

COMMENT

TROJAN UNICORN: EXPLOITING RELIGIOUS EXEMPTIONS TO ADVANCE LGBTQIA+ LAW

RILEY PALMER*

In the Supreme Court’s landmark civil rights case *Bostock v. Clayton County*, Justice Gorsuch suggested the Religious Freedom Restoration Act (RFRA) is a super-statute that may supersede the Court’s holding. This “RFRA caveat” demonstrates the dangers unanalyzed assertions of super-statutedom pose. This Comment first argues RFRA is undeniably *not* a super-statute. Then, to disincentivize such assertions, this Comment proposes a revised framework called Informed Comparative Scrutiny (ICS) for analyzing super-statutes in conflict. ICS moves the dispositive question away from whether a statute is super and toward what to do when super-statutes collide.

ICS proposes that when assessing super-statutes in conflict, reviewing courts should engage in a two-step process that looks both to the comparative weight of the rights infringement and to the nature of the interests or rights at stake. Because super-statutes are quasi-constitutional, ICS incorporates Justice Thurgood Marshall’s sliding-scale theory of heightened scrutiny, while super-statutes themselves provide democratic guidance for assessing the importance of competing values. ICS applies a version of sliding-scale to both constitutional claims and to claims implicating interests closely related to guaranteed rights.

ICS provides an analytical roadmap for litigants facing unsympathetic judges and Justices to advance new, progressive claims. Using ICS, progressive litigants may seize on the Court’s openness to super-statute analysis as a means to persuade courts to use a more reasoned approach to balancing religious freedom with LGBTQIA+ rights and reproductive rights. In turn, this may increase the likelihood of success for LGBTQIA+ claims and intersectional claims more broadly.

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INTRODUCTION

In June 2020, the Supreme Court held in *Bostock v. Clayton County*¹ that the sex-based antidiscrimination provisions within Title VII of the Civil Rights Act of 1964² (CRA) include discrimination on the basis of sexual orientation and/or gender identity.³ *Bostock* was a landmark victory for LGBTQIA+ advocates and immediately granted to LGBTQIA+ people nationwide employment discrimination protections previously available only to those protected by certain states' statutory schemes.⁴ The Fourth Circuit quickly followed the Court's interpretive logic to find discrimination against transgender people to be a sex-based classification in violation of the Equal Protection Clause.⁵ This rapid adoption suggests *Bostock* may have laid the groundwork for a new expansion of LGBTQIA+ rights. However, in the *Bostock* plurality opinion's final sentences, Justice Gorsuch may have kneecapped LGBTQIA+ equality by invoking the sanctity of anti-LGBTQIA+ religious convictions.⁶ He affirmed not only that the door is open to exemptions from the CRA under the Free Exercise Clause,⁷ but possibly also to statutory religious exemptions under the Religious Freedom Restoration Act⁸ (RFRA).⁹

Neither RFRA nor the Free Exercise Clause was before the Court,¹⁰ yet Justice Gorsuch took the opportunity to lay out, in dicta, a litigation strategy for future challengers of LGBTQIA+ protections. Justice Gorsuch opined that "RFRA operates as a kind of super statute . . . [that] might supersede Title VII's commands in appropriate cases."¹¹ Super-statute theory is a comparatively underdeveloped area of law that suggests there

1. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.

3. *Bostock*, 140 S. Ct. 1731.

4. *Id.* at 1737.

5. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–10 (4th Cir. 2020) (using an analytical approach similar to that in *Bostock* to find discrimination against transgender students to be sex-based discrimination).

6. *Bostock*, 140 S. Ct. at 1753–54 ("[E]mployers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions . . . [which] merit[s] careful consideration . . .").

7. U.S. CONST. amend. I.

8. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.

9. *Bostock*, 140 S. Ct. at 1754.

10. While RFRA was not before the Supreme Court, one of the cases consolidated within *Bostock* unsuccessfully pursued a RFRA claim in the lower courts and did not include the claim in its petition for certiorari. *Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 585–86 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

11. *Bostock*, 140 S. Ct. at 1754.

is a separate class of legislation, the super-statute, that carries greater weight such that it becomes quasi-constitutional.¹² By asserting RFRA's super-statedom, Justice Gorsuch threatened *Bostock*'s precedential value to the ongoing expansion of LGBTQIA+ legal protections,¹³ warranting further inquiry since religious exemptions frequently underly anti-LGBTQIA+ litigation.¹⁴

As advocates pursue continued expansion of LGBTQIA+ rights,¹⁵ a clear framework for courts to balance LGBTQIA+ rights and other individual liberties will be essential for strategic litigants.¹⁶ The newly-constituted Supreme Court, which has made its intentions to curtail LGBTQIA+ rights clear,¹⁷ reinforces the need for a robust framework. These developments raise three important questions. First, how should the role of the Court be normatively construed? Second, how do super-statutes interact with constitutional law? Third, if super-statutes can “bend” the Constitution,¹⁸ how might they inform courts' assessments of rights in conflict and applications of heightened scrutiny?

12. See *infra* Section I.B.

13. As of November 2021, *Bostock* had been cited in 279 federal district court cases. *Bostock v. Clayton County: Citing References*, WESTLAW EDGE: KEYCITE, [\(https://1.next.westlaw.com/RelatedInformation/1576207cbaed911eaa4a6da07b08de5cd/kcCitingReferences.html?docSource=27755c4156f5418fab06b81a777fd4fl&pageNumber=1&facetGuid=hc820050cc8720db0074808b06dc2013c&ppcid=da9fecaeacd34dbf8948102be23090cb&transitionType=ListViewType&contextData=\(sc.UserEnteredCitation\)\)](https://1.next.westlaw.com/RelatedInformation/1576207cbaed911eaa4a6da07b08de5cd/kcCitingReferences.html?docSource=27755c4156f5418fab06b81a777fd4fl&pageNumber=1&facetGuid=hc820050cc8720db0074808b06dc2013c&ppcid=da9fecaeacd34dbf8948102be23090cb&transitionType=ListViewType&contextData=(sc.UserEnteredCitation)) (last visited Nov. 14, 2021) (filtering by “Federal > District Courts”); see also Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021); Memorandum from Principal Deputy Assistant Att’y Gen. Pamela S. Karlan, U.S. Dep’t of Just. Civ. Rts. Div. (Mar. 26, 2021) (sharing the DOJ’s view that Title IX prohibits discrimination “on the basis of gender identity and sexual orientation”).

14. See, e.g., *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020).

15. See, e.g., *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

16. Inconsistent and unclear balancing of rights plagues many types of cases. Compare *Otto v. City of Boca Raton*, 981 F.3d 854, 857–58 (11th Cir. 2020) (holding ban on LGBTQIA+ conversion therapy violates free speech rights of therapists who practice it), with *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 434 (6th Cir. 2019) (holding “speech-and-display” abortion requirements are not compelled speech in violation of the First Amendment).

17. See, e.g., *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (Thomas, J., concurring in denial of certiorari) (expressing intent to revisit *Obergefell*); Emma Brown & Jon Swaine, *Amy Coney Barrett, Supreme Court Nominee, Spoke at Program Founded to Inspire a ‘Distinctly Christian Worldview in Every Area of Law,’* WASH. POST (Sept. 27, 2020), https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b_story.html [https://perma.cc/J5B2-ZFZJ] (reporting Barrett spoke annually for five years at the Alliance Defending Freedom’s Blackstone Fellowship, an anti-LGBTQIA+ organization that has advocated against the separation of church and state).

18. See *infra* note 56 and accompanying text.

Using Justice Gorsuch's unanalyzed assertion of RFRA's super-statedom as an entry point, this Comment argues that litigants should leverage super-statutes to argue for a revised framework for courts to apply heightened scrutiny. Super-statute theory can revive and build on Justice Marshall's sliding-scale approach to heightened scrutiny¹⁹ by guiding when courts ought to apply heightened scrutiny and how heightened that scrutiny ought to be. Justice Gorsuch's RFRA caveat suggests the Court is open to super-statute analysis. Therefore, future litigants should capitalize on that reference to argue for a contemporary version of sliding-scale review that is supported by super-statute theory. In turn, litigants may use this new framework to demonstrate that a super-statute conflict between the CRA and RFRA still favors the CRA while also creating precedent for a new type of intersectional claim.²⁰

Part I of this Comment contextualizes super-statutes' potential role in contemporary jurisprudence, explains the theory of super-statutes, and provides background on RFRA. Part II assesses the qualifications of the CRA and RFRA as super-statutes in response to Justice Gorsuch's RFRA caveat. Then, because this Comment's purpose is partly to move the dispositive question away from whether a statute is super, Part III analyzes what happens when super-statutes collide. Part III expands on existing theories of competing super-statutes to propose a new framework for assessing both that competition and judicial approaches to heightened scrutiny. This Comment concludes in Part IV by addressing shortcomings of the proposed framework.

19. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102–03 (1973) (Marshall, J., dissenting) (articulating the sliding-scale theory); see *infra* Section III.C.

20. This Comment is necessarily and explicitly limited. This Comment's analysis defends limited judicial review because it is one of the leading methods by which advocates have secured greater legal protections for minority groups over the past fifty years. However, judicial review and antidiscrimination law generally are notably flawed. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381–84 (1988). While supporting antidiscrimination law has been considered the pragmatic approach to demanding legal and societal reform, it remains rooted in an equality framework that is not the normatively optimal approach to promoting equity. *Id.* at 1385; see also Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). It is merely the most immediately accessible means of reducing harm. All improvements within this framework are fundamentally limited and must not distract from the broader, longer-term work of dismantling the capitalist, white-supremacist, cis-hetero patriarchy that pervades every aspect of American historical and contemporary society. See also LIBBY S. ADLER, *GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM* (2018).

I. SUPER-STATUTES, WHICH HAVE THREE ELEMENTS, MAY HELP
BRIDGE A GAP IN CURRENT THEORIES OF JUDICIAL AUTHORITY

This Part begins with an overview of two competing frameworks for interpreting the role of the Supreme Court: judicial supremacy and popular constitutionalism. It then introduces super-statute theory and its constitutional implications. This Part concludes by positing that super-statutes may be a means of bridging the communications gap between the people (individuals and identity-based social movements) and institutions (political systems and actors at the state and federal levels) to democratize future judicial review.

A. Judicial Supremacy Versus Popular Constitutionalism

While there are many interpretive epistemologies surrounding the courts and Constitution, two stand out in particular as the primary rival ideologies: judicial supremacy and popular constitutionalism. Judicial supremacy and popular constitutionalism are relevant to understanding the dilemma this Comment seeks to address because they both demonstrate shortcomings within the United States legal system that may be mitigated by further developing super-statute theory. Judicial supremacy is the theory and practice of imbuing federal courts with broad power to enforce their understanding of the Constitution on states, the public, and coordinate branches of the federal government.²¹ Popular constitutionalism is the theory that the people, not the courts, are the ultimate arbiters of constitutional meaning and, as such, courts ought to be more deferential to public will.²² Popular constitutionalism is preferred by many who seek to pursue social change because the theory's connection to public will allows for evolving values as opposed to judicial supremacy's entrenchment of power in political elites (judges and Justices). However, the two theories are deeply interconnected, and popular constitutionalism alone is not the progressive instrument some suggest.²³ The framework proposed later in this Comment may tranquilize the existential tug-of-war between the judicial supremacists' emphasis on elite, institutional power and the popular constitutionalists' sometimes-flawed faith in the people themselves to bring about change. To explain how, the next subsections provide a brief history of these theories.

21. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 962 (2004).

22. *Id.*

23. *Cf. id.* at 970–71 (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 127–31 (1991)) (arguing that courts are ineffective institutions through which to pursue social change).

I. JUDICIAL SUPREMACY ENTRENCHES POWER WITHIN ELITE CIRCLES
AND STAGNATES THE LAW

Judicial supremacy has emerged as the dominant theory of courts' power.²⁴ The supremacy afforded, and deference given to, judicial decision-makers insulates them from the will of the people and in so doing may calcify the law's development by entrenching it within elite circles.²⁵ This dominance was not inevitable. Indeed, the supremacy seen today emerged in fits and starts during the federal courts' early history.²⁶ While "[i]t is emphatically the province and duty of the judicial department to say what the law is,"²⁷ that sentiment was previously interpreted as addressing the need for finality, not an assertion of judicial supremacy.²⁸ As the Supreme Court matured in the nineteenth and twentieth centuries, it began to assert greater power.²⁹ Both the *Lochner* era and the Warren Court were typified by judicial supremacy.³⁰ Ironically, because of the ideological flip between those two eras (the *Lochner* era being defined by anti-New Deal holdings and the Warren Court by progressive victories), many who rallied against judicial supremacy in the *Lochner* era found themselves uncomfortably supportive of it as the Warren Court began deciding cases along progressive lines.³¹

The dynamic of cowing to judicial supremacy when it is in one's favor highlights the need for reform. Due to the inherently undemocratic nature of the judiciary, ceding greater power to it by conceding to ever-expanding judicial supremacy does not uphold the ideals of republican democracy³² and can be considered a canary warning of a slide toward authoritarianism.³³ The Warren Court's assertion of supremacy was

24. See *id.* at 963–64.

25. Cf. RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 60–65 (1994).

26. See Kramer, *supra* note 21, at 962–63.

27. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

28. See Kramer, *supra* note 21, at 988–89.

29. *Id.* at 964–67.

30. See *id.* at 963–65. But see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 42 (2003) (concluding civil rights gains were made possible by popular constitutionalism).

31. See Kramer, *supra* note 21, at 965–66.

32. See, e.g., *id.* at 1003; ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72 (1996) ("The . . . dirty little secret[] of contemporary jurisprudence [is] . . . its discomfort with democracy . . .").

33. See generally Michael J. Klarman, *Foreword: The Degradation of American Democracy and the Court*, 134 HARV. L. REV. 1, 231 (2020) ("[A] Republican Court will not protect democracy from Republican efforts to undermine it or check the authoritarian tendencies of a Republican President in any substantial way.").

essential to delivering foundational civil rights victories.³⁴ Since the 1960s, however, the Court has become wary of enlarging the scope of heightened scrutiny and has restricted circumstances in which it will intervene, often portraying inaction as a neutral approach.³⁵ This demonstrates the tension between a progressive vision of the law that is willing to expand the tent of constitutional protections and a conservative vision that is hesitant to stray beyond explicitly enumerated rights.³⁶ By warming progressives to the idea of judicial supremacy, the Warren Court silenced the theory's most vocal opponents and set the Court on the trajectory to the entrenched politicization seen today.³⁷ The framework proposed by this Comment seeks to exploit this trend in order to short-circuit its continued acceleration.

2. POPULAR CONSTITUTIONALISM IS LIMITED BY FOUNDATIONAL SHORTCOMINGS

In contrast to judicial supremacy, popular constitutionalism suggests that people can check the government's constitutional misinterpretations through the electoral process.³⁸ Necessary to this idea, however, is an effective electoral process as well as additional methods by which individuals may communicate with elites or the government. The pragmatic question of how people communicate their preferences to elected officials, and the frequent challenges to that process, is known as the communications gap.³⁹ The communications gap is a weakness for popular constitutionalism because if people cannot communicate with the government and elites, it cannot be said that the people themselves can check the government's constitutional misinterpretations.

Some suggest that in addition to voting and speech, individuals can bridge the communications gap by advocating for a constitutional

34. *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

35. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding classification on the basis of intellectual disability does not warrant heightened scrutiny).

36. *E.g.*, *id.*

37. *See* Kramer, *supra* note 21, at 966.

38. *See id.* at 962. Indeed, the people repudiated the ideals of judicial supremacy by voting in the elections of 1800 and 1802. *Id.* In those elections the pro-judicial supremacy Federalists were largely voted out of power by the anti-judicial supremacy supporters of Thomas Jefferson. *See id.*; Sylvester Pennoyer, *The Case of Marbury v. Madison*, 30 AM. L. REV. 188, 190, 199–200 (1896). A more detailed explanation of this seminal period in American legal history is beyond the scope of this Comment. *See generally* Sanford Levinson & Jack M. Balkin, *What are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255 (2003); Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

39. *See* Kramer, *supra* note 21, at 963.

amendment.⁴⁰ While facially plausible, this suggestion ignores the stagnation and inherent difficulty of the Article V amendment process.⁴¹ In addition, constitutional amendments require substantial resources to pursue.⁴² To the extent that individuals do communicate their interpretations of the Constitution to the government, they do so through constitutionally protected speech, which itself depends on judicially enforceable rights.⁴³ If ordinary citizens are to be participants—“mobilizers” of the law rather than its “mere subjects,” as popular constitutionalists suggest⁴⁴—they must be able to effectively participate in the law. The communications gap, and other pragmatic questions regarding how the theory works in practice, weakens popular constitutionalism.⁴⁵ Some systems have emerged to attempt to bridge this gap but ultimately do so ineffectively. A different approach, such as the one articulated in this Comment, is therefore required.

3. IDENTITY-BASED SOCIAL MOVEMENTS HELP TO BRIDGE THE COMMUNICATION GAP BUT ALONE ARE INSUFFICIENT

One way individuals attempt to bridge the communications gap is by joining together as a part of an identity-based social movement (IBSM), a movement that organizes around advancing a particular identity community’s agenda for legal and cultural change.⁴⁶ Since IBSMs often organize along deep identity divides, their rise may not only explain why the super-majoritarian Article V process has atrophied (because the necessary super-majoritarian consensus is difficult to achieve in light of those divides),⁴⁷ but may also provide a means to bridge the communications gap by making the demands of different groups more

40. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 52–53 (2004).

41. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 247–49 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*].

42. See, e.g., Baird Helgeson, *Minnesota’s Marriage Amendment Fight Funded by Catholics Across U.S.*, *STAR TRIB.* (Oct. 18, 2012, 10:34 PM), <https://www.startribune.com/minnesota-s-marriage-amendment-fight-funded-by-catholics-across-u-s/174875371/> [<https://perma.cc/8EF8-CGNE>] (reporting the extent of funds raised by interest groups on both sides of Minnesota’s 2012 marriage amendment campaign).

43. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *CALIF. L. REV.* 1027, 1036 (2004).

44. Kramer, *supra* note 21, at 972.

45. Post & Siegel, *supra* note 43, at 1036.

46. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 *U. PA. L. REV.* 419, 421 n.10 (2001).

47. *Id.* at 499.

visible to those in power.⁴⁸ One way IBSMs advance their agendas is by advocating for enactment of super-statutes that, in turn, can begin to shape the contours of constitutional law.⁴⁹ These super-statutes may more easily be achieved because they do not require super-majoritarian support at their passage but instead build such support over time as they begin to permeate the culture.⁵⁰ Because IBSMs can advance super-statutes and at least partially bridge the communications gap, IBSMs are a necessary precondition to the framework proposed below.

If judicial supremacy threatens American democracy but popular constitutionalism does not offer viable solutions to curtail judicial power, advocates must advance alternate theories. This Comment argues super-statutes are a mechanism by which to democratize judicial review. Super-statutes are essential to the framework proposed later in this Comment because they communicate Congress's—and by extension the people's—view of those interests, identities, or values in need of protection. They fill in the contours of constitutional interpretation and provide guidance for balancing significant rights. The next Section introduces super-statutes because they may disrupt the dilemma of judicial supremacy and popular constitutionalism by further bridging the communications gap and because they form the basis of the framework proposed by this Comment.

B. Super-Statute Theory: A Brief Introduction

“Super-statutes” and the theory underlying them are comparatively new additions to the scholarship.⁵¹ In 2001, Professors William N. Eskridge and John Ferejohn laid out a comprehensive case for the theory of super-statutes.⁵² Eskridge and Ferejohn posit that not all statutes are created equal, that there is a small class of statutes that gain such broad acceptance—permeating normative and institutional culture—that they become “super-statutes.”⁵³

Eskridge and Ferejohn define a super-statute as “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy,”⁵⁴ that (2) “stick[s]” in the public consciousness, and that

48. *Id.* at 421, 423.

49. *Id.* at 499.

50. *See infra* Part II.

51. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1217 n.4 (2001).

52. *Id.* at 1215.

53. *Id.*

54. *Id.* at 1216. For example, the Endangered Species Act is not a simple law governing the protection of certain animals. Rather, it is an expansive statutory scheme enshrining a value of biodiversity as a fundamental tenet the federal government must pursue in all areas and endows significant enforcement authority with the secretary of the interior. *See id.* at 1242–43.

(3) broadly affects the law “beyond the four corners of the statute.”⁵⁵ While super-statutes do not always prevail over other statutes with which they conflict, they do exhibit a “normative gravity” that suspends normal rules of construction and can “bend” the context in which statutes are read.⁵⁶ Super-statutes are underpinned by an ideology different from that of “constitutional moments”;⁵⁷ for fundamental societal change rarely occurs in a moment.⁵⁸ Instead, super-statutes build legitimacy through their intense deliberation and pervasive effect on the public consciousness.⁵⁹

Because super-statutes are formed over time as a result of deliberation and dispersion into the public consciousness, they are rare.⁶⁰ While super-statutes are not super-majoritarian in the way that an Article V amendment is, their deliberative and principled nature lends them similar influence.⁶¹ Because of their necessary permeation into the public consciousness, super-statutes are more democratic than other forms of law.⁶² Indeed, the “key” to super-statutedom is public acceptance because that acceptance powers their enhanced legitimacy as “super” statutes.⁶³ Notably, it is not inevitable that an ambitious statutory scheme will achieve super-statutedom.⁶⁴ Some putative super-statutes are undercut before they can achieve wide acceptance or satisfy other elements of super-statutedom.⁶⁵ Because this Comment delves into the qualifications of one such putative super-statute, RFRA, the next Section provides the historical context in which RFRA emerged.

C. *The Religious Freedom Restoration Act and Emergent Trends in “Religious Exemption” Litigation*

This Section outlines the fraught history of RFRA in order to support later discussion regarding its qualification as a super-statute and applicability to conflicts with the CRA. RFRA is a federal statutory

55. *Id.* at 1216.

56. *Id.* at 1216.

57. *See generally* Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION*, *supra* note 41, at 63, 63–88.

58. Eskridge & Ferejohn, *supra* note 51, at 1217; *see also* Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737 (2007) (discussing “constitutional moments”).

59. Eskridge & Ferejohn, *supra* note 51, at 1217.

60. *See id.* at 1230–31.

61. *See id.* at 1217.

62. *See id.* at 1266–67.

63. *See id.* at 1230; *see also id.* at 1271 (“[S]uper-statutes . . . [can] not only save us from a jurocracy but also replicate the legitimacy-enhancing features of Article V.”).

64. *Id.* at 1230.

65. *Id.*

scheme enacted in 1993 that purports to protect religious freedom by prohibiting the government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability.⁶⁶ RFRA was a legislative response to the Court's holding in *Employment Division v. Smith*,⁶⁷ which held that religious practices could not be a defense to compliance with a neutral, generally applicable law.⁶⁸

Smith upheld the denial of unemployment assistance for two employees who were terminated from their positions as substance abuse counselors.⁶⁹ The employees were members of the Native American Church, a religious institution that blends elements of some Indigenous faiths and Christianity.⁷⁰ The employees were terminated for "misconduct" because they consumed peyote as a part of a church ceremony.⁷¹ Oregon law prohibited intentional possession of peyote unless it was prescribed.⁷² *Smith* held that religious practice does not exempt a person from a generally applicable controlled substances law.⁷³

The Court's decision in *Smith* did not conform to how Congress thought the Free Exercise Clause should be interpreted.⁷⁴ In a frenzied rush to counteract the precedent and restore the prior constitutional standard, Congress passed RFRA.⁷⁵ Championed by then-Representative Chuck Schumer,⁷⁶ the act passed with strong, bipartisan support.⁷⁷ Support for the act was perhaps as broad as it was because RFRA did not advance any new substantive law.⁷⁸ RFRA is exceedingly sparse, including a mere four sections and clocking in at just over 500 words.⁷⁹ The act operates exclusively as a congressional rejection of *Smith* and an attempt to force a

66. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.

67. 494 U.S. 872 (1990).

68. *Id.* at 885.

69. *Id.* at 874.

70. See Wynema Morris Walthill, *Native American Church*, in ENCYCLOPEDIA OF THE GREAT PLAINS (David J. Wishart ed., 2011), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.rel.036> [<https://perma.cc/X8WN-3XHR>].

71. *Smith*, 494 U.S. at 874.

72. *Id.* at 874; OR. REV. STAT. § 475.992(4) (1987).

73. *Smith*, 494 U.S. at 885.

74. See, e.g., *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

75. *Smith*, 494 U.S. 872; 42 U.S.C. §§ 2000bb to 2000bb-4.

76. 139 CONG. REC. 9,680, 9,684 (1993) (reporting Rep. Schumer's speech in support).

77. 139 CONG. REC. 9,687, 26,416 (1993) (indicating House and Senate votes).

78. Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 136 (1996).

79. 42 U.S.C. §§ 2000bb to 2000bb-4. By contrast, the CRA comprised eleven titles consisting of over twenty-eight pages. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

return to a strict scrutiny standard for Free Exercise Clause claims.⁸⁰ That it advances *no substantive law* will be key to its later super-statute analysis.⁸¹

While many disagree with the Court's decision in *Smith*,⁸² RFRA does not effectively counter that precedent.⁸³ It is impermissible for Congress to redefine a constitutional standard.⁸⁴ Four years after RFRA's enactment, the Court held it to be an unconstitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment, thus making the act applicable only to other federal laws and their execution rather than to both federal and state law as originally envisioned.⁸⁵ Since then, many states have adopted their own "state RFRA,"⁸⁶ and Congress passed the narrower Religious Land Use and Institutionalized Persons Act (RLUIPA).⁸⁷ RLUIPA authorizes federal and state prohibitions on interference with religious exercise but only in the contexts of institutionalized persons and certain land use laws.⁸⁸ RLUIPA derives authority from the Spending Power and Commerce Clause, as opposed to RFRA's authorization pursuant to the Fourteenth Amendment.⁸⁹ Fierce academic debate continues regarding the separation-of-powers implications of RLUIPA and the remaining federal components of the act.⁹⁰ Nonetheless, RFRA is frequently invoked as a defense to compelled equal treatment of LGBTQIA+ people and in reproductive health care cases, among others.⁹¹

80. Gressman & Carmella, *supra* note 78, at 94.

81. *See infra* Section II.B.

82. *See* MARCI HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 24–25 (Cambridge Univ. Press rev. 2d ed. 2014) (listing RFRA supporters).

83. Gressman & Carmella, *supra* note 78, at 111.

84. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 252–53 (1995).

85. *Flores*, 521 U.S. 507; *see* Protection of Religious Exercise of Institutionalized Persons, 42 U.S.C. § 2000cc-1(b). Note the widespread adoption of state RFRA and federal enactment of the narrower Religious Land Use and Institutionalized Persons Act. *See* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1905 (2001); §§ 2000cc to 2000cc-5.

86. *See generally* Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 SAN DIEGO L. REV. 163 (2016).

87. *See* Magarian, *supra* note 85, at 1947 n.198.

88. §§ 2000cc to 2000cc-5.

89. § 2000cc-1(b).

90. *Compare* Paulsen, *supra* note 84 (defending RFRA), *with* Gressman & Carmella, *supra* note 78 (critiquing RFRA); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998).

91. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). *But see* Meredith Abrams, Note, *Empirical Analysis of Religious Freedom Restoration Act Cases*

Smith prohibited employees from engaging in a religious activity essential to their religious beliefs.⁹² However, subsequent litigants have reinterpreted this purpose by claiming that RFRA protects them from being *compelled* to engage in behavior they see as *contrary* to their religious beliefs.⁹³ The latter purpose shifts the inquiry for reviewing courts and invites more difficult line-drawing questions regarding sincerely held religious beliefs. Instead of a litigant identifying a particular act as essential to their religious practice, the latter framing permits litigants to identify any behavior as generally contrary to their beliefs. These cases often follow a pattern in which a religious litigant objects to compliance with a generally applicable nondiscrimination law.⁹⁴ Courts are rightfully hesitant to inquire into the centrality of different religious exercises.⁹⁵ Litigants' reframing of RFRA's purpose permits them to capitalize on courts' hesitancy and to invoke religious infringement in essentially any circumstance—no matter if minimal, benign, or outweighed by countervailing public interests. If Congress intended such a broad exemption from civil rights law for religious institutions, the statute would say so.⁹⁶ While there are some situations in which protection from compelled action may be the proper framing,⁹⁷ this is a perversion of the act's original intent to restore the pre-*Smith* standard for heightened scrutiny.⁹⁸ More importantly, it is not clear that those claimants who do

in the Federal District Courts Since Hobby Lobby, 4 COLUM. HUM. RTS. L. REV. ONLINE 55, 59 (2019) (noting Christians are underrepresented as RFRA plaintiffs despite the post-*Hobby Lobby* increase in reproductive health care claims).

92. Paulsen, *supra* note 84, at 249–50.

93. See, e.g., *Burwell*, 573 U.S. 682.

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

95. While it is correct that courts may not interpret a church's doctrine, *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969), that does not require courts to be ignorant of the realities of a religion's history of majority control or subjugation. Understanding the context in which RFRA's supporters make claims of infringement on religious expression is essential to assess whether religious beliefs are a pretext for discrimination, an analysis that can be properly conducted without straying into judicial determination of genuine religious beliefs. This is a narrow, but essential, distinction and ties to the ability of this Comment's proposed framework to curb judicial subjectivity. See *infra* Section III.C. But see RLUIPA Definitions, 42 U.S.C. § 2000cc-5(7) (defining "religious exercise" in broad strokes without regard to the centrality of a belief).

96. Cf. *Billard v. Charlotte Cath. High Sch.*, No. 17-cv-00011, 2021 WL 4037431, at *8 (W.D.N.C. Sept. 3, 2021) (quoting *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1203 (S.D. Ind. 2020)) (referring to the Title VII exemptions, not RFRA).

97. See, e.g., *Singh v. McHugh*, 185 F. Supp. 3d 201, 204–05 (D.D.C. 2016) (requiring the army to accommodate the religious practices of an observant Sikh ROTC student).

98. RFRA reinstated the *Sherbert-Yoder* test, which required a compelling government interest if the government were to substantially burden religious exercise, even with a facially neutral law. *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972).

properly proceed under RFRA would not also be able to state a constitutional claim that would be cognizable even if RFRA did not exist.

Expanding on the worrying trends in the way litigants interpret RFRA, serious questions have emerged that suggest bias in RFRA case outcomes.⁹⁹ In addition to their general import, these concerns are specifically significant to the subsequent super-statute analysis because they highlight RFRA's flaws.¹⁰⁰ Empirical analysis indicates that Christian plaintiffs are more likely to prevail in their claims.¹⁰¹ Religious affiliation—that of both judges and claimants—is the most prominent factor influencing the judicial decision-making that determines whether a RFRA claimant will prevail in their case.¹⁰² This further demonstrates not only that RFRA is not a super-statute, but also the need for a more robust approach to review discussed later in this Comment. In order to introduce a less subjective analysis, future litigants should adopt the framework this Comment proposes below in order to argue that super-statutes inform the balancing of comparative interests so that the law, rather than judicial subjectivity, may inform case outcomes.

II. THE CRA, BUT NOT RFRA, SATISFIES THE THREE ELEMENTS OF SUPER-STATUTEDOM

This Part analyzes the super-statutedom of the CRA and RFRA using Eskridge and Ferejohn's three factors. The CRA analysis is brief because application of super-statute theory to that scheme is not novel. Analysis of RFRA's super-statutedom is more extensive, though still cursory, as the purpose of this Comment is in part to move the dispositive question away from whether a statute is super and toward what to do when super-statutes collide.

A. The Civil Rights Act of 1964: The Prototypical Super-Statute

One of the premier examples of a super-statute is the Civil Rights Act of 1964, which was hailed as a super-statute from its conception.¹⁰³ To the

99. See generally Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

100. See *infra* Section II.B.

101. Abrams, *supra* note 91, at 69–70. Conversely, members of a minority religion are significantly less likely to bring a successful claim. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 237–38, 249 (2012) (analyzing RFRA among other types of religious freedom cases).

102. Sisk, Heise & Morriss, *supra* note 99, at 614.

103. Eskridge & Ferejohn, *supra* note 51, at 1237.

extent that super-statutes exist, the CRA is incontrovertibly one of them.¹⁰⁴ The CRA established a new normative framework—antidiscrimination—which permeates all areas of American society.¹⁰⁵ Though conflict continues over the precise extent of its protections,¹⁰⁶ the CRA has undeniably altered the entire landscape of public law, spurred the Supreme Court to adopt its most expansive readings of the Commerce Clause,¹⁰⁷ and “saturated” American socio-political culture.¹⁰⁸ This broad, purposive impact has made the CRA a “constitutional milestone.”¹⁰⁹ Indeed, where prior judicial interpretations of constitutional protections have failed to adequately protect minority interests,¹¹⁰ Congress has employed the CRA and subsequent amendments to expand on the Court’s constitutional floors and carry out a more expansive purpose of protecting minority interests.¹¹¹

For example, in *Geduldig v. Aiello*,¹¹² the Court held that classifications on the basis of pregnancy do not discriminate on the basis of sex.¹¹³ Later, the Court moved to apply that reading to the CRA, which would have limited protections for people who may become pregnant.¹¹⁴ In opposition to this development, IBSMs organized and successfully pressured Congress to intervene and revise the statute to clarify that the CRA prohibits differential treatment on the basis of pregnancy.¹¹⁵ Congress responded to IBSMs’ pressure and revised the statute to clarify that the CRA prohibits classifications on the basis of pregnancy.¹¹⁶

104. *Id.*

105. *Id.*; see also Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 16–20 (1989) (discussing dual status Title VII claims and the shortcomings of the CRA for multiply marginalized plaintiffs).

106. Eskridge & Ferejohn, *supra* note 51, at 1237–38.

107. *See id.* at 1240–41.

108. *Id.* at 1240–42. The CRA is so entrenched in the consciousness that even litigants pursuing exemptions to current interpretations of the CRA do not argue against its foundational components. *See, e.g.*, Oral Argument at 42:20, *Fulton v. City of Philadelphia*, 590 U.S. ____ (2021) (No. 19-123), <https://www.oyez.org/cases/2020/19-123> [<https://perma.cc/G6WQ-9DKU>].

109. Zietlow, *supra* note 105, at 984.

110. *See, e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974).

111. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)) (amending Title VII to prohibit discrimination on the basis of pregnancy); *see also* Eskridge & Ferejohn, *supra* note 51, at 1241. IBSMs were essential to pressuring Congress to take this action. *Id.*

112. 417 U.S. at 496–97.

113. *Id.*

114. Eskridge & Ferejohn, *supra* note 51, at 1241.

115. *Id.*

116. *See* Eskridge & Ferejohn, *supra* note 51, at 1241.

Judicial review of state constitutional amendments similarly demonstrates the CRA's Constitution-bending power as a super-statute.¹¹⁷ In *Romer v. Evans*,¹¹⁸ the Court heard a challenge to an amendment to the Colorado Constitution (Amendment 2).¹¹⁹ Amendment 2 would have made it unconstitutional for Colorado municipalities to pass antidiscrimination provisions protective of LGBTQIA+ rights.¹²⁰ Just ten years prior, in *Bowers v. Hardwick*,¹²¹ the Court upheld a Georgia sodomy law on the narrow basis that there is no fundamental right to engage in homosexual sodomy.¹²² There, the Court refused to see any liberty interest in gay individuals' right to have intimate associations or privacy in their affairs.¹²³ While *Bowers* differs from *Romer* factually, the Court approached the latter case with a markedly different view of LGBTQIA+ individuals. Some suggest that the CRA is responsible for this shift.¹²⁴

In overturning Amendment 2, the *Romer* Court found it impermissible that LGBTQIA+ people were denied "[legal] protections taken for granted by most people"¹²⁵ but cited nothing for its assertion that LGBTQIA+ Coloradans are protected by the Fourteenth Amendment.¹²⁶ Instead, the Court focused on the breadth and targeted nature of the amendment.¹²⁷ Contrast this with the sodomy law in *Bowers*, which also targeted homosexuals, though not by its plain language.¹²⁸ While some may argue the difference is the facially anti-LGBTQIA+ nature of Amendment 2, that difference alone cannot justify the wholly differential outcome in *Romer* compared to *Bowers*. The historical development of courts' review of race and gender discrimination¹²⁹ suggests that changing sociopolitical mores can influence whether the Court sees a law as targeted. Because Justices are ultimately individual people with their own biases, they may not be able to see targeting until it is pointed out to them and, perhaps, until they see it discussed (and accepted) more broadly in society.

117. See *Romer v. Evans*, 517 U.S. 620 (1996).

118. *Id.*

119. *Id.* at 623–24.

120. *Id.* at 624.

121. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

122. *Id.* at 192.

123. See *id.* at 199, 201 (Blackmun, J., dissenting).

124. See Eskridge, *supra* note 46, at 500–03.

125. *Romer*, 517 U.S. at 631.

126. See Eskridge & Ferejohn, *supra* note 51, at 1242.

127. *Romer*, 517 U.S. at 632.

128. See *Bowers*, 478 U.S. at 186.

129. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

The *Romer* Court's focus on the anti-LGBTQIA+ targeting of Amendment 2 demonstrates the Court's evolution and expanding understanding of what types of actions may be constitutionally violative. By acting as a super-statute, the CRA laid the groundwork for the Court to expand its understanding of the legal bounds of constitutional equal protection.¹³⁰ Though the CRA existed when *Bowers* was decided, super-statute theory's second factor of dispersion into the public consciousness takes time and may explain this evolution.¹³¹ The *Romer* Court expanded the scope of constitutional protections; but rather than expanding protection justified by an alternate level of scrutiny, the Court instead did so on the substantive harm at issue. In *Romer*, but not in *Bowers*, the Court was willing to see anti-LGBTQIA+ animus as targeted discrimination.¹³² *Romer* thus indicates that courts and Justices do evolve their understandings of protected rights. However, the lack of a reasoned basis for the Court's holding deprives the public and future litigants of a transparent understanding of how such an evolution occurs. This shortcoming demonstrates the need for the more reasoned framework proposed by this Comment.

While the CRA is the prototypical super-statute, not all ambitious statutory schemes achieve super-statedom.¹³³ Indeed, super-statedom is far from inevitable.¹³⁴ The next section addresses RFRA, the most controversial putative super-statute in constitutional jurisprudence today.

B. The Religious Freedom Restoration Act: Insufficiently Super

Some putative super-statutes are undercut before they can achieve wide acceptance.¹³⁵ RFRA is the "most notabl[e]" example of such a putative super-statute.¹³⁶ Although the Court held RFRA to be an unconstitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment,¹³⁷ Justice Gorsuch reinvigorated the statute and renewed its potential for super-statedom by invoking it in *Bostock*.¹³⁸ Facially, suggesting RFRA's super-statedom is detrimental to LGBTQIA+ rights and reproductive rights because RFRA is often invoked

130. See Eskridge, *supra* note 46, at 500–03.

131. See Eskridge & Ferejohn, *supra* note 51, at 1231, 1242.

132. Compare *Romer*, 517 U.S. 620, with *Bowers*, 478 U.S. 186.

133. Eskridge & Ferejohn, *supra* note 51, at 1230.

134. *Id.*

135. *Id.*

136. *Id.*

137. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Note the widespread adoption of state RFRAs and federal enactment of the narrower Religious Land Use and Institutionalized Persons Act. See Magarian, *supra* note 85, at 1905; 42 U.S.C. §§ 2000cc to 2000cc-5.

138. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

by religious litigants as a defense against compliance with civil rights laws.¹³⁹ However, Justice Gorsuch’s RFRA caveat suggests the Court may support super-statute analysis. This preference could, in turn, be used to argue for a new analytical framework rooted in super-statutedom that may permit a more reasoned approach to heightened scrutiny and balancing competing constitutional rights.

RFRA is not a super-statute. Recall that a super-statute is a statutory scheme that (1) establishes a new normative framework, (2) achieves broad public recognition and acceptance, and (3) has an effect beyond the four corners of the statute.¹⁴⁰ RFRA likely fails on all three factors. Therefore, it is difficult to substantiate Justice Gorsuch’s assertion that it “might supersede” the CRA.¹⁴¹

1. RFRA DOES NOT ESTABLISH A NEW NORMATIVE FRAMEWORK

RFRA proposes no new normative or institutional framework. All it does is act as congressional imposition of a certain standard of judicial review—strict scrutiny.¹⁴² RFRA’s sparse purpose contrasts with the CRA, which actively pronounced an ambitious new goal of antidiscrimination and set out extensive and ambitious requirements to enact that purpose.¹⁴³ Even if a court interpreted RFRA’s imposition of strict scrutiny to propose a normative framework, RFRA can hardly be considered “new” given it is—by its own terms—restoring a prior standard.¹⁴⁴ Moreover, even interpreting RFRA in the most favorable light, it is difficult to see how the imposition of a procedural mechanism could be equated to the foundational changes other super-statutes have established.¹⁴⁵

139. *E.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (permitting RFRA defense against involvement in health care plans providing reproductive health care coverage).

140. *See* Eskridge & Ferejohn, *supra* note 51, at 1216; *see also supra* Section I.B (introducing super-statute framework).

141. *See Bostock*, 140 S. Ct. at 1754.

142. *See* Gressman & Carmella, *supra* note 78, at 100.

143. *See supra* Section II.A; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of title 42 of the United States Code).

144. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1). Also note the word “restoration” in its title.

145. *See* Eskridge & Ferejohn, *supra* note 51, at 1230. *But see* Paulsen, *supra* note 84, at 253.

2. RFRA HAS NOT ACHIEVED BROAD PUBLIC ACCEPTANCE

RFRA has not stuck in the public culture. While it has touched many people's lives,¹⁴⁶ it does not come close to the breadth of other super-statutes. By contrast, the CRA touches on voting, public accommodations, education, and employment, among other areas—all areas that impact almost every single American in some manner.¹⁴⁷ Furthermore, RFRA remains subject to fierce debate among many Americans about the propriety of its purpose.¹⁴⁸ RFRA was determined to be an unconstitutional exercise of Congress's authority within the first years of its enactment.¹⁴⁹ Compared to ongoing litigation over the CRA, which seeks to define its exact contours, challenges to RFRA have struck at its basic legality.¹⁵⁰ Even viewing this debate as evidence that it has permeated the public consciousness, RFRA still would not satisfy this prong of super-statutedom because that argument is about whether it should exist at all—a fundamental question as opposed to questions of particular implementation. RFRA is far from stuck in the public culture. In fact, it is hotly and fiercely contested.¹⁵¹

3. RFRA HAS NOT HAD AN EFFECT ON THE LAW BEYOND ITS FOUR CORNERS

Lastly, RFRA has not had a broad influence on related law beyond its four corners. While state RFRA and RLUIPA may suggest an enduring impact, those acts are actually legislative responses to the invalidation of the act as applied in certain circumstances.¹⁵² Therefore, rather than bending the surrounding law and changing the landscape in which it is interpreted, as the CRA does, RFRA remains embroiled in an existential fight for its existence.¹⁵³

146. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438–40 (1994).

147. See, e.g., 42 U.S.C. §§ 1981, 1981a, 2000a, 2000f.

148. E.g., HAMILTON, *supra* note 82, at 30–31 (noting the ACLU's reversal on RFRA and ongoing controversy).

149. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

150. See *id.*

151. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

152. Cf. Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2364 (2002).

153. Compare Paulsen, *supra* note 84, at 253 (“There is no question of constitutional power here. Congress possesses the same power to pass RFRA, as RFRA concerns federal statutes, as it had to pass those other federal statutes in the first place.”), with Gressman & Carmella, *supra* note 78, at 111 (“RFRA is not a free-standing statute. It has no substance. . . . It is but the vehicle by which Congress seeks to ride into the judicial reservation.”).

RFRA implements a fairly narrow reversion to a prior point in the jurisprudence.¹⁵⁴ It is at least partially unconstitutional, remaining as it does in a fierce struggle over its ongoing legality instead of introducing new substantive rights and influencing the law beyond its own four corners.¹⁵⁵ Not only is RFRA not a super-statute, then; it is barely a statute at all.

For the foregoing reasons, even viewed in a favorable light, RFRA's case for super-statutedom is weak. However, Justice Gorsuch's RFRA caveat imbued it with new life. His invocation of the theory demonstrates the power of the Court; an unanalyzed assertion can reinvigorate an atrophied statute. Justice Gorsuch has therefore also revived the issue of RFRA's super-statutedom. RFRA's journey from bold congressional assertion of authority to partially unconstitutional and back to asserted super-statute shows the subjectivity inherent in statutory and super-statutory analysis. To protect against baseless invocations of super-statutedom, litigants should then work to move the key inquiry away from whether a statute qualifies as a super-statute and toward how to assess super-statutes in conflict.

III. A MODIFICATION TO JUSTICE MARSHALL'S APPROACH TO HEIGHTENED SCRUTINY PROVIDES A FRAMEWORK FOR ASSESSING SUPER-STATUTES IN CONFLICT

Justice Gorsuch's RFRA caveat demonstrates that invocation of super-statute status is highly subjective. Therefore, to dissuade future courts and litigants from invoking super-statute status, this Comment proposes a framework for assessing super-statutes in conflict that can be considered a form of heightened scrutiny. An established framework for analyzing the conflict should disincentivize baseless assertions of super-statutedom. To build this framework, this Comment draws in part on Justice Thurgood Marshall's approach to heightened scrutiny. Because RFRA is a reversion to strict scrutiny, and because the threshold question of whether heightened scrutiny applies can prove dispositive, this Comment argues for a revised approach to heightened scrutiny that is guided by super-statute theory and may apply to either constitutional or statutory questions in certain contexts.

This Part begins with an introduction to Justice Marshall's "sliding-scale" approach to heightened scrutiny. It then analyzes how courts have evaluated super-statutes when in conflict, as framed by Eskridge and

154. Gressman & Carmella, *supra* note 78, at 115 ("[RFRA] is no more than instruction on the meaning of the Free Exercise Clause.").

155. *Flores*, 521 U.S. at 536; *see also* Eisgruber & Sager, *supra* note 146; Gressman & Carmella, *supra* note 78, at 116; Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015).

Ferejohn. This Part concludes by arguing that super-statute theory combined with Justice Marshall's sliding-scale approach can provide a revised framework for balancing competing constitutional rights or claims implicating interests closely related to those rights.

A. Constitutional Review: Marshall's Sliding-Scale

Beginning with *Korematsu v. United States*¹⁵⁶ and articulated in *Loving v. Virginia*,¹⁵⁷ the Supreme Court established the strict scrutiny standard to be used for those cases warranting the "more searching" review first suggested in *United States v. Carolene Products*.¹⁵⁸ Establishing this standard, however, caused subsequent controversy over the extent to which different "insular minorities"¹⁵⁹ would receive a heightened standard.¹⁶⁰ The Court's gatekeeping of who was "in" and who was "out" for the purposes of heightened scrutiny led to varying treatment of differently disadvantaged groups. Some Justices' selective interpretations of precedent produce outcomes opposite those of what doctrine might suggest, namely the application of strict scrutiny to affirmative action.¹⁶¹ Over time, what courts have suggested are three comparatively neat tiers of scrutiny that have become an increasingly contradictory morass of caselaw.¹⁶² Contemporaneously, the lived reality for minority groups changed, yet the Court's analysis did not adapt accordingly.¹⁶³ Justice Marshall articulated his "sliding-scale" approach to judicial review to argue that the devolution was merely a result of the Court's use of different rationales in public as opposed to in private.¹⁶⁴

Justice Marshall argued the Court had never truly reviewed constitutional claims on the basis of established tiers but rather had used a "spectrum" of standards when reviewing purported violations.¹⁶⁵ Justice

156. 323 U.S. 214, 216 (1944).

157. 388 U.S. 1, 7 (1967).

158. 304 U.S. 144, 152 n.4 (1938).

159. *Id.*

160. See generally *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (applying strict scrutiny to racial classifications); *United States v. Virginia*, 518 U.S. 515 (1996) (applying only intermediate scrutiny to gender classifications).

161. E.g., *Bakke*, 438 U.S. at 320 (determining that the university's affirmative action program did not survive strict scrutiny).

162. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

163. Overt classifications were increasingly replaced by more insidious, covert discrimination that the Court declined to remedy. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 96–97 (1995) (finding no inter-district remedy for white flight).

164. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 110 (1973) (Marshall, J., dissenting); see also PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1360–63 (7th ed. 2018).

165. *Rodriguez*, 411 U.S. at 98–99 (Marshall, J., dissenting).

Marshall noted that conceptualizing heightened scrutiny as tiers, capable of binary determination as to whether a group is in or out, improperly invites a threshold question of whether heightened scrutiny applies at all.¹⁶⁶ This question is itself vulnerable to the same interpretive biases as the actual analysis under heightened scrutiny as to whether certain state interests are “compelling” or “important.”¹⁶⁷ Justice Marshall viewed the Court as trying to distance itself from subjective determinations by emphasizing those rights explicitly protected by the Constitution but noted that enumerated rights do not exist in a vacuum.¹⁶⁸ Not only did Justice Marshall disagree with the Court’s “rigidified” approach,¹⁶⁹ but he also argued the tiered method is not as principled as many tend to suggest.¹⁷⁰ He saw it as “inescapably clear” that the Court had already applied a sliding-scale approach to heightened scrutiny but under the guise of tiered review.¹⁷¹

For example, in *Eisenstadt v. Baird*,¹⁷² the Court struck down a prohibition on purchasing contraception purportedly on rational basis, even when rational state interests existed for the regulation.¹⁷³ In so holding, the Court maintained that general commercial regulation only violated the Equal Protection Clause if it was completely irrelevant to a state interest, yet in that case there were relevant state interests that could have supported the opposite outcome.¹⁷⁴ This exemplifies the inconsistency with which Justice Marshall took greatest issue; he believed the Court tended to obscure its true analysis.¹⁷⁵ Justice Marshall viewed the Court as applying a sliding-scale in private while asserting tiered scrutiny in public.¹⁷⁶ Supporting his point, the Court in *Reed v. Reed*¹⁷⁷ again claimed to apply rational basis review to find differential treatment of women, which it had previously considered legitimate,¹⁷⁸ to be

166. *See id.* at 97–98 (Marshall, J., dissenting).

167. *See id.* at 98–99 (Marshall, J., dissenting).

168. *Id.* at 103 (Marshall, J., dissenting) (“Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself.”).

169. *Id.* at 98 (Marshall, J., dissenting).

170. *Id.* at 99–103 (Marshall, J., dissenting) (providing multiple examples of inconsistent judicial analysis, including the emergence of rational basis with bite).

171. *Id.* at 109 (Marshall, J., dissenting).

172. 405 U.S. 438, 442–43 (1972).

173. *Rodriguez*, 411 U.S. at 103–04 (Marshall, J., dissenting) (analyzing *Baird* and other cases).

174. *Id.* (Marshall, J., dissenting) (analyzing *Baird* and other cases).

175. *Id.* at 110 (Marshall, J., dissenting).

176. *See id.* (Marshall, J., dissenting).

177. 404 U.S. 71 (1971).

178. *E.g., Bradwell v. Illinois*, 83 U.S. 130, 139, 141–42 (1873).

illegitimate.¹⁷⁹ These cases show the inconsistency and subjectivity in the Court's implementation of tiered scrutiny.

As an alternative to this disingenuous approach, Justice Marshall advocated for openly declaring heightened scrutiny to be a variable standard.¹⁸⁰ He argued, "As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny . . . must be adjusted accordingly."¹⁸¹ Justice Marshall's emphasis on the "nexus" of constitutional guarantees and related interests¹⁸² moves the dispositive question away from whether a protected class exists. Instead, the sliding-scale approach assesses constitutional guarantees, related interests, and countervailing government interests in a broader, holistic framework.¹⁸³ Related interests are worthy of some degree of protection, Justice Marshall argued, because without defending the related interests that actualize a particular constitutional guarantee, courts cannot preserve the integrity of the constitutional guarantee itself.¹⁸⁴

As the Court's tiers of heightened scrutiny have continued to devolve, current jurisprudence has begun to resemble the sliding-scale approach.¹⁸⁵ However, the similarity is only facial. Litigants must continue to base their claims in the antiquated model of tiered scrutiny. This perpetuates damaging distinctions¹⁸⁶ but also prevents litigants from bringing intersectional claims¹⁸⁷ and inhibits movement beyond the equality framework.¹⁸⁸ Justices Marshall's and Brennan's retirements effectively silenced the putative sliding-scale approach, which was unsurprisingly not taken up by their ideologically dissimilar Bush-era replacements, Justices Thomas and Souter, respectively.¹⁸⁹ Super-statutes, however, provide a

179. *Reed*, 404 U.S. at 76.

180. *See Rodriguez*, 411 U.S. at 110 (Marshall, J., dissenting).

181. *Id.* at 102–03 (Marshall, J., dissenting).

182. In articulating his theory, Justice Marshall spoke of a nexus between "constitutional *guarantee[s]* and . . . nonconstitutional *interest[s]*." *Id.* at 102 (Marshall, J., dissenting) (emphasis added). It seems Justice Marshall used this broader language to acknowledge unenumerated constitutional considerations that may be needed to support guaranteed rights and thus can become "more fundamental" and worthy of heightened scrutiny. *Id.* at 102–03 (Marshall, J., dissenting).

183. *Id.* at 110–16 (Marshall, J., dissenting).

184. *Id.* at 103 (Marshall, J., dissenting).

185. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124 (2007).

186. For example, consider intermediate scrutiny, which implicitly suggests that women are unequal.

187. *See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

188. *See ADLER, supra* note 20, at 5.

189. Sliding-scale was a minority view in its heyday and has not been supported by a Supreme Court Justice since Justices Marshall and Brennan retired from the Court. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 455–56 (1985) (Marshall,

possible route to reviving the approach and informing the relationship between related interests and constitutional guarantees.

Justice Marshall's framework allows for broad, inquisitive review grounded in an antisubordination view of the Constitution. This begins to rectify the foundational problem wherein courts understand discrimination on the basis of race to be that which affects Black men and discrimination on the basis of gender to be that which affects white women.¹⁹⁰ Justice Marshall's sliding-scale review is thus not only a call to eschew the retrograde jurisprudence in which benign classifications are afforded strict scrutiny but not laws that clearly perpetuate subordination,¹⁹¹ but also a call for greater judicial honesty and transparency. This theory has implications for how advocates conceptualize the modern evolution of the Court and the direction of the next generation of civil rights jurisprudence. Pairing super-statutes with Justice Marshall's sliding-scale, as this Comment does below, introduces a mechanism by which litigants may more easily bring intersectional claims.

B. Super-Statutes in Conflict

Super-statutes may inform how to assess which interests are related to constitutional guarantees. The RFRA caveat, however, demonstrates that super-statutedom may be baselessly invoked. Therefore, to secure against such invocations and to move the dispositive question away from claimed super-statute status, litigants must know how super-statutes interact. In laying out their theory of super-statutes, Eskridge and Ferejohn posit that courts have a rough framework for assessing super-statutes in conflict.¹⁹² Eskridge and Ferejohn argue courts weigh conflicting super-statutes based on the comparative impairment of the interests at stake in each.¹⁹³ Because a modification of their logic is a tool to reintroduce and operationalize Justice Marshall's sliding-scale, this Comment briefly overviews their approach before turning to the proposed framework in the next Section.

When super-statutes conflict, the Supreme Court has tended to use an approach that some call comparative impairment (CI).¹⁹⁴ CI suggests that the weight or extent to which one super-statute conflicts with another

J., dissenting in part); *see also* BREST, LEVINSON, BALKIN, AMAR & SIEGEL, *supra* note 164, at 1360–63.

190. *See* Crenshaw, *supra* note 187, at 140.

191. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down University of Michigan's affirmative action program using strict scrutiny); *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (using rational basis to uphold classifications on the basis of pregnancy).

192. Eskridge & Ferejohn, *supra* note 51, at 1260.

193. *Id.*

194. *Id.*

should determine which super-statute yields to the other.¹⁹⁵ For example, the Court used a CI framing to hold that Title VII of the CRA did not severely compromise the Federal Arbitration Act (FAA) because the core policy of the FAA is arbitration of commercial and contractual disputes, compared to the employment antidiscrimination purpose of Title VII.¹⁹⁶ Because requiring arbitration in commercial and contractual disputes is generally independent of any discrimination, achieving the purpose of promoting arbitration would not be significantly impaired by applying Title VII. By contrast, a hypothetical super-statute that imposed time or subject matter restrictions on litigation and arbitration would likely interfere with the FAA. Therefore, the extent to which one act is burdened by the other guides the CI analysis.¹⁹⁷ Admittedly, assessing the extent of the burden placed by one act on the other still requires policy judgments.¹⁹⁸ However, the underlying purposes of the statutes in conflict place outer bounds on those judgments. Because they are the product of extensive deliberation and because they articulate new normative policy frameworks, super-statutes can provide democratic guidance to reviewing courts by informing how they evaluate the weight of one super-statute's infringement on another.

When viewed as a part of broader super-statute theory, the implications of CI expand beyond the examples presented by Eskridge and Ferejohn.¹⁹⁹ CI lends itself to the constitutional context by suggesting that whichever interest or right is least infringed should yield. However, it only addresses the comparative *weight* of competing interests; it does not assess the *nature* of those interests. Proper balancing must take both into consideration. By combining CI with the sliding-scale approach to heightened scrutiny, litigants may urge courts to balance competing constitutional or related interests on the basis of the weight of comparative infringement and the nature of the rights in conflict. The next Section proposes and applies this new hybrid framework.

C. Informed Comparative Scrutiny: A Hybrid Approach

The ongoing erosion of doctrinal tiers of scrutiny, most notably in reproductive health care and LGBTQIA+ rights cases, reveals what Justice Marshall argued has always been true: the Court will apply a variable level of scrutiny that corresponds to the importance of the rights at issue. However, this requires an assessment of which rights and related interests

195. *Id.* at 1260–63, 1260 n.201.

196. *Id.* at 1261.

197. *Id.* at 1261–63.

198. *Id.* at 1263 (noting that comparative impairment often depends on extrinsic assumptions and policy).

199. *See supra* Section III.B.

are more important. The Court's opaque doctrine as to the comparative importance of different rights does not provide meaningful guidance regarding when it will apply the more searching inquiry that comes with heightened scrutiny. Applying super-statute theory as a whole—both CI and the three elements of super-statutedom—can reintroduce the sliding-scale approach to heightened scrutiny while guiding the substantive assessment of rights' comparative importance. A new, two-step approach that both varies the intensity of heightened scrutiny based on the values at stake and provides, via any applicable super-statute(s), guidance as to the comparative importance of those values may democratize judicial review. This framework may apply to judicial review of both constitutional rights and interests closely related to those rights that are, as Justice Marshall argued, necessary to protect certain enumerated rights.

1. INFORMED COMPARATIVE SCRUTINY MAY CONTEMPORIZE JUDICIAL PHILOSOPHIES TO ADVANCE PROGRESSIVE JURISPRUDENCE

Rather than attempt to slot new and evolving claims into an eroded framework, courts should embrace a new approach. When faced with an issue of reproductive justice or LGBTQIA+ rights,²⁰⁰ courts should apply what this Comment calls Informed Comparative Scrutiny (ICS). ICS draws together CI and the sliding-scale to enact an antisubordination principle that accounts for both the weight of infringement and nature of a guaranteed right or related interest. Unlike CI, a court applying ICS would look not just to the extent of comparative infringement, but also to the importance of the interests infringed. For example, a court assessing a plaintiff's claim of anti-LGBTQIA+ discrimination could not only incorporate in its analysis the comparative infringements, but also consider Congress's intent to promote nondiscrimination as expressed by the CRA. Thus, even when a narrow distinction exists regarding the weight of impairment, the nature of the interest as informed by super-statutes can break the tie in favor of a more marginalized interest. This analysis would limit judicial subjectivity and likely also change cases where relief was denied to those not in traditionally protected classes.²⁰¹

Under ICS, a court would first look to a plaintiff's claimed constitutional guarantee. If not a constitutional guarantee, the court would look to the claimed non-constitutional interest and the nexus between that interest and the related constitutional guarantee. For example, the nexus

200. This proposal is limited to those areas of fundamental rights and Equal Protection Clause jurisprudence that have become the most doctrinally confused. However, the theory has broader implications both for the context of race and a wider world of as-yet unadopted intersectional constitutional claims.

201. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that a classification on the basis of intellectual disability does not warrant heightened scrutiny).

between being LGBTQIA+ and the Fourteenth Amendment's equal protection guarantee would warrant defense of LGBTQIA+ rights. Then, depending on the constitutional and societal importance of the interests adversely affected and the potential invidiousness of the basis for infringement, a court would apply a correspondingly more searching scrutiny. For example, a court would apply higher scrutiny to a bisexual plaintiff than it would to an otherwise identical heterosexual plaintiff.²⁰² A court should then look for an applicable super-statute to guide how it assesses importance and invidiousness. If there is a purported super-statute, a court should assess whether it meets the elements of super-statedom²⁰³—for example, the CRA as a super-statute elaborating on the Fourteenth Amendment. If there is a genuine super-statute, a court should use the statute's purpose to guide how it frames the importance of the interests at issue. Even if a statute is not a super-statute, or super-statedom is baselessly invoked, ICS could still guide a court's interpretation and would likely favor the more established statutory scheme on the basis of super-statute theory's three elements. Applying ICS thus accounts for historical subordination and current conditions in the context of democratically adopted values.

2. APPLYING INFORMED COMPARATIVE SCRUTINY TO HYPOTHETICAL POST-*BOSTOCK* LITIGATION

ICS would not change the outcome in *Bostock*. However, it would have changed the basis on which the decision was made and reduced the potential consequences of Justice Gorsuch's RFRA caveat. This Comment applies ICS to a hypothetical, post-*Bostock* case in which a litigant raises a RFRA claim to exempt themselves from compliance with Title VII.²⁰⁴

Zev is white,²⁰⁵ nonbinary, and worked for FaithCo, a Catholic organization. When FaithCo discovered Zev is nonbinary, FaithCo terminated them. Zev argues they have statutory and constitutional protections against being fired for being nonbinary²⁰⁶ and that there is a close nexus between their identity as protected by the CRA per *Bostock*

202. These hypotheticals, however, should not be viewed as absolute. In particular, actual identity is irrelevant; instead, perceived identity by the discriminating party should be the basis.

203. See *supra* Part II.

204. Note, however, that the Supreme Court has not decided whether RFRA applies to suits between private parties, though three circuits have held it does not. *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010); *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999).

205. See *infra* Section III.C.4 (applying ICS to multiply marginalized litigant).

206. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741, 1783 (2020); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 606, 618 (4th Cir. 2020).

and as protected by the Fourteenth Amendment's equal protection guarantee. This nexus, Zev argues, warrants a more searching inquiry of FaithCo's actions. FaithCo responds that interpreting Title VII as preventing it from terminating Zev is a substantial burden imposed by the state on its sincerely-held religious beliefs.

A court's challenge is how to assess Zev and FaithCo's arguments when both implicate constitutional guarantees. Under ICS, scrutiny would slide upwards because FaithCo treated Zev unequally on a basis closely tied to the Fourteenth Amendment. A court would know this is a nexus worthy of heightened scrutiny because the CRA, as a super-statute, announces Congress's intent to counteract discrimination.²⁰⁷ FaithCo would assert a competing super-statute, RFRA.

While RFRA is not a super-statute,²⁰⁸ even assuming it is would lead a court to compare the weight and nature of interests infringed. To do so, a court should assess which interest or right is comparatively impaired the least (i.e., weight of the interest) but also account for the importance (i.e., nature of the interest), which may include historical subordination. Here, the weight tips in Zev's favor because they lost their employment and were directly harmed by discrimination. FaithCo would argue requiring them to employ Zev is a substantial burden that exceeds Zev's. However, even assuming a similarly-weighted interest, under ICS the nature-of-the-interests prong would tip in Zev's favor as well and thus lead a court to rule for them even if the assessment were otherwise tied. The nature-of-the-interest prong tips to Zev because the interest in equal protection free from gender-motivated animus, as envisioned by the CRA, is more in need of government protection than FaithCo's interests.²⁰⁹ Gender-expansive individuals experience well-documented, rampant discrimination,²¹⁰ while FaithCo, as a Catholic organization, is part of a hegemonic force whose influence and values so pervade current social and political systems in the United States that it is not currently in need of government protection.²¹¹

207. See *supra* Section II.A.

208. See Eskridge & Ferejohn, *supra* note 51, at 1230.

209. Cf. *Equal Emp. Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362, 1369 (9th Cir. 1986) ("Because the impact on religious belief or practice is minimal and the interest in equal employment opportunities is high, the balance weighs heavily in favor of upholding [employer's] liability under Title VII for its sexually discriminatory health insurance compensation program.").

210. See generally SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/SR8Y-YK8L>] [hereinafter 2015 U.S. TRANSGENDER SURVEY].

211. The president of the United States is Catholic, six out of nine Supreme Court Justices are Catholic, and Catholicism is the second largest religion and largest Church in the country. See CIA, *Field Listing — Religion*, CIA.GOV: WORLD FACTBOOK (2021), <https://www.cia.gov/the-world-factbook/field/religions/> [<https://perma.cc/A57N-LVHX>].

Some may argue the last step in the above hypothetical borders on the conclusory. Though correct to a limited extent, courts must eventually make decisions. ICS suggests a framework by which courts may minimize the subjectivity in those decisions. Here, a court must ultimately still assess the weight and nature the infringement suggests.²¹² To a judge who does not recognize or understand trans rights, Zev's case may still look different. However, the proposed ICS framework attempts to counteract any judge's individual subjectivity or bias by informing the scrutiny and comparisons made in their review with the purpose of democratically-expressed values communicated to the courts by super-statute. Under this framework, a judge who does not understand trans rights could be guided not only by the precedent set in *Bostock* and *Grimm*, but also by Congress's articulation of the importance of nondiscrimination in order to arrive at the same conclusion as a judge who did previously understand trans rights. In this way, ICS and super-statutes can provide a similar type of judicial education that was at play in *Romer*.

Notwithstanding the power of Catholics in this country, flipping the facts on the aforementioned hypothetical would still lead to their protection. Assume, briefly, that Zev is the manager of a new business and, after their termination from FaithCo, harbors animosity against all Catholics. Zev feels threatened in the presence of any Catholic. Eve applies for a job with Zev and is accepted. When she asks to come in late on Ash Wednesday, Zev fires her because she is Catholic. In this alternative hypothetical, the weight and nature of Eve's interest in employment outweigh any interest Zev may have in facilitating a workplace free from religious bias. Though Zev's experience is valid and may be worthy of protection in some cases, it does not extend so far as to permit employment discrimination against another. It would defy the principles of nondiscrimination laws that protect individuals' freedom of religion to suggest that an individual person cannot be harmed by an institution (here, Zev's business) just because that institution is run by a nonbinary person. Arguing to the contrary would misunderstand the ICS framework.

As of the 116th Congress, over thirty percent of Congressmembers were Catholic, overrepresenting Catholics in the general population by ten percent. ALEKSANDRA SANDSTROM, PEW RSCH. CTR., FAITH ON THE HILL: THE RELIGIOUS COMPOSITION OF THE 116TH CONGRESS (2019), <https://www.pewforum.org/wp-content/uploads/sites/7/2019/01/Faith-on-the-Hill-116-1-3.pdf> [<https://perma.cc/E4ZH-SWTH>]. To the extent that Catholics' political power did not once match their church's current status, they are presently powerful. If, as Justice Scalia suggests, LGBTQIA+ organizations have become a sufficiently powerful minority such that they do not warrant protection, it defies reason to suggest that Catholics are not at least as powerful. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

212. See also *infra* Part IV.

The Catholic interest in the latter example is importantly different from the interest in the former example. An individual who loses their job and seeks to have the government step in to protect them from that discrimination differs from a religious organization asking a government that functionally shares those same religious beliefs to step in and allow that organization to exert its beliefs on others. Nondiscrimination—of any kind—is the law of the land, not religious values.

The key to ICS is to first look at whether a constitutional right was explicitly violated. If one was not, then look to whether there is a violation of an interest closely related to a particular constitutional right. If so, the inquiry should proceed to assess the weight and the nature of the infringed interests. The next subsection applies this inquiry and the proposed ICS framework to another context in which litigants often invoke RFRA: reproductive health care.

3. APPLYING INFORMED COMPARATIVE SCRUTINY TO *HOBBY LOBBY*

If applied to a case analogous to *Burwell v. Hobby Lobby Stores, Inc.*,²¹³ ICS would result in a changed outcome. *Hobby Lobby* involved a RFRA challenge to the Affordable Care Act²¹⁴ (ACA) and Department of Health and Human Services' (HHS) requirement that employer health insurance plans include coverage for certain reproductive health care.²¹⁵ The ACA is, admittedly, very likely not a super-statute. Recall that a super-statute is a statutory scheme that (1) establishes a new normative or institutional framework, (2) achieves broad public recognition and acceptance, and (3) has an effect beyond the four corners of the statute.²¹⁶ When compared to RFRA, however, the ACA bears substantially more indicia of super-statutedom. Unlike RFRA's "restoration," the ACA did establish a new normative and institutional framework for health care in the United States.²¹⁷ Some of its components, in particular coverage for preexisting conditions, "stuck" in the public culture.²¹⁸ However, its key framework—especially as operationalized by the individual mandate—

213. 573 U.S. 682 (2014).

214. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.

215. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014).

216. See Eskridge & Ferejohn, *supra* note 51; see *supra* Section I.B.

217. Cf. Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 HOW. L.J. 855, 855–59 (2012).

218. See, e.g., Ashley Kirzinger, Calley Muñana & Mollyann Brodle, *KFF Health Tracking Poll—July 2019: The Future of the ACA and Possible Changes to the Current System, Preview of Priorities Heading Into 2nd Democratic Debate*, KAISER FAM. FOUND. (July 30, 2019), <https://www.kff.org/health-reform/poll-finding/kff-health-tracking-poll-july-2019/> [<https://perma.cc/DW8X-U3BK>] (reporting seventy-two percent of Americans support preserving coverage for people with pre-existing conditions).

very clearly did *not* stick in the public culture.²¹⁹ The ACA could have had a broad effect on the law beyond its four corners, but, like RFRA, substantial questions of its legality curtailed that possibility. If, then, the ACA bears more—or at least equivalent—resemblance to a super-statute than RFRA, but Justice Gorsuch suggests RFRA may be a super-statute, how might these two semi-super-statutes interact in an ICS framework?

Returning to the characters from prior hypotheticals, Zev and FaithCo can again demonstrate ICS's application to this case. Zev is again working for FaithCo. When Congress passed the ACA, FaithCo updated its employee health insurance plan coverage but refused to provide coverage for reproductive health care. Zev needs their employer's health insurance plan to cover reproductive health care. Like the *Hobby Lobby* plaintiffs, FaithCo disapproves of contraception and related health care. FaithCo therefore would sue the HHS, alleging the ACA and HHS regulations violate RFRA.

Assuming both RFRA and the ACA are super-statutes, under ICS a court would compare the weight and nature of the interests infringed. To do so, a court would assess which interest or right is comparatively impaired the least (i.e., weight of the interest), but also account for the importance (i.e., nature of the interest), including historical subordination. Like in the first Zev/FaithCo example, the challenge to a court in a FaithCo/HHS example is how the court will balance the interests of the government, Zev, and FaithCo. Here, scrutiny would slide upwards because of the differential treatment evinced by denying coverage to employees who may become pregnant. Access to reproductive health care is a basis closely tied to the Fourteenth Amendment's guarantee of equal protection.²²⁰ A court would further know this is a nexus worthy of heightened scrutiny because the ACA, as (an assumed) super-statute, announces Congress's intent to enable equitable access to health care.²²¹

Here, the weight tips in the HHS and Zev's favor. Denial of a medical service regularly required by a substantial portion of the population is of significant weight. Emphasizing this, many people will be unable to access health care if it is not covered by their employer-provided health insurance plan.²²² FaithCo would argue that requiring compliance burdens its

219. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (upholding the individual mandate on narrow grounds).

220. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

221. *See, e.g., Title I—Quality, Affordable Health Care for All Americans*, Pub. L. No. 111-148, §§ 1001–1563, 124 Stat. 131.

222. Jennifer Tolbert, Kendal Orgera & Anthony Damico, *Key Facts About the Uninsured Population*, KAISER FAM. FOUND. (Nov. 6, 2020), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/view/footnotes/> [<https://perma.cc/D9LJ-ELKJ>] (reporting over thirty percent of uninsured people went without

religious exercise by compelling action contrary to those beliefs. When comparing the weight of these burdens—denial of essential health care versus approving paperwork—HHS/Zev’s interests are impaired to a greater degree than FaithCo’s.

Even if a court determined the HHS/Zev and FaithCo’s interests were impaired to a similar degree, the nature prong would still suggest that HHS/Zev should prevail. The nature-of-the-interest prong would tip in Zev’s favor because the interest in equitable access to reproductive health care is key to the Fourteenth Amendment’s equal protection guarantee.²²³ Equitable access to health care therefore warrants protection as a related interest in order to secure the Fourteenth Amendment’s guarantee. While FaithCo has religious liberty interests, the nexus between those interests and the employee health insurance plans is substantially more attenuated. Arguably, compelled coverage of certain health care is so attenuated from religious expression it is not even a related interest at all.²²⁴ Moreover, not only does the nature prong also favor HHS/Zev because of the proximity of the interests to a constitutional guarantee, but a contrary holding would substantially extend the reach of FaithCo’s right of religious expression. Holding in favor of FaithCo would amount to a holding that one person’s religious beliefs can be enforced upon another person, despite that person’s own contrary beliefs. The Constitution does not go so far.²²⁵ Therefore, both the weight of the impairment on HHS/Zev that would occur were RFRA to exempt FaithCo from compliance and the nature of the interests at stake suggest a reviewing court should hold in favor of HHS/Zev.

In an ICS analysis, a *Hobby Lobby*-style dispute would result in a holding opposite that of *Hobby Lobby* itself. This demonstrates the progressive realignment purported by ICS, the potential benefits of tethering judicial review to values announced via super-statute, and the way Justice Marshall’s sliding-scale informs the analysis. The next Section addresses how ICS may enable intersectional claims to proceed more successfully than under the status quo.

4. APPLYING INFORMED COMPARATIVE SCRUTINY TO CLAIMS BY MULTIPLY MARGINALIZED LITIGANTS

Altering the above examples to incorporate race further demonstrates the utility of ICS. By incorporating the sliding-scale approach, ICS would

medical care and reviewing data showing uninsured people cannot access preventative care or care for major or ongoing health conditions).

223. See *supra* note 220 and accompanying text.

224. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 745–46 (2014) (Ginsburg, J., dissenting).

225. See U.S. CONST. amend. I.

help litigants persuade a court to more effectively address intersectional claims made by multiply marginalized litigants. For example, a court could consider a constitutional claim brought by a Black woman under a correspondingly greater scrutiny than one brought by a white woman because discriminating on the basis of multiple marginalized identities (gender and race) is a more invidious basis than on one alone, and thus a court may vary the degree of care with which it scrutinizes an issue.²²⁶ The same approach would apply when both a constitutional right and a non-constitutional related interest are at issue. Those related interests that are more fundamental to a constitutional guarantee are correspondingly in need of an even more searching review.²²⁷ Current law inadequately accounts for these types of claims. ICS, then, provides a contemporary avenue by which to introduce this distinction into the jurisprudence and argue for more effective relief under existing doctrine.

Altering the *Hobby Lobby* example above, suppose Zev is Black. ICS's flexible standard enables review that is further heightened as compared to what it would be if Zev were white. It is well documented that Black people who are pregnant experience adverse reproductive health outcomes as a result of medical racism.²²⁸ While Zev is not pregnant in the above hypothetical, the importance of their demand that their employer provide reproductive health care is underscored by the disproportionately adverse health outcomes that Black pregnant women experience. While Zev is not a woman, when combined with nonbinary people's experience with health care providers overall,²²⁹ the data on pregnant Black women's health outcomes can be extrapolated to be at least as adverse, if not more, for a nonbinary Black person who may become pregnant. The combination of these factors produces the need to scrutinize any burden on Zev's access to reproductive health care more seriously.

Recall the previously discussed constitutional and statutory interests in access to reproductive health care as bases closely tied to the Fourteenth Amendment's guarantee of equal protection.²³⁰ In addition to the gender-based equal protection claim, the Equal Protection Clause also prohibits

226. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting); Crenshaw, *supra* note 187.

227. Cf. *Rodriguez*, 411 U.S. at 103 (Marshall, J., dissenting).

228. E.g., Elise Ashley, Comment, *Ignoring the Cries of Black Mamas: Looking Beyond Tort Law to Ensure that Black Mothers Are Heard During Childbirth*, 2021 WIS. L. REV. 1511; Kenya Glover, Comment, *Can You Hear Me?: How Implicit Bias Creates a Disparate Impact in Maternal Healthcare for Black Women*, 43 CAMPBELL L. REV. 243, 245–46 (2021).

229. See 2015 U.S. TRANSGENDER SURVEY, *supra* note 210, at 96.

230. See *supra* Section III.C.3.

discrimination on the basis of race.²³¹ When both race and gender are at issue, they do not merely add onto one another: they multiply into a more egregious violation insufficiently accounted for by current law.²³² Both prongs of the analysis would change on these altered facts. The weight-of-the-interest analysis tilts more heavily to Zev because of the more severe consequences that could be expected to follow if Zev is denied access to reproductive health care coverage as compared to if Zev were white. Similarly, the nature-of-the-interest analysis would also tilt even more heavily in favor of Zev than in the previous example because in this instance both race and gender are at issue. The history of invidious racial discrimination, the CRA's purpose to counteract discrimination because of race and gender, and the demonstrated and continuing trend of adverse health outcomes for marginalized individuals²³³ combine to show that the nature-of-the-interests prong weighs in Zev's favor. These interests, not the purported religious beliefs of an employer corporation, must prevail.

By tying judicial review to a super-statute like the CRA and applying a sliding-scale analysis, ICS could begin to make multiply marginalized claims more legible to reviewing courts. In certain circumstances, this legibility may translate into a holding in favor of a multiply marginalized litigant in a case where the traditional analysis that recognizes only a single axis of discrimination may not prevail. Admittedly, this framework is largely novel and mostly untested. As such, the next Part addresses some of ICS's primary shortcomings in addition to its need for further elucidation.

IV. INFORMED COMPARATIVE SCRUTINY HAS SHORTCOMINGS, BUT THEY ARE NOT FATAL FLAWS

While this Comment delves into an area of law on which much has been written, the specific topic here—super-statutes—is less discussed. Therefore, because this Comment attempts to focus most of its attention on super-statedom, it necessarily omits many worthwhile and significant corners of constitutional and antidiscrimination jurisprudence. In addition to these general weaknesses, this Part addresses three particular concerns. First, this Part addresses the potential downsides of tying judicial review to super-statutes. Second, it then addresses the argument that this Comment collapses the distinction between constitutional and statutory law. Lastly, this Part concludes by acknowledging that ICS still relies substantially on judicial supremacy.

231. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). *But see Washington v. Davis*, 426 U.S. 229 (1976) (holding racially disproportionate impact alone does not violate the Fourteenth Amendment).

232. *See Crenshaw*, *supra* note 187, at 140.

233. *See supra* note 228.

A. Informed Comparative Scrutiny May Limit the Court's Ability to Protect Those Outside the Scope of Super-Statutes

ICS, though oriented toward enabling progressive advances in the law, may still be criticized fairly by progressives. Because ICS tries to check judicial decision-making by tying it to super-statutes, it may limit the extent to which a court may broaden the scope of some laws. In some circumstances, this could have the effect of denying litigants a judicial remedy and forcing them to seek a remedy through the democratic process. If this were to occur, ICS may lead to the same result as some conservative Justices who deny litigants relief on the belief that they should seek it through the democratic process,²³⁴ a flawed and cowardly way to avoid responsibility for denying litigants relief.

While this outcome is possible, ICS is still a worthwhile framework. By seeking to check judicial subjectivity, it can bring greater consistency to the judiciary. This contrasts with the status quo. Because ICS ties its analysis to super-statutes, not regular statutes, the normative purpose that is an element of super-statutedom will guide a court's review. As compared to regular statutes, super-statutes' normative purposes are broad, values-based, aspirational goals rather than narrow or specific requirements. The broader, values-based purposes of super-statutes make them more flexible to accommodate new types of claims that, even if not previously contemplated, may still be within the normative objective of the super-statute. It is unlikely that ICS would prevent a court from granting relief to a litigant raising a new type of claim because super-statutes build their flexibility into the ICS framework. If a claim is within the normative purpose of a super-statute, ICS provides a route for a litigant to articulate why the claim warrants protection.

Though the CRA and other super-statutes are flawed and incomplete,²³⁵ ICS would bind a court's review to their purpose but not to their explicit text. For example, the CRA's antidiscrimination purpose could be used to begin moving courts' analyses beyond the equality framework to advance principles of antisubordination.²³⁶ On balance, while ICS has limitations, it would still be an improvement for progressive advocates because it could act as a tool to democratize judicial review. In addition, the newly-constituted Court has made it clear it is hostile to expansions of many progressive policy goals, including LGBTQIA+ rights.²³⁷ This hostility suggests that working within existing statutory

234. Cf., e.g., *Obergefell v. Hodges*, 576 U.S. 644, 714–16 (2015) (Scalia, J., dissenting).

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

236. See generally ADLER, *supra* note 20, at 10 (discussing the need for progressives to eschew the equality framework).

237. See *supra* note 17.

schemes, like the CRA, while using a theory to which the Court may be open (super-statutes) may be the most likely route to successful litigation in this period.

B. Informed Comparative Scrutiny Challenges the Traditional Boundaries Between Constitutional and Statutory Law

On one view, ICS is a radical proposal. Some may argue it impermissibly collapses the distinctions between the Constitution and statutes by placing constitutional interpretation “on a level with ordinary legislative acts.”²³⁸ Others may suggest that tying constitutional interpretation to statutory interpretation reverses the proper order of law by placing statutes above the Constitution. Further, if Congress changes statutory meaning, that in turn suggests the constitutional meaning may change as well, destabilizing the law.

This argument is not without merit but is ultimately unpersuasive. First, this Comment’s proposal is not as radical as it seems. Courts employ balancing frameworks not dissimilar from ICS in other areas of law to compare and assess state-imposed burdens and individual rights.²³⁹ Furthermore, to the extent that those doctrines are susceptible to judicial subjectivity, that only emphasizes the need for ICS. The key difference between current doctrines and ICS is tying the balancing done to an external factor—here, super-statutes—to check judicial subjectivity. Doing so democratizes that balancing and can be seen as upholding institutional legitimacy by strengthening the checks and balances between the branches of the federal government. Second, since super-statutes are the result of extensive deliberation, they can be more stable than judicial doctrine, placing outer limits on judicial ability to rewrite the law. If Congress were to change the statutory meaning in a way that altered its normative purpose (the first element of super-statutedom), the legislation would likely fall out of super-statutedom and thus would not immediately alter the constitutional landscape.²⁴⁰ Third, the fact-intensive approach of ICS may suggest it will produce a slew of litigation. However, that is not so different from the status quo.²⁴¹ To the extent that is true, a clearer

238. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

239. *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (providing the eponymous balancing framework used in Fourteenth Amendment disenfranchisement cases).

240. If the Senate were to eliminate the filibuster, the deliberative component may be reduced. However, the purpose of this Comment is in part to move the dispositive question away from whether a statute is “super” and toward what to do when purported super-statutes collide. A change to the balance between the elements of super-statutedom therefore would not invalidate ICS.

241. For example, the “undue burden” standard from abortion access cases generated nearly identical Supreme Court litigation twice in four years. *See Whole*

framework would permit district courts to resolve these questions without continuous appeal to terminal courts.

C. Informed Comparative Scrutiny May Encourage Continued Assertions of Judicial Supremacy to the Detriment of Democratic Branches of Government

One of the biggest flaws of ICS is that it relies to a substantial degree on continuing judicial supremacy. As the fraught relationship between the three branches of the federal government continues to evolve, advocates should be wary of any framework that may encourage expanded assertions of supremacy. However, the federal courts must exert a modicum of supremacy in order to comply with their constitutionally-mandated role. This tension highlights both the need for ICS and more foundational reform. Here, court reform is likely a needed and proper change so that, to the extent courts remain supreme, their exertions of supremacy come from a larger number of judges that would represent greater ideological diversity. A larger judiciary may have a moderating effect as a result of the diversity it could create.²⁴² Court reform is, however, an area this Comment leaves to other analyses.²⁴³

Even without court reform, the ICS framework could be a sweet spot between judicial supremacy and popular constitutionalism.²⁴⁴ By infusing sliding-scale with the values of an enacted super-statute, ICS places limits on courts' interpretations and ensures such interpretations are based in a democratically enacted value system.

CONCLUSION

In June 2020, LGBTQIA+ rights advocates were pleasantly surprised that their strict textualist argument regarding the meaning of "sex" within Title VII persuaded a majority of the Court to rule in their favor. However, in the Court's plurality opinion, Justice Gorsuch suggested RFRA may be a mechanism by which future litigants could abridge the efficacy of the very opinion he authored. RFRA was not at issue in *Bostock*, and Justice Gorsuch's statement came as a surprise to those who noticed it in the last lines of his opinion. This RFRA caveat made the questions of how courts

Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

242. Cf. Eric Segall, *Supremely Elite: The Lack of Diversity on Our Nation's Highest Court*, HUM. RTS., July 2014, at 18–19.

243. E.g., Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021).

244. See *supra* Section I.A.

assess competing interests and how closely they evaluate those interests even more pressing.

Current jurisprudential inconsistencies demand a more rationalized system in which to evaluate competing interests. Entrenched judicial supremacy disconnects courts from popular understandings of the importance of rights. Purported tiers of heightened scrutiny have continued to devolve, and judicial subjectivity appears to have an increasing influence in case outcomes despite Justices' continued protestations to the contrary.²⁴⁵ These trends create uncertainties for litigants and destabilize the law. It is therefore necessary to calm the waters by tying judicial review to democratic principles. One obvious way to reintroduce some element of popular understanding and values is to connect judicial review to super-statutes. Justice Gorsuch's RFRA caveat provided the opening to expand the role of super-statutes in judicial review. Contrary to his suggestion, however, doing so—if analyzed honestly—would democratize judicial decision-making and lead to more progressive outcomes.

In response to the need for a more robust analytical approach and Justice Gorsuch's signaled openness to super-statutes, this Comment proposes a new framework: Informed Comparative Scrutiny. ICS proposes using super-statutes to revitalize Justice Marshall's sliding-scale approach to heightened scrutiny and then applying that framework to contemporary questions of constitutional rights and their related interests. ICS draws together super-statute theory's Comparative Impairment approach and Justice Marshall's sliding-scale to enact an antisubordination principle that accounts for both the weight of infringement and nature of a guaranteed right or related interest. Super-statute theory further animates this goal by providing a democratically enacted expression of those interests closely related to constitutional rights, thus guiding the substantive assessment of interests' importance. This two-step approach of varying heightened scrutiny and providing, via the applicable super-statute, a context in which to assess the rights or interests at issue may democratize judicial review.

Most importantly, by pushing beyond the Court's purported tiers of scrutiny, ICS may enable litigants to bring new types of claims. ICS would enable litigants to pursue judicial relief that matches the harm they experienced rather than contort their injury into the Court's contrived and inconsistent protected classes. While it is the logical continuation of

245. See, e.g., Piper Hudspeth Blackburn, *Barrett Concerned About Public Perception of Supreme Court*, AP NEWS (Sept. 12, 2021), <https://apnews.com/article/health-amy-coney-barrett-courts-coronavirus-pandemic-us-supreme-court-73389c829dc170751a95c5c1d4fc7ca6>; Ruth Marcus, Opinion, *Breyer's Airbrushed Portrayal of the Judicial Process*, WASH. POST (Sept. 10, 2021, 5:37 PM), <https://www.washingtonpost.com/opinions/2021/09/10/breyers-airbrushed-portrayal-judicial-process/> [<https://perma.cc/6KPL-CYD3>].

existing legal theories, ICS could bring a sea change in how multiply marginalized individuals seek judicial remedy. Yet ICS cannot compete with the strategies and well-considered legal theories Critical Legal Scholars and activists have developed over decades. Lawyers and activists must prioritize those more systemic, radical reforms. ICS merely responds to the opening provided by Justice Gorsuch's RFRA caveat to propose a short-term route to advancing progressive causes.