting. Further, the gaslighting takes on additional destructive significance once it appears in the decision, because it embeds false equivalences into law. One potential future harm of this gaslighting is that by falsely equating *Dobbs* and *Brown*, prohibitions against racial discrimination may be imperiled.

POST-*DOBBS* DECISION (2022), <https://cga.ct.gov/2022/rpt/pdf/2022-R-0227.pdf> [<https://perma.cc/7FMB-R9XD>].

302. CTR. FOR REPROD. RTS., *supra* note 301.

303. See, e.g., Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans Here's What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [<https://perma.cc/J966-68UD>].

304. See, e.g., *Watch: Treasury Secretary Yellen Capitol Hill Testimony on Finance Touches on Abortion*, PBS NEWS, at 19:00–20:11 (May 10, 2022, 4:48 PM), <https://www.pbs.org/newshour/politics/watch-live-treasury-secretary-yellen-testifies-on-financial-stability-in-senate-banking-hearing> [<https://perma.cc/269A-KSY2>] (reporting on testimony of Treasury Secretary Janet Yellen to the Senate Banking Committee, in which she stated: “I believe that eliminating the right of women to make decisions about when and whether to have children would have very damaging effects on the economy and would set women back decades . . . [D]enying women access to abortion increase[s] their odds of living in poverty or need for public assistance.”).

305. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2262 (2022).

306. *Id.* at 2662, 2663 & n.48.

i. *Adopting Justice Barrett's Gaslighting on Safe Haven Laws*

The majority accepted Justice Barrett's gaslighting, which relied on the availability of safe haven laws as a justification for overturning *Roe*.³⁰⁷ Her gaslighting at oral argument now has been enshrined in legal precedent.³⁰⁸ As a result, many American women may continue to suffer from structural inequalities that are baked into parenting in the United States, such as no right to paid parental leave; the near-total unavailability of high-quality, affordable childcare; and employment discrimination against those who are pregnant or are caregivers.³⁰⁹

ii. *Claiming that Dobbs Does Not Imperil Obergefell, Griswold, or Lawrence*

Roe rested its reasoning on the right to privacy and autonomy included under the umbrella of substantive due process.³¹⁰ *Roe* cited prior cases that found a similar privacy and autonomy right, namely *Griswold v. Connecticut* and *Eisenstadt v. Baird*, which both affirmed a right to obtain contraceptives.³¹¹ Those cases were also a basis for finding a constitutionally protected right to engage in same-sex intimate conduct in *Lawrence*³¹² and the right to same-sex marriage in *Obergefell*.³¹³

Pro-*Roe* advocates thus argued that overturning *Roe* sets up the overturning of *Griswold*, *Obergefell*, and *Lawrence*.³¹⁴ In the *Dobbs* opinion, Justice Alito emphatically rejected this argument: "And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."³¹⁵

Deceptive claims such as this one are what gaslighting is made of. Justice Alito's dissent in *Obergefell* directly maps onto his majority opinion in *Dobbs*.³¹⁶ Justice Thomas, who voted with the *Dobbs* majority and authored a concurring opinion, said the quiet part out loud—he expressly called for the Court to revisit *Obergefell*.³¹⁷ Moreover, when they were nominees to the Court, Justices Barrett, Gorsuch, and Kavanaugh testified that *Roe* was established precedent and that they would adhere to the principle of stare decisis.³¹⁸

307. Transcript of Oral argument, *supra* note 268, at 57:7–59:8.

308. See *supra* Part II.F.1.a.

309. See *Dobbs*, 142 S. Ct. at 2339 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

310. 410 U.S. 113, 152–53 (1972).

311. *Id.* at 129 (first citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); and then citing *Eisenstadt v. Baird*, 405 U.S. 438, 452–54 (1972)).

312. *Lawrence v. Texas*, 539 U.S. 558, 564–66 (2003).

313. *Obergefell v. Hodges*, 576 U.S. 644, 665–66 (2015).

314. *Dobbs*, 142 S. Ct. at 2277–78.

315. *Id.*

316. See *Obergefell*, 576 U.S. at 736–42 (Alito, J., dissenting) (arguing that same-sex marriage is neither traditional, nor a constitutional right under the Fourteenth Amendment).

317. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

318. See, e.g., Lexi Lonas, *What the Conservative Justices Said About Roe v. Wade During Confirmation Hearings*, THE HILL (May 3, 2022, 12:25 PM), <https://thehill.com/regulation/court-battles/3475490-what-the-conservative-justices-said-about-roe-v-wade-during-confirmation-hearings/> [https://perma.cc/UYJ5-MFHX].

In *Dobbs*, Justice Alito frames the abortion question as one of deep moral significance about when life begins, but marriage equality, contraception, and same-sex sodomy *also* were (and continue to be) cast as moral debates. There is little in the way of a principled distinction between abortion, on the one hand, and marriage equality, contraception, and same-sex sodomy, on the other, despite Justice Alito's gaslighting statement to the contrary.

Because the purported distinction between abortion and these other rights is flimsy, at best, and deceptive, at worst, the distinction constitutes gaslighting. It undermines the epistemic agency of advocates in the LGBTQ and reproductive rights communities who have been issuing warnings and rally cries that same-sex marriage, contraception, and same-sex intimate conduct are vulnerable after *Dobbs*. Justice Alito's assurance that these rights are not up for grab means that those warning otherwise may be dismissed as crying wolf, or delegitimized as overreacting. Justice Alito has taken the position that the concepts are different: abortion is different than those other rights and thus the legal principles are also different. When the LGBTQ and reproductive rights communities say otherwise, they may be dismissed as simply being incorrect about the concepts that apply, an example of second-order gaslighting.

iii. *Disclaiming that the Decision Takes a Position on When Life Begins*

Dobbs gaslights about the Christian-based background norm that informs the decision. At its core, the case rests on a Christian belief that "life" may begin before birth, but the majority hides and/or ignores that premise, even though it is a driver of the outcome. Justice Alito goes as far as to say that the holding is *not* resting on that belief: "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin."³¹⁹

However, the majority opinion arguably is grounded on a theological assumption, or at least on a religiously informed background norm: there is no need to permit states to outlaw abortion unless one believes that life begins at conception, and it is *that* religious belief that the majority is thrusting onto the nation. Under the dissent's position, which would affirm *Roe* and *Casey*, those with religious opposition to abortion may simply choose not to have one. In contrast, the majority's opinion supports the imposition of the particular theory of Christianity (that life begins at conception) on *everyone*.

When Justice Alito disclaims any position on when life begins while simultaneously taking religious views on that question into account in his opinion, he undertakes gaslighting in the form of epistemic injustice. For those who see the religiously based norm lurking under the surface of the opinion, the disclaimer is a "wrong perpetrated done to someone in their capacity as a knower."³²⁰ And even if such opponents of *Dobbs* stand firm in their own confidence as "knowers," the epistemic power of Justice Alito's gaslighting disclaimer nonetheless may wield power: the power to delegitimize the voices who contest his disclaimer. That delegitimization may, in turn, lead to a marginalizing of such voices in public discourse, to the extent that such voices

319. *Dobbs*, 142 S. Ct. at 2261.

320. See Podosky, *supra* note 13, at 218 (quoting FRICKER, *supra* note 62, at 1); see also *supra* note 119 and accompanying text.

lose some or all epistemic status or trust in the larger public debate. On the flip side, the epistemic status of antiabortion advocates who perpetuate and build upon Justice Alito's gaslighting disclaimer may be legitimized and the anti-choice movement emboldened, as a result.

iv. Claiming that Pro-Choice Advocates Have a Meaningful Remedy Through Voting

Dobbs minimizes the impact of overturning *Roe* by contending that reproductive rights can and will be worked out in the legislative arena:

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.³²¹

Justice Alito's message, which seems to boil down to "if you want abortion, just go vote, ladies," is gaslighting. It implies that voting is equally accessible to all and that the electoral system is set up in a way that ensures representative government. Neither is true.

Voting is not equally accessible to all.³²² There has been an uptick in voter suppression over the past two decades.³²³ These efforts include limiting or eliminating mail-in ballots, as well as "imposing strict voter ID laws, cutting voting times, restricting registration, and purging voter rolls."³²⁴ Such measures disproportionately disadvantage people of color,³²⁵ people of all races living in poverty,³²⁶ and transgender people.³²⁷ Thus, for many, voting is a hollow "right" that is difficult or impossible to exercise.

321. *Dobbs*, 142 S. Ct. at 2277 (footnotes omitted).

322. See, e.g., *Vote Suppression*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression> [<https://perma.cc/L6FT-PREX>] (last visited Apr. 5, 2024).

323. See *id.* While disenfranchisement and voter suppression have been part of the fabric of America since its founding, the Court's 2013 decision in *Shelby County v. Holder* marked the modern-day turning point of retrenchment. See generally 570 U.S. 529 (2013). *Shelby County* held unconstitutional a key part of the Voting Rights Act (VRA) of 1965. *Id.* at 556–57. The decision allowed state and local governments to bring back to life formerly dormant discriminatory election policies—long dormant *because of* that stricken provision of the VRA. See *Democracy Explainers: Shelby v. Holder, ROCK THE VOTE*, <https://www.rockthevote.org/explainers/shelby-v-holder/> [<https://perma.cc/FWK8-XGJQ>] (last visited Apr. 5, 2024). Today's onslaught of voter suppression efforts is the consequence of the holding in *Shelby County*. See *id.*

324. *Vote Suppression*, *supra* note 322.

325. *Id.*

326. See K.A. Dilday, *Voting Rights Aren't Just a Black Issue: They Affect Poor People of All Races*, BLOOMBERG (Nov. 13, 2018, 1:44 PM), <https://www.bloomberg.com/news/articles/2018-11-13/voter-suppression-targets-blacks-but-affects-all-poor> [<https://perma.cc/UB3N-9YPW>].

327. See KATHRYN K. O'NEILL, NATHAN CISNEROS, WILL TENTINDO & JODY L. HERMAN, UCLA SCH. OF L., *THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS IN THE 2022 GENERAL ELECTION* 18 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Sep-2022.pdf> [<https://perma.cc/D3TL-V8CL>].

As a result, Justice Alito's implied admonition to "just go vote, ladies" is gaslighting. This passage of the opinion is a sociolinguistic act of knowledge creation, because it uses language prone to cause the victim to question their ability to interpret the world accurately.³²⁸ This gaslighting is aimed directly at victims of voter suppression who may experience dissonance or a feeling of being destabilized upon reading this passage. Even if such victims of suppression remain confident that their lived experience is epistemologically accurate, Justice Alito's gaslighting on the topic may cause the stories of such victims to be discounted or ignored, thus derailing recognition of the considered contributions³²⁹ of such victims by the polity at large. Epistemic injustice results from gaslighting when the "dominantly situated epistemic subjects," such as lawmakers, lobbyists, judges, and powerful mass media personalities, fail to acknowledge or actively discredit "the knowledge contributions of marginalized individuals," such as those who experience voter suppression.³³⁰

G. *West Virginia v. EPA*

West Virginia v. EPA addressed the scope of agency authority to implement the Clean Air Act.³³¹ In 2015, the EPA issued a new rule requiring coal power plants either to reduce their own production of electricity, or to subsidize increased generation of power by cleaner sources, such as natural gas, wind, or solar.³³² Although the Clean Air Act authorizes the EPA to regulate power plants by setting a standard of performance for emissions of certain pollutants, and the EPA had done so for some fifty years, several states and private entities challenged the 2015 rule as an improper expansion of agency power.³³³

Until this case, it was largely an accepted principle that agencies do, in fact, have the power to enact rules such as the 2015 rule.³³⁴ This result makes sense—Congress passes sweeping laws like the Clean Air Act, but its members commonly lack the expertise to craft specific regulations to actually ensure clean air, water, and the like. As a result, Congress authorizes agencies like the EPA, which is staffed with environmental experts, to promulgate regulations based on empirical scientific data and informed by subject matter and industry expertise. Moreover, it would make little sense to expect members of Congress, who are largely subject matter generalists, to be engaged in activities such as the regulation of coal power plants on an ongoing basis—such in-the-weeds regulatory decision-making and monitoring simply is not within the bandwidth or wheelhouse of Congress. Stanford Law Professor Mark Lemley explains that the EPA rule involved "individual decisions about how to account for carbon emissions from a variety of different polluters, decisions which must be made in response

328. See Podosky, *supra* note 13, at 213.

329. See Sinha, *supra* note 12, at 5.

330. Podosky, *supra* note 13, at 218.

331. 142 S. Ct. 2587, 2599–600 (2022).

332. *Id.* at 2599.

333. *Id.* at 2605; see also 42 U.S.C. § 7411.

334. See Jeff Turrentine, *The Supreme Court's EPA Ruling, Explained*, NRDC (July 7, 2022), <https://www.nrdc.org/stories/supreme-courts-epa-ruling-explained> [https://perma.cc/UB5G-T7TD] ("Put simply, this [major questions] doctrine holds that the Court shouldn't defer to agencies (as it has been doing for the last four decades or more) if and when an agency appears to do something novel . . .").

to constantly changing conditions; it is impossible to imagine Congress making those decisions itself on an ongoing basis.”³³⁵

In upholding the challenge to the 2015 rule, the Court reasoned that Congress did not *clearly* delegate to the EPA the authority to direct coal power plants to shift from one way of generating power to another.³³⁶ Most importantly, the Court held that federal agencies cannot take action on anything that *the Court* deems to be a “major question,” without clear and explicit congressional permission.³³⁷ This is the case “no matter how detailed and bound up with agency expertise that question is and regardless of congressional intent to delegate that question to the agency.”³³⁸ The holding thus means that the

EPA can’t use the Clean Air Act to tackle any significant new problem without going back to Congress each time for new, and very detailed, legislation They’re counting on lobbyists and dark money to keep Congress gridlocked, so that those new laws are impossible to pass.³³⁹

The decision is a win for the power industry and a loss for the environment and for the climate justice movement.³⁴⁰ Environmental regulation itself is a civil rights issue: loose, industry-friendly environmental regulation disproportionately harms communities of color and poor communities; this is environmental racism at work.³⁴¹

335. Lemley, *supra* note 3, at 99 (footnote omitted).

336. *West Virginia*, 142 S. Ct. at 2609 (holding that “[t]he agency instead must point to ‘clear congressional authorization’ for the power it claims” to regulate the mode of power generation (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

337. *Id.* at 2614.

338. Lemley, *supra* note 3, at 99.

339. Turrentine, *supra* note 334. Dark money is “money spent by sources that are virtually untraceable.” Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 905 (2014). It is used for the funding of amicus briefs in high-profile U.S. Supreme Court cases, as well as to fund political campaigns and lobbying efforts. See Whitehouse, *supra* note 133. The money is collected

primarily via secret donations routed through 501(c)(4) social welfare groups or 501(c)(6) trade associations, which are named after the sections of the Internal Revenue Code that grant tax exempt status to these organizations. . . .

Sometimes referred to as “issue advocacy” groups or “dark money” groups, they are not required to publicly disclose their donors.

What Is Dark Money?, CAMPAIGN LEGAL CTR. (May 9, 2022), <https://campaignlegal.org/update/what-dark-money> [<https://perma.cc/J6NA-G69K>].

340. See Lemley, *supra* note 3, at 99 (“[T]he practical effect of the decision is to make it impossible for the EPA to regulate carbon emissions by coal plants and to drastically limit its power to handle climate change more generally.”); see also *West Virginia*, 142 S. Ct. at 2644 (Kagan, J., dissenting) (“The subject matter of the regulation here makes the Court’s intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let’s say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants’ carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”).

341. See, e.g., TIM DONAGHY & CHARLIE JIANG, GREENPEACE, FOSSIL FUEL RACISM (2021), <https://www.greenpeace.org/usa/wp-content/uploads/2021/04/Fossil-Fuel-Racism.pdf> [<https://perma.cc/PJJ7-Q6XS>]; DARIELY RODRIGUEZ & HOPE KWIATKOWSKI, LAWS’ COMM. FOR C.R. UNDER L., HOW RACE, ETHNICITY, AND GENDER IMPACT YOUR LIFE’S WORTH: DISCRIMINATION IN CIVIL DAMAGE AWARDS 4 (2018), https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf

How did the Court get around the longstanding understanding that Congress both can and should delegate the regulation of these kinds of activities to the experts in agencies to reach its preferred outcome?³⁴² It found a way, at least in part, through gaslighting. That gaslighting in *West Virginia* is similar to the gaslighting in the COVID-19 cases and in *Bremerton*—the introduction by the Court of a new doctrine while denying that it is, in fact, a new doctrine. In *West Virginia*, that new doctrine was the “major questions doctrine.”³⁴³ However, it did not function as a doctrine in any way; rather, it is an approach that relies on patently subjective decision-making and short circuits decades of existing doctrine.³⁴⁴

In addition to threatening environmental regulations (and increasing racial injustice), the “doctrine” threatens civil rights. Civil rights laws, such as Title VII³⁴⁵ and Title IX,³⁴⁶ are largely enforced via the administrative state, through agency rules and regulations.³⁴⁷ The danger of the “doctrine” lies, in large part, with the fact that the Court no longer will defer to agencies, as it has for decades; instead it is the Justices themselves that decide what constitutes a “major question.”³⁴⁸ In this way, *West Virginia*’s anointment of a “major questions” exception to the historical judicial deference to agency determinations as a “doctrine” of the Court is a separation-of-powers grab.³⁴⁹ The result of this power grab is a Court that crossed the line separating executive and judicial powers.³⁵⁰ It allows the Justices to force their own policy goals upon all of us in ways

[<https://perma.cc/55DW-3XRB>] (“Communities of color are also disproportionately impacted by environmental hazards created by toxic waste centers, industrial facilities, unsafe drinking water, and chemical factories.”).

342. See Turrentine, *supra* note 334.

343. See *West Virginia*, 142 S. Ct. at 2609.

344. See Lemley, *supra* note 3, at 100 (“The ‘major questions’ doctrine the Court employed is a recent judicial invention, one that has no basis in the Constitution or congressional mandate.”); see also *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting) (“The majority claims it is just following precedent, but that is not so. The Court has never even used the term ‘major questions doctrine’ before.”); *id.* at 2642 (“The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed.” (footnote omitted)). See generally Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 272–85 (2022) (describing the creation of the new “major questions doctrine”); *id.* at 264 n.14 (“[W]hat the Court labeled as the ‘major questions doctrine’ is a clear statement rule that materially differs from the doctrine that the Court applied to major questions in the past.”); Richard L. Revesz, *Bostock and the End of the Climate Change Double Standard*, 46 COLUM. J. ENV’T L. 1, 33 (2020) (describing the Trump administration as having “create[d], out of whole cloth, an amorphous doctrine to which it assigns a familiar label but that in fact bears no resemblance to its prior invocations”).

345. 42 U.S.C. §§ 2000e–2000e-17.

346. 20 U.S.C. §§ 1681–1689.

347. See, e.g., 29 C.F.R. §§ 1614.101–103, .407 (EEOC promulgated regulations regarding Title VII actions).

348. See Turrentine, *supra* note 334.

349. See, e.g., Kimberly Wehle, *The Supreme Court’s Extreme Power Grab*, THE ATLANTIC (July 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/west-virginia-v-epa-scotus-decision/670556/> [<https://perma.cc/WM9J-ZDNC>].

350. See, e.g., Sohoni, *supra* note 344, at 262–63.

that violate the separation of powers doctrine and contradict the policy preferences of a majority of Americans.³⁵¹

The gaslighting in the *West Virginia* case is visible in the majority's downplaying of the significant legal shift that it created—a change that has been described as “a massive power grab by the justices.”³⁵² The Court is doing one thing (creating a new doctrine) but saying another (“we are not creating a new doctrine”). When the dissent opinion calls this out, the majority and concurring opinions seek to minimize and downplay the dissent's assertions.³⁵³ This is second-order gaslighting—in the majority and concurring opinions, the Justices challenge the dissent's invocation of the long-used, well-recognized, and deeply established doctrine of judicial deference to agencies and fail to acknowledge the seismic legal shift created by the major questions doctrine.³⁵⁴

This gaslighting renders the dissenting Justices epistemically suspect to observers, thus diminishing their status and eroding trust in what they have to say. The imposition of the novel major questions doctrine (while minimizing the radical nature of that legal move), together with the majority's and concurrence's treatment of the dissent's warning cry about the seismic legal shift, tend to cast those that align with the dissent's position as non-agents of knowledge production who are stripped of the status of evidence provider.³⁵⁵

While the *West Virginia* Court did “not (yet) go[] so far as to dismantle the administrative state. . . . [I]t is clearly embarked on a project to rein in the power of administrative agencies, at least when they do things the current Court majority doesn't like.”³⁵⁶ And it used gaslighting as a means and mechanism to this end, in ways that are analogous to the COVID-19 cases³⁵⁷ and *Bremerton*.³⁵⁸

H. *Fulton v. City of Philadelphia*

In *Fulton v. City of Philadelphia*, a unanimous Supreme Court held that the City of Philadelphia violated the First Amendment right to the free exercise of religion when it

351. In the October 2022 Term, the Court decided *Biden v. Nebraska*, a case that challenged the Biden administration's student loan cancellation program. 143 S. Ct. 2355, 2364–65 (2023). The Court struck down that program using the major questions doctrine, *id.* at 2373–74, even though a majority of Americans supported the policy. See, e.g., William A. Galston, *Do Americans Support President Biden's Student Loan Plan?*, BROOKINGS INST. (Sept. 6, 2022), <https://www.brookings.edu/articles/do-americans-support-president-bidens-student-loan-plan/> [<https://perma.cc/N4GF-YFUP>] (noting that every survey taken on the issue showed majority support for President Biden's plan). The so-called major questions doctrine has shown itself to be an end run around any policy with which the conservative supermajority disagrees.

352. Ian Millhiser, *The Supreme Court's Big EPA Decision Is a Massive Power Grab by the Justices*, VOX (Jun 30, 2022, 1:45 PM), <https://www.vox.com/2022/6/30/23189610/supreme-court-epa-west-virginia-clean-power-plan-major-questions-john-roberts> [<https://perma.cc/WUR6-F8JG>].

353. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *id.* at 2624–25 (Gorsuch, J., concurring).

354. One commentator described the decision as one made by “radicals in robes.” Tyler Kruse, *Greenpeace USA Condemns Supreme Court “Radicals in Robes” for West Virginia v. EPA Decision*, GREENPEACE (June 30, 2022), <https://www.greenpeace.org/usa/news/greenpeace-usa-condemns-supreme-court-radicals-in-robes-for-west-virginia-v-epa-decision/> [<https://perma.cc/8YKZ-4QS3>].

355. See Beerbohm & Davis, *supra* note 12, at 877.

356. Lemley, *supra* note 3, at 101.

357. See *supra* Part II.D.

358. See *supra* Part II.E.

denied one of its contractors, Catholic Social Services (CSS), a religious exemption that would allow it to turn away same-sex couples seeking certification as foster parents.³⁵⁹ CSS sought an exemption based on its religious belief that marriage is a sacred bond that can exist only between a man and a woman.³⁶⁰

The Court declined to address the question that seemed central to most observers—whether a neutral and generally applicable public accommodations law that prohibits sexual orientation and gender identity discrimination must give way to religiously based First Amendment free exercise and free speech exemption claims.³⁶¹ Instead, the Court grounded its holding on an antidiscrimination provision in the contract between the City and CSS, which prohibited providers like CSS from discriminating against prospective adoptive parents based on their sexual orientation, as well as the provision's exemption clause, which allowed the City to grant an exception to the antidiscrimination prohibition based on the sole discretion of a City commissioner.³⁶²

The gaslighting in *Fulton* is an extension of the gaslighting in the COVID-19 cases. The *Fulton* Court used the upside-down strict scrutiny test,³⁶³ which it had created from whole cloth in the COVID-19 shadow docket cases.³⁶⁴ Applying the “[e]xceptions for one means strict scrutiny for all”³⁶⁵ approach from the COVID-19 cases, the *Fulton* Court held that the City could not meet this strict scrutiny test.³⁶⁶ As a result, the City could not constitutionally enforce a nondiscrimination clause in its foster care contract against a Catholic foster care agency that wanted to refuse to certify same-sex foster parents.³⁶⁷ Through *Fulton*, the gaslighting that began in the COVID-19 cases has been extended to and embedded into the Court's ordinary docket precedent.³⁶⁸

III. RIGHTS CLAIMS BY THOSE IN THE MAJORITY: AMPLIFYING THE GASLIGHTING

The gaslighting that is occurring in civil rights cases is further reinforced by reference to cases addressing the rights of majority individuals—race claims by white people,³⁶⁹ First Amendment religious claims by majority (and largely white) religions in

359. 141 S. Ct. 1868, 1881–82 (2021).

360. *Id.* at 1875.

361. *See generally id.*

362. *Id.* at 1881–82.

363. *Id.* at 1921 (Gorsuch, J. concurring).

364. *See supra* Part II.D.

365. *Fulton*, 141 S. Ct. at 1929 (Gorsuch, J. concurring) (citing *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam)).

366. *See id.* at 1882 (majority opinion).

367. *Id.* at 1881 (“The question . . . is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.”).

368. While this Article's focus is on cases decided through the Court's October 2021 Term, cases decided in the October 2022 Term continue to gaslight. *See, e.g.,* *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (holding the use of race-conscious admission in public and private colleges and universities unconstitutional). In his concurring opinion, Justice Thomas declared that the term “freedman”—used in Freedmen's Bureau Acts in the 1860s, which were enacted to assist formerly enslaved people—was a race-neutral term and that this legislation was colorblind. *Id.* at 247–48. (Thomas, J., concurring).

369. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009); *Students for Fair Admissions*, 600 U.S. at 214–18.

religious exemption cases,³⁷⁰ Second Amendment claims by the powerful (and largely white) gun lobby in gun rights cases,³⁷¹ First Amendment speech claims made by powerful (and largely white) political organizations in campaign finance cases,³⁷² and cases brought or supported by the powerful (and largely white) fossil fuel industry challenging the federal government's authority vis-a-vis environmental regulation.³⁷³ In these cases, similar claims—First Amendment religion and speech claims and Equal Protection claims, for example—come out in favor of the claimant whose social and cultural positionality is one of power and privilege.

Put another way, the harms of gaslighting are compounded when considered in contrast to Court decisions that *favor* those who challenge government action, challengers who are white, heterosexual, aligned with the white Christian nationalism movement, wealthy, or politically powerful. The Court's solicitude to the "rights" of these claimants stands in stark contrast to its rejection of similar rights claimed by marginalized groups. On this view gaslighting means that "structured precarity remains for some populations but not others," and "new structuralist views of oppression as the coordinated maldistribution of social harm" have developed on this understanding.³⁷⁴

The types of gaslighting explored above "function[] to obscure the nonaccidental connections between structures of oppression and the patterns of harm that they produce and license."³⁷⁵ Structural gaslighters "invoke epistemologies and ideologies of domination that actively disappear and obscure the actual causes, mechanisms, and effects of oppression."³⁷⁶ Thus, structural gaslighting works to preserve structural inequalities by "obscuring the social systems and mechanisms of power that uphold them."³⁷⁷

IV. WHY IT MATTERS AND WHAT WE CAN LEARN

Why is it important to describe the Court's recent civil rights cases as gaslighting?

A. *It Allows Us To Avoid the "Can't See the Forest for the Trees" Problem*

Identifying gaslighting across substantive legal doctrines and across marginalized groups allows us to zoom out to see the big picture of the Court's dismantling of civil rights. This is important for several reasons. First, it forces marginalized communities to get out of our silos and see connections among our struggles; in that way it provides yet another reason for strategic coalition-building among such communities. We must

370. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018); 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 2309–10 (2023).

371. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022).

372. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 364 (2010).

373. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); see also Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 *DEPAUL L. REV.* 555, 578–79 (2010) (discussing cases involving the foregoing issues).

374. Ruiz, *supra* note 17, at 692.

375. Berenstein, *supra* note 20, at 734.

376. *Id.*

377. *Id.*

always remember that “[t]hinking with others resists gaslighting and improves political activity.”³⁷⁸

Second, it exposes the extent of the campaign by the Court’s conservative Justices, alongside like-minded people and groups within legal and political communities, to preserve white Christian nationalist ideals and write them into law. It matters because it helps to explain one of the tactics that got us to this moment of the imperial Supreme Court:

[T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself. The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices’ own, but by undercutting the ability of any entity to do something the Justices don’t like.³⁷⁹

To get to this place, the Court is “happy to embrace conflicting philosophies to achieve the ends it wants in the case before it.”³⁸⁰ As a result, focusing on a particular judicial philosophy as a way to theorize and comprehend what is going on may just continue to obscure the depth and breadth of the regressive, pro-white Christian nationalism bent in the Court’s recent cases. The gaslighting lens helps to make visible this retrenchment and consolidation of conservative power in ways that cannot be accomplished by trying to understand the shift through frames like *stare decisis*, “textualism,” or “original intent” alone.³⁸¹

In fact, what is happening is not the principled application of conservative judicial philosophies but, instead, structural gaslighting: “it both draws its power from and simultaneously reinforces structural oppression in an unending positive feedback loop.”³⁸² The gaslighting framework thus facilitates a deeper understanding and appreciation of the long-established judicial norms that are being jettisoned via the

378. Beerbohm & Davis, *supra* note 12, at 877. Consciousness-raising groups that emerged during feminism’s second wave provided spaces where women spoke to each other about their experiences, which allowed them to realize that their issues were not only personal but also political. See, e.g., Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. L. GENDER & L. 99, 125 (2007) (“Ever since consciousness-raising was adapted from socialist organizers, women’s accounts of their own lives have formed the backbone of much feminist thought and political action.”). In many ways, these groups are a paradigmatic example of how thinking and talking with others helps resist gaslighting:

The point of the process was not so much that hitherto-undisclosed facts were unearthed or that denied perceptions were corroborated or even that reality was tested, although all these happened. It was not only that silence was broken and that speech occurred. The point was, and is, that this process moved the reference point for truth and thereby the definition of reality as such. Consciousness raising alters the terms of validation by creating community through a process that redefines what counts as verification. This process gives both content and form to women’s point of view.

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 87 (1989).

379. Lentley, *supra* note 3, at 97.

380. *Id.*

381. See *id.* at 111–13 (“None of this is to say that textualism, originalism, and fidelity to precedent aren’t playing a role in modern Court opinions. But they are tools the Justices deploy to achieve particular results those Justices have already decided they want to reach; they can’t explain those results because they aren’t used consistently.”).

382. See, e.g., Berenstain, *supra* note 20, at 735.

gaslight docket. Critically, these norms, including stare decisis, procedural integrity, standing, and deference to lower courts' factfinding, are largely what give the Supreme Court its legitimacy.³⁸³ The Court's gaslighting enables and foments its imperialism. The Court wields a social power unlike any other American institution. The "destabilizing effect of [gaslighting] is only magnified by the power asymmetry"³⁸⁴ between the Court and the people.

B. It Reminds Us that Identities and Law Are Socially Constructed

Calling out gaslighting also matters because the way that we understand and know the world around us—our reality—is a social construct.³⁸⁵ Moreover, the words of judges matter because "law talk" is constitutive of our shared reality.³⁸⁶ This is arguably heightened when those words come from the Supreme Court—the ultimate arbiter of who has fundamental rights and what those fundamental rights are. "[T]he way we talk about individual identity and social roles, as well as substantive issues in the law, constructs a discrete world of meaning."³⁸⁷

There are, thus, constitutive consequences to the Court's gaslighting: it has a "world-building epistemological function . . . to produce totalizing and abusive ambients—languages, stories, buildings, practices, rituals, forms and documents—that work to destroy resistance to . . . authority."³⁸⁸ Connecting the dots among the Court's recent spate of rights-diminishing cases, which the gaslighting framework facilitates, thus makes explicit what might otherwise remain obscured—that the Court is part of a coordinated campaign to operationalize the agenda of white Christian nationalism.³⁸⁹

Connecting the dots to reveal this agenda, and the Court's role in it, reminds us that "culturally structured epistemic mobilization is always *coordinated to obstruct* emancipation in any meaningful, life-changing way for marginalized peoples at the level of populations."³⁹⁰ While things "do get better, for some, for a time[.]" the long game of white Christian nationalism "does not have freedom as a basic condition of our lives. It

383. See Lemley, *supra* note 3, at 115 ("The imperial Supreme Court is dismantling those norms. A Court that rejects stare decisis, that does not defer to considered policy decisions simply because it disagrees with them, that throws out established judicial procedure to take and decide cases that it wants whether or not there is a live dispute or whether the facts or the courts below present those cases for resolution, is much more dangerous. Right now the danger is mostly apparent in the dismantling of political institutions and the withdrawal of individual rights, because the substantive tenor of the conservative majority has targeted those things. And the Court has taken these actions in ways that favor Republican interests and hurt Democratic ones."); see also Sinha, *supra* note 12, at 1101–02 ("[G]aslighting is dangerous for several reasons. It undermines the credibility of a government official or agency, or even the government as a whole. It is also inconsistent with public officials' duties to the public to execute their responsibilities in good faith.").

384. Sinha, *supra* note 12, at 1090.

385. See Davis & Ernst, *supra* note 101, at 762.

386. Richard K. Sherwin, *Lawyer Theory: An Overview* What We Talk About When We Talk About Law, 37 N.Y.L. SCH. L. REV. 9, 46 (1992).

387. *Id.*

388. Ruiz, *supra* note 17, at 696.

389. See generally STEWART, *supra* note 2.

390. Ruiz, *supra* note 17, at 696–97.

won't simply be given.”³⁹¹ The Court's gaslighting on issues of race, sex, sexual orientation, and gender identity, when coupled with its gaslighting on the First Amendment religion clauses, positions the Court as epistemically superior to those who have marginalized identities. The gaslighting takes advantage of the Court's position of power in knowledge creation. And this Court-created “knowledge” becomes “truth” even though it, too, is a social and legal construct.³⁹²

The gaslighting thus normalizes discrimination along axes of marginalized identity whether that be sex, race, sexual orientation, or gender identity.³⁹³ The stakes of understanding and appreciating this could not be higher, because “[b]acked by an authoritative system of justice, the law functions as an authoritative tool through which certain justifications are sanctioned and others rejected.”³⁹⁴

C. It Exposes Dignitary Harms, the Harms of the Lack of Legal Candor, and the Risks that Lie Ahead

In addition to concrete harms perpetuated by the Court's gaslight docket, “there are dignitary harms associated with misleading the public about the nature and function of judicial review.”³⁹⁵ Exposing these dignitary harms, in addition to concrete harms, might serve to strengthen the call for coalition building across identity categories.

The Court's gaslighting is “problematic not only because it can be used to serve illiberal or undemocratic ends, but also because it is deliberately misleading as to what the law is” and thus “infringes on a distinct value that legality can serve—namely, that of legal [candor].”³⁹⁶ Legality is a state of things that “allows citizens to form expectations about what they can do and what can be done to them; and . . . expresses social norms. . . . [T]hese two functions can be seen as the bases for a distinct value—that of legal [candor].”³⁹⁷

Exposing the lack of legal candor implicit in gaslighting allows us to see it as “epistemic consolidation”³⁹⁸ rather than as single-issue, unrelated cases scattered over several Supreme Court terms. It also illustrates “the love of structured untruths as a way of journeying toward a particular cultural form of truth.”³⁹⁹ Once collected and connected through the lens of gaslighting, we can see these once seemingly disconnected cases as “a structured accumulation of epistemic power.”⁴⁰⁰

391. *Id.* at 697; see also Graves & Spencer, *supra* note 241, at 58 (“At the heart of racialized gaslighting is a failure to yield epistemic ground to Black lives and Black experience.”).

392. See generally MICHEL FOUCAULT, *Two Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS OF MICHEL FOUCAULT 1972-1977*, at 78, 78–108 (Colin Gordon ed., Colin Gordon et al. trans., 1972).

393. See Abramson, *supra* note 30, at 3.

394. Laura E. Deeks, *Discourse and Duty: University Endowments, Fiduciary Law, and the Cultural Politics of Fossil Fuel Divestment*, 47 ENV'T L. 335, 381 (2017).

395. Siegel, *supra* note 373, at 598.

396. Cheung, *supra* note 101, at 54–55.

397. *Id.* at 56.

398. Ruiz, *supra* note 17, at 698 (noting that “epistemic consolidation through the disappearing of violences [is] a form of cultural gaslighting that is necessary for the survival of the ongoing settler project”).

399. *Id.*

400. *Id.* at 699.

D. It Explains How Changing Demographics Threaten White Christian Nationalism Privilege

The flipped narrative of the white Christian nationalist movement is itself gaslighting, because those who are a part of this movement continue to sit atop the American status hierarchy.⁴⁰¹ Even a cursory glance at the anti-equality bills introduced in state legislatures—targeting transgender youth, LGBTQ history, the history of slavery and Jim Crow, and critical race theory—amply illustrates the power of the white Christian nationalist network.

While they are *not* victims of oppression, white Christian nationalists *are* correct that the demographics of the United States are shifting in unprecedented ways along religious and racial lines. Fewer people identify as people of faith.⁴⁰² Racial and ethnic diversity has shifted⁴⁰³—albeit only slightly in the grand scheme of things—and there has been a rise in political power of racial and ethnic minorities.⁴⁰⁴ Gender and sexual minorities are more out and open than ever before.⁴⁰⁵ This destabilizes what most have considered a rigid, natural, and normal gender binary, which in turn destabilizes patriarchy.⁴⁰⁶ So, while it is correct to say that traditional Christian values are currently contested as U.S. society becomes more secular and more diverse,⁴⁰⁷ the contestation of values is not the same as being stripped of privilege and power. Nonetheless, it might

401. An example of this is the conservative super majority itself: five Justices are Catholic and one, Justice Gorsuch, is Episcopalian. See Alyssa Murphy, *6 of the 9 Supreme Court Justices are Catholic Here's a Closer Look*, NAT'L CATH. REG. (Oct. 28, 2020), <https://www.ncregister.com/blog/supreme-court-catholics> [https://perma.cc/75QA-GGTG]; Neil Gorsuch, OYEZ, https://www.oyez.org/justices/neil_gorsuch [https://perma.cc/N6GW-9B7D] (last visited Apr. 5, 2024). The sixth Catholic Justice is Sotomayor. Sonia Sotomayor, OYEZ, https://www.oyez.org/justices/sonia_sotomayor [https://perma.cc/G22S-W4K2] (last visited Apr. 5, 2024).

402. See GORSKI & PERRY, *supra* note 131, at 2.

403. See *id.*

404. See, e.g., Anna Brown & Sara Atske, *Black Americans Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RSCH. CTR. (Jan. 22, 2021), <https://www.pewresearch.org/short-reads/2021/01/22/black-americans-have-made-gains-in-u-s-political-leadership-but-gaps-remain/> [https://perma.cc/VYQ9-PGGQ].

405. See generally, *Out for America 2022: A Census of LGBTQ Elected Officials Nationwide*, LGBTQ+ VICTORY INST., <https://victoryinstitute.org/out-for-america-2022/> [https://perma.cc/K6WB-KZ9L] (last visited Apr. 5, 2024); Scottie Andrew, *More US Adults Identify as LGBTQ Now Than at Any Time in the Past Decade, a New Poll Says*, CNN (Feb. 17, 2022, 2:36 PM), <https://www.cnn.com/2022/02/17/us/lgbtq-population-increase-gallup-ccc/index.html> [https://perma.cc/ZY6C-KMFG].

406. See, e.g., Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1976 (1995); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 266 (1998); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMANS. 161, 161–62 (1996).

407. See Talbot, *Justice Alito's Crusade*, *supra* note 153 (“In the end, Alito may be angry for the same reasons that many conservatives of his demographic are angry—because they find their values increasingly contested; because they feel less culturally authoritative than they once were; because they want to exclude who they want to exclude, and resent it when others push back.”).

feel to traditional Christians that their power has been diminished, because “[w]hen [you are] used to privilege, equality feels like oppression. But it’s not.”⁴⁰⁸

These shifts are not an indication that white Christian nationalists are persecuted, despite the protestations of the conservative super majority. As Professor Ira Lupu clarifies, Christian Americans “don’t get *persecuted*—they get disagreed with.”⁴⁰⁹ But the conservative supermajority “seems to be saying that the growing percentage of secular people is in itself a form of religious persecution.”⁴¹⁰ The majority seems to see injustice when these social changes diminish the power of white Christian nationalists to exert their privilege by harnessing the law to reflect and uphold their biblical worldview—as in, for example, *Obergefell*. But the majority is nonetheless blind to injustice when it burdens secular minority interests.⁴¹¹ Gaslighting intersects with and informs the reactions of the conservative supermajority to these changing demographics and the attendant shifting power relations, because “successful gaslighting involves the gaslighter’s creating conditions such that [their] own deep anxieties are relieved by the successful gaslighting.”⁴¹²

Law Professor Reginald Oh calls this Supreme Court trend “racial superordination.”⁴¹³ This concept captures well the practical results of the Court’s gaslighting: it gaslights marginalized communities as it strips their rights or reaches decisions that further subordinate them, while at the same time elevating the rights of white Christian nationalists *in cases that involve similar legal principles*.⁴¹⁴ The phenomenon of different outcomes for cases involving similar principles reflects racial superordination, a move through which the “Court is increasingly widening the gap between conceptions of, and levels of protection provided for, equality in the context of race and religion in ways that prioritize the interests of whiteness and set those interests as the normative baseline in both areas of constitutional law.”⁴¹⁵ Similar dynamics of heterosexual superordination and gender-binary superordination likely are also in play. The gaslighting framework allows us to see this.

408. Chris Boeskool, ‘When You’re Accustomed to Privilege, Equality Feels Like Oppression,’ HUFFPOST, https://www.huffpost.com/entry/when-youre-accustomed-to-privilege_b_9460662 [https://perma.cc/3WX8-2KMW] (last updated Dec. 6, 2017).

409. Talbot, *Justice Alito’s Crusade*, *supra* note 153 (quoting Professor Ira Lupu).

410. *Id.*

411. *See id.* (“[I]t’s been increasingly common to see Alito fret over the burdens of certain classes of people while downplaying those of others.”); *see also supra* Section II.

412. Abramson, *supra* note 30, at 6, 11 (noting that what the gaslighting dynamic “creates at the most general level is a situation in which one person’s anxieties and needs are relieved by making reality fit the contours of those anxieties/needs”).

413. Reginald Oh, Reading *Loving* into *Brown*: Racial Segregation, Interracial Marriage & the Anti-Supremacy Principle 35–36 (Jan. 25, 2022) (unpublished manuscript) (on file with author).

414. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2473 (2021) (noting that the equal value principle—one that informs the MFN approach—“overwhelmingly is working to protect mainstream religious denominations—including the United States’ largest Christian groups, Roman Catholics and Protestant Evangelicals. Instead of providing a shield for minority sects against majoritarian policymaking, equal value today seems to be participating in polarized ideological conflict. Even occasional support for unorthodox faiths now gives every appearance of being driven by an alliance with traditional religious conservatives.” (footnote omitted)).

415. Simson, *supra* note 2, at 1633.

Law Professor David Simson builds on the principle of racial superordination in asserting that the Court's MFN theory of religious equality must be considered alongside the Court's "'least favored nation' equality theory for race and race consciousness."⁴¹⁶ Once we break down the silos of "race jurisprudence" and "religion jurisprudence," it becomes apparent that the Court is privileging whiteness and traditional Christianity when it chooses to apply its MFN approach to religion cases but refuses to apply the MFN approach to race cases, in particular to race-conscious programs that consider race in higher education admissions decisions.⁴¹⁷

The Court has rejected the use of race in higher education admissions,⁴¹⁸ again displaying its "cramped racial equality jurisprudence."⁴¹⁹ It continued its trend of "innovating and strengthening constitutional equality protections"⁴²⁰ for majority white, Christian religions when it found in favor of a white Christian website designer who sought to turn away same-sex couples.⁴²¹ The equality asymmetry is clear—in MFN religion cases, courts *must* give religion "priority consideration,"⁴²² whereas, in race cases, courts *must reject* race-conscious decision-making.⁴²³ In sum, there is a "massive gap in constitutional principles that suggests selective solicitude for comparable constitutionally protected equality rights" that "illustrates the Court's participation in a racial project to superordinate whiteness through constitutional interpretation."⁴²⁴ The gaslighting frame amplifies and brings into stark relief the compelling claims made by Professors Oh and Simson, and thus helps warn us of what is likely to come.

E. *It Supports Resistance*

Gaslighting is enduring and persistent, happening "within a system of oppressive patterned behavior over time"; it is not a one-time, fleeting occurrence.⁴²⁵ Gaslighting thus attends to context and background norms: most linguistic settings involve reliance on stereotypes, tropes, shared social meaning, and embedded hierarchies situated within a privilege-subordination dynamic.⁴²⁶ "In unjust social environments, the extant patterns of interaction unfairly privilege some and subordinate others."⁴²⁷

416. *Id.*

417. *Id.* at 1633–34.

418. *See Students for Fair Admissions Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023).

419. Simson, *supra* note 2, at 1634.

420. *Id.*

421. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2298 (2023).

422. Simson, *supra* note 2, at 1642, 1644 ("[T]here are certain constitutionally protected aspects of social life, such as religion, that are entitled to a particularly powerful form of equality protection—MFN status.").

423. *Id.* at 1641–42, 1645 ("[T]he Court is moving toward not even *permitting* the government to consider race in almost all circumstances.").

424. *Id.* at 1653–54 ("[T]he Court through its own race-conscious jurisprudence is constitutionally *encouraging* and incentivizing, perhaps even forcing state actors to do precisely the kind of thing that it is *faulting* them for doing in the religion context: to be insensitive to the constitutionally protected equality interests that attach to certain significant aspects of people's social life, such as religion and race . . .").

425. Podosky, *supra* note 13, at 212 (emphasis omitted).

426. *Id.*

427. *Id.*

Resistance to gaslighting may depend on one's resilience, grit, and evidence threshold—the level to which opposing evidence must rise before one changes one's belief.⁴²⁸ When the gaslighting is collective, such as in political gaslighting and Supreme Court gaslighting, the stakes are higher, because such gaslighting threatens collective consciousness and confidence, both of which are necessary for a democratic political system to thrive.⁴²⁹

Exposing the gaslighting may encourage and engender resistance to it. Bringing to the forefront the Court's gaslighting thus may

continue to refocus attention on the systemic violences that are continuously marshaled . . . strategically, predictively, and from one generation to the next. It is an anti-gaslighting tool to lift others up, pass the baton, and say, 'I get what's happening here, and my name will not be counted on your ledger of those captured.'⁴³⁰

CONCLUSION

Marginalized communities need to be empowered in multiple ways to deny the Court an epistemic leg up. This dynamic is particularly stark when the gaslighter is the Court. The Court as gaslighter is "laying claim to a special or privileged epistemic status relative to [its] victim[s]."⁴³¹ We thus need to continuously and steadfastly contest rhetoric that suggests that the Court has "an epistemically credible grasp of the situation."⁴³²

The gaslighting framework provides a needed reminder to *the people* that in our constitutional democracy we deserve to be considered an epistemic peer with the Court in determining issues of subordination, equality, and civil rights and in identifying dignitary harms and power differentials. We need not concede that the Court is an epistemic superior because of its position.⁴³³ Considering the Court's October 2021 Term through the lens of gaslighting helps to make legible the retrenchment and consolidation of conservative power, and it may also help mobilize resistance.

428. See Beerbohm & Davis, *supra* note 12, at 872.

429. See *id.* at 873.

430. Ruiz, *supra* note 17, at 702.

431. Spear, *supra* note 115, at 76.

432. *Id.*

433. See *id.* at 79.