

David Simson
Acting Assistant Professor of Lawyering
NYU School of Law
Abstract for ACS Constitutional Law Scholars Forum 2022

Title: *Most Favored Racial Hierarchy - The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*

Abstract: This essay engages in a critical comparative analysis of the recent history and the likely future trajectory of the Supreme Court's constitutional jurisprudence in matters of race and religion to uncover new aspects of the racial project that Reggie Oh has recently called the "racial superordination" of whiteness—the reinforcing of the superior status of white Americans in American society, including by prioritizing their interests in structuring constitutional doctrine. This analysis shows that the Court is increasingly widening the gap between conceptions of, and levels of protections provided for, equality in the contexts of race and religion in ways that prioritize the interests of whiteness and set them as the normative baseline in both areas of constitutional law. While in the Free Exercise Clause context the Court has increasingly moved toward an aggressive and religion-conscious "most favored nation" equality theory, in the equal protection context the Court's continued march toward mandating colorblindness is arguably moving toward something akin to a "least favored nation" equality theory for race and race-consciousness. Arguments can be made that the most favored nation approach should be applied to race as well. Doing so would provide more doctrinal space for racial equality-enhancing government programs and would call into question deeply entrenched aspects of the Court's current affirmative action jurisprudence. The Court's refusal to even hint at the possibility of such an approach points to a racial project of superordinating the interests of white Americans to be constitutionally protected from race-conscious interference with their dominant position in the racial hierarchy over the application of consistent constitutional principles.

Bio: David Simson is an Acting Assistant Professor of Lawyering at NYU Law School where he teaches the first-year Lawyering course. In July of 2022, David will begin a tenure-track appointment at New York Law School, where he will teach courses on Constitutional Law and civil rights and will be affiliated with the NYLS Racial Justice Project and Wilf Impact Center for Public Interest Law. Previously, David was the Greenberg Law Review Fellow at UCLA Law School, where he taught Employment Discrimination and a seminar on Race, Social Psychology, and the Legal Process. David's scholarship analyzes how statutory and constitutional antidiscrimination law affect racial equality, often relying on ideas from Critical Race Theory and social psychology research in his work. His article Whiteness as Innocence won the Denver Law Review's 2018 Emerging Scholar Award. During law school, David served as the Academic Chair of UCLA Law School's ACS chapter.

Keywords: Equal Protection, First Amendment Religion Clauses, comparative equality analysis, racial superordination, most favored nation, affirmative action