But is it Discrimination?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

Continuing controversy over whether the Trump Administration's travel-ban unconstitutionally discriminates against Muslim believers brings into sharp relief a perennial, complicated question of constitutional law.

Regularly, judges and others assessing governmental action face this general question: When should a law or policy that is not discriminatory "on its face" nevertheless be treated as though it is discriminates because of how it operates and because of the circumstances and statements surrounding its development?

As the travel ban shows, this question can certainly arise in challenges based on the Constitution's Free Exercise and Anti-Establishment Clauses, which ban discrimination against and favoritism for religion generally, or one religion over another.

The query about when facial neutrality masks discriminatory intent also arises in constitutional Equal Protection challenges. Because greater judicial skepticism (and a higher chance that challengers will win) kicks in when government discriminates based on "suspect" classifications such as race, gender or religion, it very much matters what lines the laws or policies ultimately seem to draw.

For example: Because mother nature does not distribute tallness equally among different racial and ethnic groups and between men and women, a facially neutral minimum-height requirement to be hired, say, as a government security guard excludes more potential applicants from shorter-on-average ethnic groups and women. If the evidence suggests that government deliberately used this seemingly neutral way to hide an evil purpose to discriminate based on race or gender, an especially jaundiced eye will be trained on evaluating this covert discrimination. If, on the other hand, the evidence suggests that government is pursuing valid non-discriminatory goals "in spite of" the disparate impact on minorities and women, the law will be upheld under a much more forgiving standard.

What does all this have to do with the travel ban?

Under it, eligibility for visas and refugee status does not turn expressly on the religious beliefs of the residents from the (now six) countries the ban covers. And the revised travel ban eliminates the previous ban's refugee-status preference for Christian believers from the affected countries. So, in exercising presidential powers over who can legitimately enter the country, the ban does not overtly discriminate based on religion.

True, because residents of the six countries are predominantly Muslim, the ban has a pronounced “disparate impact” on believers in that religion. But, under leading cases, evidence of an unequal adverse effect on suspect classes is an “important starting point” – but not itself conclusive.

So, to prove deliberate religious discrimination, travel-ban opponents have turned to other indicators of discriminatory intent. Their strategy follows the Supreme Court’s approach in the 1993 case of *Church of Lukumi-Babalu Aye v. City of Hialeah, Florida*. There, challengers successfully argued that a city ordinance was rigged to only reach religious rituals of members of the non-mainstream Santeria religion, which planned to establish a religious center in the city. Challengers successfully pointed to public-hearing statements showing that city council members and residents intended to stem a Santeria influx. Similarly, travel-ban opponents point to the variety of pro-“Muslim ban” statements by then-candidate Trump and his surrogates – and to statements continuing after the election – to suggest an anti-Muslim intent. And, just like the challengers in *Lukumi-Babalu*, the travel-ban opponents have had to overcome a reluctance to engage in what a leading Establishment Clause case called inappropriate “judicial psychoanalysis” of hidden motivation. Such reluctance reflects a strong judicial-restraint impulse to avoid unelected judges second guessing elected policy makers.

Arguments along these lines have persuaded multiple federal judges to enjoin the travel ban -- at least temporarily -- on religious-discrimination grounds. Whether these judgments ultimately stick, the controversy is the latest prominent example of how and why it matters to answer the question “But is it *Discrimination*?”