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### Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?

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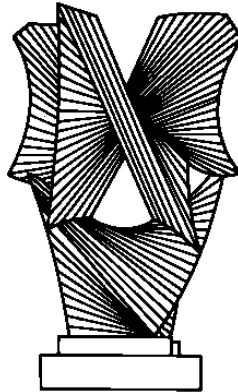
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# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 11



## LESSONS FOR THE FUTURE OF AFFIRMATIVE ACTION FROM THE PAST OF THE RELIGION CLAUSES?

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MARY ANNE CASE

LESSONS FOR THE FUTURE OF  
AFFIRMATIVE ACTION FROM THE PAST  
OF THE RELIGION CLAUSES?

Race and religion each have a privileged position in the American constitutional scheme: Both racial equality and religious freedom are central commitments of modern American constitutionalism. Similar awareness of historical abuses has led to a wariness about the uses of both racial and religious classifications by government actors. At the same time, the dangers of oppression and exclusion make acknowledgment of race or religion difficult to avoid. This tension between the importance and the danger of race and religion has led to similar oscillations in the constitutional case law, with a satisfactory equilibrium position difficult to attain in either field. Currently, the pendulum of case law is swinging in somewhat

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opposite directions for race and religion. While the trend has been toward increasing explicit inclusion of religion and the religious (whether literally in the public square<sup>1</sup> or more broadly in funding and subsidy opportunities<sup>2</sup>), by contrast, recent cases seem increasingly to question any explicit use of race, even in areas of law, such as affirmative action and voting rights, where the intent of such use is to include rather than oppress or exclude minorities.

In this article, I want to press some analogies between the constitutional law of race and of religion, analogies I believe have implications for the future of both affirmative action and race-conscious districting.<sup>3</sup> My contention is that the Supreme Court's attitude toward race, at least in the two contexts of educational affirmative action and voting rights, should follow the same trajectory as its attitude toward religion already has.<sup>4</sup> The trajectory I have in mind is the following: For a period of time, on Establish-

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<sup>1</sup> See, e.g., *Lynch v Donnelly*, 465 US 668 (1984), and its progeny; *Widmar v Vincent*, 454 US 263 (1981) and its progeny.

<sup>2</sup> See, e.g., *Rosenberger v Rector and Visitors of U. Va.*, 515 US 819 (1995).

<sup>3</sup> Numerous commentators over the past decade have suggested or contested analogies between the constitutional treatment of race and that of religion. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color Blind"*, 44 Stan L Rev 1, 64–68 (1991) (suggesting that “[t]he free exercise and establishment clause decisions provide a model for constitutional adjudication in the area of race to supplant the color-blind model” and introducing concepts of “free exercise of race” and “racial establishment”); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 Howard L J 1, 86–89 (1995) (arguing that “*Rosenberger* and *Adarand* involved the same basic constitutional problem but arrived at contradictory results”). Many have focused on whether governmental accommodation of the religious practice of minority religions through exemption from generally applicable laws can fruitfully be compared to affirmative action for racial minorities. See, e.g., Jesse Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 Cornell L Rev 491 (1994); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 Ind L Rev 77, 95–103 (2000); Abner Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 Colum L Rev 1, 58 (1996); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 Ind L Rev 119 (1997). Other commentators have compared majority-minority districting for racial and religious minorities. See, e.g., Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing Kiryas Joel with Shaw/Miller*, 26 Cumb L Rev 365 (1996); James U. Blacksher, *Majority Black Districts, Kiryas Joel and Other Challenges to American Nationalism*, 26 Cumb L Rev 407 (1996); Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 Cumb L Rev 515 (1996).

<sup>4</sup> In an effort to reduce the number of moving parts in the discussion, I take the Court's current religion clause jurisprudence as a given. This jurisprudence seems to me (although not to everyone) to be comparatively settled, while the Court's jurisprudence of race is more open and confused at the moment. My objective is not to endorse or defend the holdings in *Widmar*, *Rosenberger*, or their progeny, or in any other case or line of cases involving religion. Rather, I start from the premise that these cases are the law and ask what implications the Supreme Court majority's approach in these cases has or should have for cases concerning educational affirmative action and majority-minority districting.

ment Clause grounds, the exclusion of religion and the religious from otherwise generally available opportunities was endorsed, indeed, was seen as constitutionally required. Then the Court came to realize that it worked a discrimination against those whose central organizing characteristic or salient trait was their religion to allow other such characteristics, but not religion, to form the basis for inclusion. Similarly, to allow every other basis for commonality or salience to count and not race may be seen to disadvantage those for whom race is a defining characteristic in a way that itself implicates the Equal Protection Clause.<sup>5</sup>

That the trend on the current Court is to exclude only race as the basis for forming a community of interest in voting rights cases and that this works a problematic discrimination against those whose basis for community is their race is clear to commentators on and off the Court. As Lani Guinier put it, “In contemporary discourse, colorblindness has come to mean that mere recognition of race, except to condemn intentional racial discrimination, is dangerous. Yet, because of the recognition and support our political system gives to other, non-racial groups, colorblindness, although ostensibly race-neutral, singles out race for special treatment.”<sup>6</sup> And, as Justice Stevens first observed as a lower court judge, “an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would in itself be invidious.”<sup>7</sup> Each of

<sup>5</sup> Compare *Washington v Seattle School Dist. No. 1*, 458 US 457 (1982) (holding unconstitutional state initiative allowing busing of schoolchildren away from their neighborhood school for virtually all reasons other than to achieve racial integration).

<sup>6</sup> Lani Guinier, *The Supreme Court, 1993 Term: [E]racing Democracy: The Voting Rights Cases*, 108 Harv L Rev 109 at 123, n 104 (1994). See also James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 Howard L J 633 (1996) (“The problem with the *Shaw* Cases is not simply that they have launched the federal courts into uncharted (indeed unchartable) political waters in an effort to restrain excessive gerrymandering, but that the only shoal they have marked as hazardous is racial classifications. By leaving legislative bodies free to squiggle district boundaries for partisan political purposes, to protect incumbents, or for any other nonracial reason, the Court has suggested—if it has not actually ruled—that it is black and Latino citizens alone who may not choose to associate with each other freely and try to optimize their legislative influence in pursuit of a common political agenda.”).

<sup>7</sup> *Cousins v City Council of Chicago*, 466 F2d 830, 852 (7th Cir 1972) (Stevens dissenting). Although, in the context of *Cousins*, Stevens's point was that blacks should not be given a different and greater kind of political protection than members of other groups, in recent dissents from Supreme Court districting cases, Stevens has made clear his view is also that it would be invidious to offer different and lesser protection to blacks. See, e.g., *Shaw v Hunt*, 517 US 899, 949 (1996) (Stevens dissenting) (“Nor do I see how our constitutional tradition can countenance the suggestion that a State may draw unsightly lines to favor

the other habitual Supreme Court dissenters to the *Shaw v Reno*<sup>8</sup> line of majority-minority districting cases has made a similar point.<sup>9</sup>

Though the force of these observations has thus far escaped a majority of the current Court, that same majority has come to a similar realization in the context of the religion clauses. As Justice O'Connor put it in one of a line of recent cases mandating that the religious be afforded the "recognition and support" given other groups, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hos-

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farmers or city dwellers, but not to create districts that benefit the very group whose history inspired the Amendment that the Voting Rights Act was designed to implement"); *Bush v Vera*, 517 US 952, 1035 (1995) (Stevens dissenting) ("After the Court's decisions today, therefore, minority voters can make up a majority only in compact districts, . . . while white voters can be placed into districts as bizarre as the State desires. . . . Unaffected by the new racial jurisprudence, majority-white communities will be able to participate in the districting process by requesting that they be placed in certain districts, divided between districts in an effort to maximize representation, or grouped with more distant communities that might nonetheless match their interests better than communities next door. By contrast, none of this political maneuvering will be permissible for majority-minority districts, thereby segregating and balkanizing them far more effectively than the Districts here at issue, in which they were manipulated in the political process as easily as white voters. This result, it seems to me, involves 'discrimination' in a far more concrete manner than did the odd shapes that offended the Court's sensibilities in *Miller*, *Shaw II* and *Bush*.").

<sup>8</sup> 509 US 630 (1993).

<sup>9</sup> See, e.g., *Abrams v Johnson*, 521 US 74, 117–18 (1997) (Breyer dissenting) ("Thus, given today's suit, a legislator might reasonably wonder whether he can ever knowingly place racial minorities in a district because, for example, he considers them part of a 'community' already there. . . . And the legislator will need a legal principle that tells whether, or when, the answers to such questions vary depending on whether the group is racial or reflects, say, economics, education, or national origin. . . . Further, any test that applied only to race, ignoring, say, religion or national origin, would place at a disadvantage the very group, African Americans, whom the Civil War Amendments sought to help."); *Bush v Vera*, 517 US at 1066 (Souter dissenting) ("[I]t is in theory and in fact impossible to apply 'traditional districting principles' in areas with substantial minority populations without considering race. . . . It therefore may well be that the loss of the capacity to protect minority incumbency is the price of the rule limiting States' use of racial data. If so, it will be an exceedingly odd result, when the whole point of creating yesterday's majority-minority districts was to remedy prior dilution, thus permitting the election of the minority incumbent who (the Court now seems to declare) cannot be protected as any other incumbent could be."); *Miller v Johnson*, 515 US 900, 947 (1995) (Ginsburg dissenting) ("In adopting districting plans, however, States do not treat people as individuals. . . . Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then 'reconcile the competing claims of [these] groups.' . . . That ethnicity defines some of these groups is a political reality. . . . Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. . . . If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out 'the very minority group whose history in the United States gave birth to the Equal Protection Clause.'") (citations omitted).

tility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.”<sup>10</sup>

To put the argument that follows in extremely compressed and referential form, if colorblindness is analogous to aggressive enforcement of the Establishment Clause, then, while the University of California’s use of race in the plan struck down in *Bakke*<sup>11</sup> may resemble the New York legislature’s use of religion in the districting legislation struck down in *Kiryas Joel*,<sup>12</sup> the inclusion of race in the Harvard admissions plan praised by Justice Powell<sup>13</sup> more closely resembles the inclusion of religion mandated by the Supreme Court for the University of Virginia’s funding scheme in *Rosenberger*.<sup>14</sup> And, if the affirmative action claims of racial minorities are like the accommodation claims of religious minorities, then, while some voluntary pursuit of racial diversity by public educational institutions is like permissible accommodation, some majority-minority districting under the Voting Rights Act is like required accommodation. This is in part because the Equal Protection Clause itself may demand it, and in part because the Thirteenth and Fifteenth Amendments are like the Free Exercise Clause—counterweights to the presumption against state use of race or religion.

I wish to focus inquiry, not merely on any formal parallels in the structure of these arguments, but also on some of the common underlying concerns that special governmental treatment of the salient characteristics of race and religion may have. When “one of the [emerging] philosophical touchstones of the current Court’s constitutional jurisprudence is giving content to the elusive line

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<sup>10</sup> *Bd. of Ed. of Westside Community Schools v Mergens*, 496 US 226, 248 (1990) (citing Brennan’s concurrence in *McDaniel v Paty*, 435 US 618, 641 (1978)).

<sup>11</sup> See *Regents of the University of California v Bakke*, 438 US 265 (1978) (striking down set aside of specified number of slots in state medical school class for disadvantaged members of minority groups).

<sup>12</sup> See *Bd of Ed. of Kiryas Joel v Grumet*, 512 US 687 (1994) (holding New York legislature’s establishment of a special school district for a community of Satmar Hasidim unconstitutional).

<sup>13</sup> See *Bakke*, 438 US at 321 (1978).

<sup>14</sup> See *Rosenberger*, 515 US 819 (requiring university student activities’ funding scheme to include a student publication dedicated to promoting an evangelical Christian viewpoint).

between ‘equal rights’ and ‘special preferences,’”<sup>15</sup> it seems worth exploring how the Court may walk that line differently for race and religion. While the Constitutional and sociopolitical reasons for worrying about “special preferences” for race and religion are far from identical, similar distortions in the landscape may occur when race or religion are eliminated by Constitutional force from the picture, and there are similar risks of divisiveness surrounding the question of their inclusion.

Just as the drafters of the Establishment and Free Exercise Clauses had centuries of the established churches of Europe and of England as cautionary backdrop,<sup>16</sup> so the drafters of the Civil War Amendments had centuries of black chattel slavery.<sup>17</sup> In neither case did this history lead to an immediate abolition of state use of the dangerous categories: state religious establishment continued after the passage of the First Amendment and Jim Crow established both racial categorization and white supremacy for nearly a century after the passage of the Fourteenth Amendment. I use the term “established” advisedly—parallels can readily be drawn between the position of whites under Jim Crow and members of an established church. Compare, for example, the Bill Establishing a Provision for Teachers of the Christian Religion, which gave rise to Madison’s *Memorial and Remonstrance Against Religious Assessments*<sup>18</sup> with the use of Southern state tax dollars to support public education for whites only.<sup>19</sup> Compare the degree of

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<sup>15</sup> Richard Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L J 2505, 2511 (1997).

<sup>16</sup> See, e.g., *Everson v Board of Ed.*, 330 US 1 (1946) (“The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife and persecutions, generated in large part by established sects. . . . These practices . . . transplanted to the soil of the new America . . . shock[ed] the freedom-loving colonists into a feeling of abhorrence.”).

<sup>17</sup> See, e.g., *The Slaughter-House Cases*, 83 US 36 (1873) (“[I]n the light of events almost too recent to be called history, . . . and on the most casual examination of the language of these amendments, . . . no one can fail to be impressed with the one pervading purpose found in them all, . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”).

<sup>18</sup> The Bill and Madison’s *Memorial* are each reprinted as an appendix to Douglas’s opinion in *Walz v Tax Commission*, 397 US 664, 716–26 (1970).

<sup>19</sup> See *Cumming v Bd. of Ed.*, 175 US 528 (1899) (unsuccessfully challenging use of black tax dollars for white high school).



concern the law accords marriage within an established church<sup>20</sup> with Virginia's concern, in the statute struck down in *Loving*, with the racial purity of marriages of whites only.<sup>21</sup> Is it too much of a stretch to hear in Harlan's insistence in his *Plessy* dissent that the white race "will continue to be for all time [the dominant race], if it remains true to its great heritage,"<sup>22</sup> the words of a true believer denying that establishment of his faith is necessary to its continued dominance?

By the mid-twentieth century, the Supreme Court mandated the end of both racial and religious establishment, incorporating the Establishment Clause against the states and putting an end to Jim Crow. It is perhaps no accident that many of the early contested cases in both spheres involved education. In the area of race and the schools, the Supreme Court moved from increasingly aggressive enforcement of separate but equal standards to the rejection of legally established separateness in *Brown*. It spent the rest of the century working through the required and permissible boundaries for the use of race in ending educational segregation. Among its leading affirmative action cases were two, *Bakke* and *Wygant*,<sup>23</sup> concerning the use of race in selecting, respectively, students and teachers.

Although the Supreme Court has not recently decided a case in the area, lower courts have continued to struggle with the use of racial affirmative action in the schools. Early in 2001, two district judges in the Eastern District of Michigan reached opposite conclusions with respect to the uses of race in admissions by two units of the same university. In the more recent case, *Grutter v. Bollinger*,<sup>24</sup> Judge Bernard Friedman struck down the University of Michigan Law School's "race-conscious" admissions policy and

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<sup>20</sup> See, e.g., An Act for the Better Preventing of Clandestine Marriages, popularly known as Lord Harwicke's Act or the Marriage Act of 1753 (recognizing only marriages performed by ministers of the established Church of England in accordance with prescribed rules).

<sup>21</sup> See *Loving v Virginia*, 388 US 1 (1967) (holding unconstitutional Virginia's antimiscegenation statute, which prohibited only racially mixed marriages in which one partner was white).

<sup>22</sup> *Plessy v Ferguson*, 163 US 537, 559 (1896) (Harlan dissenting).

<sup>23</sup> *Wygant v Jackson Bd. of Ed.*, 476 US 267 (1986).

<sup>24</sup> 2001 US Dist Lexis 3256 (ED Mich 2001). The Sixth Circuit issued a stay pending appeal so that the University of Michigan Law School could complete its admissions season. *Grutter v Bollinger*, 2001 US App Lexis 5606 (6th Cir 2001).

held that any future policy must be “race-neutral.” Only a few months earlier, in *Gratz v Bollinger*,<sup>25</sup> his colleague Judge Patrick Duggan had upheld the University of Michigan’s undergraduate admissions office’s current use of race as a factor in admissions. The law school and the undergraduate admissions office did have somewhat different approaches to the use of race as a factor in admissions. Judge Friedman found that, for the law school, “race is not . . . merely one factor which is considered among many others in the admissions process” but rather “the law school places a very heavy emphasis on an applicant’s race in deciding whether or not to accept or reject.” More importantly, however, the two judges also reached significantly different conclusions as to the law that they applied to their respective facts. In *Gratz*, Judge Duggan, following the path laid out in Powell’s *Bakke* opinion, distinguished the Michigan undergraduate admissions office’s most recent use of race as one of many factors, which he upheld, from its more rigid and singular use of race in earlier years, which he held to have been unconstitutional. In contrast, Judge Friedman, in addition to finding an absence of narrow tailoring in the law school’s use of race in admissions, also held categorically, and directly contrary to Judge Duggan, that “the achievement of [racial] diversity is not a compelling state interest.” The Ninth Circuit, in a case involving admission to the University of Washington School of Law, recently took the opposite position, holding that “educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.”<sup>26</sup> Federal circuit courts have recently become much more aggressive in their opposition to the use of racial classifications, with the Fifth Circuit in *Hopwood* banning any use of race in admissions decisions by the University of Texas Law School,<sup>27</sup> the Third Circuit in *Taxman* banning the use of race as a tiebreaker in determining which of two equally qualified teachers should be laid off,<sup>28</sup> the Fourth Circuit in

<sup>25</sup> 122 F Supp 2d 811 (ED Mich 2000).

<sup>26</sup> *Smith v Univ. of Washington*, 233 F3d 1188 (9th Cir 2000). The policy with respect to the use of race at issue in *Smith* was discontinued after the passage in 1998 of Initiative Measure 200, which, inter alia, forbade the State of Washington to “discriminate against, or grant any preferential treatment to, any individual or group on the basis of race . . . in the operation of . . . public education.” *Id.* at 1192.

<sup>27</sup> *Hopwood v Texas*, 78 F3d 932 (5th Cir 1996).

<sup>28</sup> *Piscataway Township Bd. of Ed. v Taxman*, 91 F3d 1547 (3d Cir 1996). The Supreme Court took cert in this case, but it was settled after briefing and before argument.

*Podberesky* striking down a scholarship program for exceptionally talented black applicants to the University of Maryland,<sup>29</sup> and the D.C. Circuit holding FCC pressure on broadcasters to recruit minorities unconstitutional.<sup>30</sup>

In so doing, these circuit courts claim to be responding to signals sent by a Supreme Court that appears to them to have both intensified its scrutiny of<sup>31</sup> and narrowed its list of acceptable justifications for governmental use of<sup>32</sup> racial classifications in efforts to benefit minority groups. While some of these signals came in traditional affirmative action cases involving employment opportunities of one sort or another,<sup>33</sup> a majority of the Court has also increasingly restricted the use of race in an effort to benefit minorities in the political process through the creation of majority-minority districts.

It is not my intent to summarize or analyze the full development of Supreme Court case law concerning either race or the religion clauses over the past several decades. Instead, for both educational affirmative action and the use of race in districting, I want to pursue parallels with the Supreme Court's religion clause jurisprudence in aid of my argument that the approach mapped out by the Powell opinion in *Bakke*, the Michigan District Court in *Gratz*, and the Supreme Court dissenters in the recent voting rights cases<sup>34</sup> makes more sense as a part of our constitutional law than

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<sup>29</sup> *Podberesky v Kirwan*, 38 F3d 1884 (4th Cir 1994).

<sup>30</sup> *MD/DC/DE Broadcasters v FCC*, 2001 US App Lexis 570 (DC Cir 2001). I include the broadcasting cases within the scope of a discussion otherwise centered on educational affirmative action and districting because the broadcasting cases, unlike, for example, cases examining affirmative action in the construction industry, focus on issues of diversity and community rather than simply on remedying prior discrimination.

<sup>31</sup> For example, by holding that federal as well as state use of racial classifications for affirmative action was subject to strict scrutiny. *Adarand v Peña*, 515 US 200 (1995).

<sup>32</sup> For example, by rejecting the so-called role model justification for affirmative action in selecting teachers. *Wygant*, 476 US at 274.

<sup>33</sup> See, in particular, *Adarand*, 515 US 200, requiring strict scrutiny for all racial classifications, including those used by the federal government in an effort to aid minorities. It is worth noting that, on remand, the Tenth Circuit took to heart the notion that strict scrutiny need no longer be "fatal in fact" and held a revamped program for "disadvantaged business enterprises" in construction subcontracting to be narrowly tailored to achieve a compelling governmental interest in remedying the nationwide effects of past and present discrimination against racial minorities in the construction industry. *Adarand Constructors v Slater*, 228 F3d 1147 (10th Cir 2000).

<sup>34</sup> Because I believe the argument in the districting cases is stronger and simpler and has already been well laid out on the current Supreme Court by these dissenters, I will spend somewhat more time laying out the argument in the education context.

the sort of categorical opposition to the use of race in anything other than a strictly remedial context<sup>35</sup> that is rapidly becoming its chief competition.<sup>36</sup> The most direct religious parallel to the inclusion of racial communities of interest in districting and racial diversity in admissions comes in the line of cases from *Widmar* through *Rosenberger*, mandating the inclusion of religious groups in opportunities offered by public schools.<sup>37</sup> As I will discuss in detail below, a hallmark of these cases is their focus, not on discrimination between religions, or between religion and atheism or nonreligion, but rather between religion and other bases for inclusion or selection for governmentally provided opportunities.

The notion that religion and the religious cannot be singled out for extraordinarily unfavorable treatment extends beyond the *Widmar/Rosenberger* line of cases. Closely related to cases involving participation of religious groups in conceptual public fora like the *Rosenberger* funding scheme are those involving the inclusion of religious speech literally in the public square. As Scalia wrote in *Capitol Square Review Bd. v Pinette*,<sup>38</sup> “[T]he State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.” Here again, analogies between extraordinarily discriminatory treatment for race and for religion spring readily to hand. Just as

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<sup>35</sup> The distinct aspects of affirmative action and race-conscious districting as remedies for prior discrimination are not directly related to or addressed by my argument in this article. Although there may be disagreement about the appropriate circumstances, there is no disagreement on the Court that, in such circumstances, both racial affirmative action and the use of race in districting can be justified as such a remedy.

<sup>36</sup> I am not arguing that logical consistency necessarily demands parallel treatment of race and religion. One might well see analogies breaking down or see comparatively greater risk from either recognition of race or that of religion. But one should at least acknowledge and respond to the parallel structure of the argument to a greater degree than has yet been done by those Justices in the Court majority in both lines of cases.

<sup>37</sup> *Widmar v Vincent*, 454 US 263 (1981); *Mergens*, 496 US 226 (1990); *Lamb's Chapel v Steigewald*, 508 US 384 (1993); *Rosenberger*, 515 US 819 (1995). The latest in this line of cases, *Good News Club v Milford Central School*, reported below at 202 F3d 502 (2d Cir 2000), is presently before the Court. The chief new wrinkle in *Good News Club* is that the school at which the club, led by an adult minister rather than students, wished to hold meetings of religious instruction immediately after the school day, was an elementary school; the prospective members included first graders. Largely because of these distinctions, the Second Circuit upheld the school's decision to exclude the club.

<sup>38</sup> 515 US 753, 769 (1995).

Scalia in *Pinette* sees it as “perverse”<sup>39</sup> to argue that religious speech should fare worse than pornography and commercial speech, given the special constitutional status of religion, so Stevens in *Shaw v Reno* sees it as “perverse,”<sup>40</sup> given African-Americans’ special constitutional status, to have them fare worse in opportunities to obtain representation than Republicans and rural voters.<sup>41</sup>

And, just as in *Rosenberger* the Court held that the University of

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<sup>39</sup> *Pinette*, 515 US at 766–67 (“Private religious speech cannot be subject to veto by those who see favoritism where there is none. The contrary view . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. . . . It will be a sad day when this Court . . . finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were religious speech simply protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause.”) (citations omitted).

<sup>40</sup> *Shaw v Reno*, 509 US at 677 and n 4 (1993) (Stevens dissenting) (“Finally, we must ask whether otherwise permissible redistricting to benefit an underrepresented minority group becomes impermissible when the minority group is defined by its race. The Court today answers this question in the affirmative, and its answer is wrong. If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. . . . A contrary conclusion could only be described as perverse. . . . The Court’s opinion suggests that African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting. Not very long ago, of course, it was argued that minority groups defined by race were the only groups the Equal Protection Clause protected in this context.”) (citations omitted).

<sup>41</sup> Scalia and Stevens elsewhere make arguments that mirror one another without acknowledging any resemblances or inconsistencies. As I have noted before, for example, other than the substitution of sex for race, the position on the relationship between remedy and standing that Scalia articulates in his *JEB* dissent is identical to what Stevens set forth in his *Shaw v Reno* opinion, a tension neither Scalia nor Stevens bothers to resolve or even acknowledge. Scalia’s own focus on the individual in race cases is in substantial tension with his willingness to focus on the group in sex cases. This inconsistency is common among conservatives—Ted Olson, admittedly a hired gun, but one who frequently chooses his clients for the ideological appeal of their position, represented both Virginia in the Supreme Court argument of the VMI case, *U.S. v Virginia*, 318 US 515 (1996), and Cheryl Hopwood in her litigation successfully challenging the University of Texas’s affirmative action policies. This put him squarely on both sides of the antistereotyping question. For women, Olson argued to the Supreme Court, individual merit was or should legally be irrelevant—group averages or tendencies could and should shape the law and exceptions be damned. But, in *Hopwood*, he successfully insisted on behalf of plaintiffs that all applicants to the University of Texas Law School be evaluated as individuals and not lumped with their racial group. Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L Rev 1447, 1472 n 124 (2000).

Virginia could not single out for exclusion from funding religiously colored polemic, so in *Church of the Lukumi*<sup>42</sup> it held that a city cannot single out for disfavor religious reasons for killing animals. Again, importantly for the affirmative action and districting analogies I am pressing, in neither case was the relevant discrimination between religions<sup>43</sup> or even in a technical sense between religion and nonreligion or atheism, but rather it was between religious motivations and all others, like racial bases for community or diversity and all others.

The same notion of nondiscrimination against the religious underlies, according to Justice Scalia, the constitutionally mandated payment of unemployment compensation to those whose reason for unemployment is their religion: “[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”<sup>44</sup> When similarly individualized assessments are made of candidates for admissions or employment, excluding only their race from consideration as a factor may be, I would argue, similarly problematic. While I do not quite wish to argue that the makers of such individualized assessments “may not refuse to extend that system to [race] without compelling reason,” their willingness to include race in the system, as those engaged in voluntary affirmative action do, should be seen as solving a potential constitutional problem, not just creating one. To pursue the religious analogy, such actions by admissions and hiring committees should be seen as at least comparable to permissible accommodation of religion, if not to required accommodation like that in the pre-

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<sup>42</sup> *Church of the Lukumi Babalu Aye, v City of Hialeah*, 508 US 520 (1993).

<sup>43</sup> The relevant contrast for the Court in *Church of the Lukumi* is not between religions, notwithstanding the care the statute’s drafters took to protect kosher butchering. See *id.* at 535.

<sup>44</sup> *Employment Division v Smith*, 594 US 872, 884 (1990), citing *Bowen v Roy*, 476 US 693, 708 (1986). In *Roy*, the plurality observed that, “The statutory conditions at issue in [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, ‘without good cause,’ he had quit work or refused available work. The ‘good cause’ standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated exemption to be ‘without good cause’ tends to exhibit hostility, not neutrality, towards religion.” Thus, the unemployment cases can be seen “as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect.” *U.S. v Lee*, 455 US 252, 263 n 3 (1981) (Stevens concurring).

*Smith* Supreme Court unemployment compensation cases.<sup>45</sup> This is particularly so given how narrowly states were otherwise permitted to define “good cause” for unemployment in these cases, excluding, for example, family obligations.<sup>46</sup>

Finally, although the case law is a thorny thicket into which I do not wish to wade deeply for present purposes, there are analogies in the Court’s treatment of tax exemptions and direct and indirect governmental subsidies to religious organizations, notably sectarian schools: “[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. . . . [The] state encourages these activities not because it champions religion per se but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation. Viewed in this light, there is no nonreligious substitute for religion as an element of our societal mosaic, just as there is no nonliterary substitute for literary groups.”<sup>47</sup> (And no nonracial substitute for racial groups?)

One might argue that an important difference between the religion and race cases I am discussing, a difference that vitiates the force of my analogy, is that, in the race cases, but not in the religion cases, the state actor must be conscious of the suspect criterion and must use it in decision making. In other words, opponents of my argument would claim, while the religion cases require the state to be blind to the claimants’ religion (religion-blind), to grant benefits without regard to religion, the race cases would require it to be conscious of the claimant’s race (race-conscious), to grant benefits on account of race. I believe this difference to be overstated as a formal matter and, in any event, less than fully determinative as a conceptual matter.<sup>48</sup> Whether or not religious classifi-

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<sup>45</sup> *Sherbert v Verner*, 374 US 398 (1963); *Thomas v Review Bd.*, 450 US 707 (1980); *Hobbie v Unemployment App. Commission*, 480 US 136 (1986).

<sup>46</sup> See, e.g., *Sherbert*, 374 US at 419 (Harlan dissenting).

<sup>47</sup> *Walz*, 397 US at 688, 693 (1970) (Brennan concurring).

<sup>48</sup> As a conceptual matter, it is, for example, important to remember that the constitutional equality guarantee is not textually or conceptually the same as, for example, the Title VII antidiscrimination guarantee. The Fourteenth Amendment does not ban race discrimination; it guarantees equal protection of the laws to persons of all races. The question to be asked is not whether prohibition on the use of the category of race in, for example, admissions or districting is race discrimination (it is not), but whether such a prohibition may work a denial of equal protection to some persons for whom race is a particularly salient characteristic.

cations are actually at work in a given case, it is important to remember that “we have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as . . . stating a unitary principle that ‘religion may not be used as a basis of classification for the purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.’ . . . Such rigid conceptions of neutrality have been tempered by constructions upholding religious classifications where necessary to avoid ‘[a] manifestation of . . . hostility [toward religion] at war with our national tradition.’”<sup>49</sup>

As a formal matter, in the *Widmar/Rosenberger* line of cases, not just any group can have access to facilities or funding, but only groups organized along appropriate dimensions. The state does, then, have to ask, “What sort of group is this?” and to use the answer in its decision making. That Wide Awake’s activities are recognized by the state actor to be principally religious and not, for example, political, philanthropic, or social<sup>50</sup> is crucial to its claim of access in *Rosenberger*.<sup>51</sup> Thus, at a certain level, the group’s central organizing characteristic, what it is that the members of the group have in common that distinguishes them from other groups, plays a role in governmental decision making and in the allocation of governmental benefits in both sorts of cases. Moreover, in both sorts of cases, it is generally in the first instance not the state but the individuals who identify themselves by classification, by applying as a group organized along a religious dimension in the access cases and through filling out census or application forms in the race cases.<sup>52</sup>

Similarly, in the unemployment compensation cases, in asking, as it must, “For what reason did a claimant become unemployed?”

<sup>49</sup> *McDaniel v Paty*, 435 US at 638 (1978) (Brennan concurring).

<sup>50</sup> See *Rosenberger*, 515 US at 825 (detailing groups eligible and ineligible for university funding).

<sup>51</sup> The funding Wide Awake gets is not that dissimilar from the admissions preference given to black applicants to university. Just as the pool for other funding candidates is marginally smaller if Wide Awake must be funded, so the odds of all other candidates go down marginally in the face of a thumb on the scales for blacks. In rejecting the categorical distinction between funding and access to facilities, the Court in *Rosenberger* shifted to the realization that all resources are scarce or none are.

<sup>52</sup> By contrast, in cases involving what are now seen as paradigmatically illegitimate racial classifications, such as *Plessy*, 163 US at 549, the state itself is in the first instance doing the classifications, for example, by telling Plessy he is colored despite his claim to the contrary.



and using the answer to distinguish between claimants, by treating religious reasons, but not, for example, family reasons, as acceptable, the state is at some level not “blind to” but “conscious of” the claimant’s religion. At least after *Smith*, which rejects a broad free-exercise-based right of the religiously motivated to exemptions from generally applicable laws, it is not enough of an answer to invoke the distinctive requirements of the Free Exercise Clause to distinguish the race from the religion cases.<sup>53</sup> Rather, with both the equal access cases and the unemployment cases, the need to avoid inequality in treatment rather than any categorical right to the benefit at issue is doing the bulk of the work in cases benefiting the religious.<sup>54</sup>

In the public display cases, both menorahs and creches erected by the state on state property are chosen for display specifically as religious symbols, arguably unlike a Christmas tree (whose secular significance may predominate) and also unlike the cross in *Pinette* (erected by the Klan and not the state<sup>55</sup> and, in that context, having a significance historically more sinister than religious).

A particularly dramatic example of state use of a religious criterion in selection ironically comes from the same circuit that categorically prohibited the use of race in decision making in *Hopwood*. The Fifth Circuit, this time sitting en banc, very recently considered the constitutionality of the Beaumont, Texas, public school system’s Clergy in the Schools program.<sup>56</sup> For this program, the school district on its own initiative enlisted local clergy by invitation to come to school to counsel groups of students on “secular issues including race, divorce, peer pressure, discipline and drugs.” True to the name the school district had selected for it, the program refused to allow participation by nonclergy, even “profes-

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<sup>53</sup> Nor is the availability of broader First Amendment speech clause arguments sufficient to distinguish religion cases like *Rosenberger* from race cases like *Bakke*: as the Court has repeatedly recognized, broad First Amendment concerns are implicated in virtually every aspect of a public university’s intellectual activities, including, specifically, its freedom to determine “who may be admitted to study.” T. X. Huxley quoted by Frankfurter in *Sweezy v New Hampshire*, 354 US 234, 263 (1957) and again by Stevens concurring in *Widmar*, 454 US at 279 n 2.

<sup>54</sup> In most of the equal access cases, equal protection claims were raised, but not addressed by the Supreme Court; there is little reason to think such claims would have been rejected had it been necessary to reach them.

<sup>55</sup> 515 US at 758.

<sup>56</sup> *Doe v Beaumont Ind. School Dist.*, 2001 US App Lexis 1153 (5th Cir en banc 2001).

sionals from secular counseling professions.” And the only members of other professions participating as such in other school programs seemed to be law enforcement officers. Although my own view is that Judge Wiener’s *Beaumont* dissenting opinion for himself and five colleagues, arguing that summary judgment should be entered against the school district, accurately represents the current state of the law of the religion clauses, five circuit judges astonishingly were prepared to issue summary judgment in the school district’s favor and a controlling minority of three more remanded for further fact-finding. I find striking the contrast between the Fifth Circuit’s willingness to let Texas schools be religion-conscious and its insistence that they be race-blind.

Although I am not arguing generally that if religious criteria can be used then so can race, I also find the contrast between the Supreme Court’s apparent view of race and religion as criteria in districting nevertheless worthy of note.<sup>57</sup> When Kennedy wrote in his *Kiryas Joel* concurrence that “[t]he real vice of the school district, in my estimation, is that New York created it by drawing political boundaries on the basis of religion. . . . [I]n my view one . . . fundamental limitation [imposed by the Establishment Clause] is that government may not use religion as a criterion to draw political or electoral lines,”<sup>58</sup> he was speaking for himself alone; no other Justice joined any part of his opinion.<sup>59</sup> As noted above, the dissenting Justices in the *Shaw* line have contrasted uses of race in districting called into question by the majority with uses of religion that have not been so questioned.<sup>60</sup> Although both the lower court and the Supreme Court make a point in *U.F.O. v Carey* of insisting that “petitioners enjoyed no constitutional right in reap-

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<sup>57</sup> Indeed, in districting it may be more to the point, as the habitual *Shaw* dissenters have argued, that if voters’ national origin (e.g., Chinese-American or Russian-American) can be and is used in districting, race should and could be to at least the same extent. See, e.g., *Miller*, 515 US at 947 (Ginsburg dissenting).

<sup>58</sup> 512 US at 573, 577.

<sup>59</sup> Indeed, three of the other four habitual *Shaw* line majority—Scalia, Rehnquist, and Thomas—dissented in *Kiryas Joel*.

<sup>60</sup> See, e.g., *Shaw v Reno*, 509 US at 677 (Stevens, dissenting) (“If it is permissible to draw boundaries to provide adequate representation . . . for Hasidic Jews . . . it necessarily follows that it is permissible to do the same thing for [African-Americans]”). See also Ginsburg dissenting in *Miller v Johnson*, 515 US at 945 (citing newspaper report that “an Irish Catholic [State Assembly member] ‘wanted his district drawn following [Catholic] parish lines so all the parishes where he went to baptisms, weddings and funerals would be in his district’”).

portionment to separate community recognition as Hasidic Jews,”<sup>61</sup> neither did the courts suggest that the Hasidic community was precluded from such recognition on Establishment Clause grounds. There does seem to be a comparable suggestion in the recent voting rights cases that African-Americans may be precluded from “separate community recognition” because this would be to assume, stereotypically, that members of the same race have a community of interest.<sup>62</sup>

Is the argument I’m making in the affirmative action context dependent on establishing that diversity is a compelling governmental interest?<sup>63</sup> I don’t think so. The relevant compelling governmental interest is in equal protection:<sup>64</sup> it would deny equal protection to racially defined groups to deny them an opportunity afforded other groups, in the same way as it denies equal protection to the religious to deny them opportunities afforded others to compete for funds or to use facilities. A public university can choose to admit on board scores alone, it can reject diversity entirely in favor of homogeneity<sup>65</sup> in its admissions process, but it cannot seek diversity without being allowed, perhaps in some instances required, to include racial diversity. Similarly, teachers can be laid off and people sorted into voting districts by lot, but perhaps not by criteria in *pari materia* with race to the exclusion of race.

Note that this argument is subtly different from an argument that diversity is a compelling interest—it does not so much argue for diversity, but to suggest that, if diversity is sought or mandated along other dimensions, the Constitution does not require ignoring racial diversity and might even compel racial diversity in cer-

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<sup>61</sup> *U.J.O. v Carey*, 430 US 144, 153 (1977), describing holding of lower court in *UJA v Wilson*, 377 F Supp 1164, 1165–66 (ED NY 1974).

<sup>62</sup> Compare Richard H. Pildes and Richard G. Niemi, *Expressive Harms, “Bizarre” Districts and Voting Rights: Evaluating Election District Appearances After Shaw v Reno*, 92 Mich L Rev 483, 578 (1993) (discussing difficulty of distinguishing “legitimate communities of interest from the now-illegitimate one of race”).

<sup>63</sup> A controversial and somewhat open question in current law, as noted above.

<sup>64</sup> Compare *Texas Monthly v Bullock*, 489 US 1, 39 (1989) (Scalia dissenting) (“[R]ather than reformulating the *Lemon* test in ‘accommodation’ cases . . . , one might instead simply describe the protection of free exercise concerns, and the maintenance of the necessary neutrality, as ‘secular purpose and effect,’ since they are a purpose and effect approved, and indeed to some degree mandated, by the Constitution.”).

<sup>65</sup> Of course, not deliberate racial homogeneity.

tain circumstances.<sup>66</sup> Similarly, no one claims that the Free Exercise Clause mandates availability of student funds for religious activities or of rooms for student prayer, only that (a) the Establishment Clause does not categorically prohibit making such facilities available, and (b) the Equal Protection Clause and the antidiscrimination component of the First Amendment may require them to be made available to the religious for religious purposes if they are made available to others for a wide variety of other purposes. How do these claims differ from a claim that free exercise requires provision to the religious? First, the state actor need not establish a forum at all and can also restrict it to activities not remotely in *pari materia* with religion. For example, I know of no one who seriously suggests that if the only extracurricular activities a given school offers are sports, the exclusion of a Christian fellowship seeking to use the playing fields for prayer group meetings would create a constitutional problem. But, if a much broader spectrum of activities has access to school facilities and support, not only will the Establishment Clause not stand in the way, the Equal Protection Clause may require that the religious also have access to funding or space for their activities.<sup>67</sup>

Similarly, a university selecting on SAT scores alone need not add race to the mix (at least absent a history of discrimination or

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<sup>66</sup> See *Bakke*, 438 US at 403, 404, 406 (opinion of Blackmun) (“The number of qualified, indeed highly qualified applicants to medical schools in the United States far exceeds the number of places available. . . . It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate level than on the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful. . . . [G]overnmental preference has not been a stranger to our legal life. We see it in veterans’ preferences. We see it in aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs . . . . And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.”).

<sup>67</sup> See, more generally, Michael McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U Chi L Rev 115, 189 (1992) (“The problem with the secularization baseline is that it is not neutral. . . . [W]hen the government owns . . . many of the principal institutions of culture, exclusion of religious ideas, symbols, and voices marginalizes religion in much the same way that the neglect of the contributions of African American and other minority citizens, or of the viewpoints and contributions of women, once marginalized those segments of the society. . . . When the public sphere is open to ideas and symbols representing nonreligious viewpoints, cultures, and ideological commitments, to exclude all those whose basis is ‘religious’ would profoundly distort public culture.”).

a strong disparate-impact argument), but it is not precluded from so doing, and, depending on what all else it considers, one can imagine situations under which it may be required to include race. Consider, for example, an entering class selected to “look like America”<sup>68</sup> along every conceivable dimension but race. Or consider, more plausibly, in the voting rights arena, a redistricting plan in which every large concentrated group but blacks can elect a representative, but blacks cannot. Under certain circumstances the latter plan may violate the Voting Rights Act, it may constitute vote dilution, and it may be unconstitutional.<sup>69</sup>

Making sure that other constituencies<sup>70</sup> have their representatives, whether in the legislature (as in voting rights cases), in the classroom (as in admissions cases), or on the airwaves (as in the licensing cases), but excluding racially defined constituencies, works a discrimination so long as there still are racially defined constituencies.<sup>71</sup> This is especially so when racial constituencies are asymmetrically distributed throughout the relevant population— asymmetrically in two senses: first, in that racial identity means more to some than to others,<sup>72</sup> and second, in that those to whom racial identity is most salient are in the literal sense a minority group. Compare members of some minority religions, more intensely committed to religion and less likely to be in the political majority than the average citizen. Just as, predictably, more members of minority religions will find their employer’s requirements

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<sup>68</sup> In the phrase used by the Clinton administration to describe its ambitions for the Cabinet.

<sup>69</sup> Stevens, dissenting in *Miller v Johnson*, 515 US at 933 (“I have long believed [citing *Cousins*] that treating racial groups differently from other identifiable groups of voters, as the Court does today, is itself an invidious racial classification. Racial minorities should receive neither more nor less protection than other groups against gerrymanders. A fortiori, racial minorities should not be less eligible than other groups to benefit from districting plans the majority designs to aid them.”).

<sup>70</sup> Even religious constituencies, as noted above.

<sup>71</sup> “[R]ace remains a defining characteristic of American life. Even in a world of racial equality, the educational imperative that Justice Powell identified in *Bakke* would exist as long as one’s race was so prominent a part of one’s experience.” Introduction to the expert submissions of the University of Michigan in *Gratz v Bollinger*, No 97-75321 (ED Mich) 4–5.

<sup>72</sup> Consider, e.g., the high frequency with which members of racial minorities, compared to others, put race on even a very short list of their defining characteristics: when asked to describe themselves using only three adjectives, disproportionately many blacks and females as compared with whites and males listed their race and sex. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, in Katharine T. Bartlett and Rosanne Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* 263, 270 (1991).

incompatible with their religion and thus will be eligible for benefits, so predictably more members of minority racial and ethnic groups will find themselves underrepresented at state universities and will be eligible for admission on a diversity rationale.

In *Hopwood*, the Fifth Circuit lists a slew of characteristics an admissions office is permitted to consider: “A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant’s home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant’s parents attended college or the applicant’s economic and social background.”<sup>73</sup> If all of these characteristics are indeed considered, and race may not be, a discrimination is worked against those who offer racial diversity.<sup>74</sup>

The Fifth Circuit in *Hopwood* strongly disagrees with this analysis, claiming that “the caselaw [i]s sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. . . .”<sup>75</sup> Among that court’s premises is that, unlike other

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<sup>73</sup> *Hopwood*, 78 F3d at 946 (5th Cir 1996).

<sup>74</sup> Interestingly, Scalia, dissenting in *Powers v Ohio*, 499 US 400, 423–24 (1991), seems to understand almost exactly this point in the context of race-based peremptory challenges. He insisted in that context that “When a particular group has been singled out in this fashion, its members have been treated differently, and have suffered the deprivation of a right and responsibility of citizenship. But when that group, like all others, has been made subject to peremptory challenge on the basis of its group characteristic, its members have been treated not differently but the same. In fact, it would constitute discrimination to exempt them from the peremptory-strike exposure to which all others are subject. If, for example, men were permitted to be struck but not women, or fundamentalists but not atheists, or blacks, but not whites, members of the former group would plainly be the object of discrimination. . . . Unlike the categorical exclusion of a group from jury service, which implies that all its members are incompetent or untrustworthy, a peremptory strike on the basis of group membership implies nothing more than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies or hostilities—most notably sympathies toward their own group members. Since that reality is acknowledged as to all groups, and forms the basis for peremptory strikes as to all of them, there is no implied criticism or dishonor to a strike.”

Because the Court’s liberal wing, in the majority in *Powers*, disagrees with Scalia about the stigma of a strike and also disagrees with him about the constitutional difference between a “welcome mat” and a “no trespassing sign,” they are less susceptible to a charge of inconsistency than Scalia and the Court’s conservatives in this matter.

<sup>75</sup> *Hopwood*, 78 F3d at 945–46 (5th Cir 1996) (citations omitted).

characteristics, race may not constitutionally be used as an imperfect proxy and it is at best an imperfect proxy for characteristics a school may legitimately seek in applicants. But is it really imperfect here? I have elsewhere already questioned some aspects of the narrowness of the Supreme Court's remedial exception for racial classifications, arguing that, as the Supreme Court appears to have recognized with respect to sex, but notoriously not yet with respect to race, 100 percent of members of the historically subordinated group or suspect class, including those not demonstrably materially affected by discrimination, are subject to ambient discrimination on the basis of their membership in the group.<sup>76</sup>

And is race really a proxy here at all? Affirmative action in hiring and admissions need not proceed from the (stereotyping) assumption that blacks think alike or think differently from whites, but can instead proceed from exactly the opposite assumption.<sup>77</sup> It can proceed from the assumption that, by experience with black teachers and students who are no different than their white counterparts, students will realize the error of their previous stereotypic thinking about blacks: they will realize that there is no difference and will learn to reject “existing misconceptions and stereotypical categorizations which in turn lead to future patterns of discrimination.”<sup>78</sup> In insisting that “[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different [and that] Such a criterion is no more rational on its own terms than would be choices based on the physical size or blood type of applicants,”<sup>79</sup> the *Hopwood* court misses the point. It is an accident

<sup>76</sup> See Mary Anne Case, “*The Very Stereotype*,” 85 Cornell L Rev at 1454–55, 1460–61.

<sup>77</sup> To put it in Alex Johnson's terms, if admitted black students play bid whist, they can offer cultural diversity; but if they play bridge instead, they can demonstrate that blacks, too, play this card game like the white majority. Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 Cal L Rev 1401 (1993) (using the metaphor of bid whist and tonk, card games favored by African-Americans, to describe a unique African-American culture potentially threatened by forced integration).

<sup>78</sup> *Taxman*, 91 F3d at 1577 (Lewis dissenting) (citation omitted). Justice Stevens makes a similar argument in his *Wygant* dissent, 476 US at 315. And Justice O'Connor was quite right to note that, “The goal of providing ‘role models’ discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. . . . [T]his latter goal was not urged as such in support of the layoff provision before the [courts below].” *Wygant*, 476 US at 288 (O'Connor concurring in part and in the judgment).

<sup>79</sup> Note that more than skin color was in fact at stake for the UT admissions officials, because they did not consider a black Nigerian to be a minority candidate. *Hopwood*, 78 F3d at 936 n 4.

of history that in the United States race has the sort of salience that leads to worrisome stereotypical categorizations and blood type does not, such that government here has a compelling interest in eradicating stereotypes with respect to race and not blood type, even through occasional affirmative use of racial classifications to do so. In a place like Japan, by contrast, where there has been a widespread popular belief that blood type does determine character, so that many believe one profitably could select employees, political candidates, and prospective mates by blood type,<sup>80</sup> it might make the same kind of sense to implement an admissions program seeking diversity by blood type, not in an endorsement of the ultimate rationality of blood type discrimination, but in an effort to eradicate such discriminatory impulses in the next generation.<sup>81</sup> The *Hopwood* majority is therefore wrong to claim so categorically that “Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection.”<sup>82</sup>

One lesson of all the educational affirmative action cases from *De Funis* through *Hopwood* is that constitutional difficulties will arise when admissions officers “compar[e] minority applicants only with one another.”<sup>83</sup> But there are two radically different ways to compare them with the whole of the applicant pool, as William

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<sup>80</sup> See, e.g., Jennifer Trueland, *Japanese Search in Vein for Perfect Blood Type*, *The Scotsman* 12 (Aug 13, 1998); Associated Press, “*What’s Your Blood Type?*” *Endures as one of Japan’s Best Pickup Lines*, *Chicago Tribune North Sports Final Edition* N34 (Dec 18, 1997).

<sup>81</sup> See Bowen et al’s evidence, adopted in *Gratz*, of benefit to white majority from exposure to minorities.

<sup>82</sup> *Hopwood*, 78 F3d at 945. The *Hopwood* majority appears to proceed from the assumption that the alternative to the use of race as a factor in admissions is the treatment of all applicants “as individuals.” 78 F3d at 945, 940. But admission to law or medical school is not like bidding on a road contract. It is not even like admission to graduate school, where applicants can provide evidence of earlier academic work in the field. It is more like admission to a jury. Challenges are peremptory, rarely for cause. It is necessarily proxy thinking that gets one selected, because there is rarely available direct evidence of the ability to do what one is asking to do. It makes little sense to talk of treating people as individuals by, for example, taking their family circumstances into account, because we do not all react the same way to circumstance. An admissions officer can only bet that, for example, plaintiff *Hopwood*’s own difficult family circumstances (including a severely handicapped child) will give her “a different perspective” (and hence make her a better bet) or “burden . . . her academic performance” (and hence make her a worse bet)—both possibilities considered by the *Hopwood* appeals court, 78 F3d at 946–47, in a tacit admission of the proxy character of any factor in the decision.

<sup>83</sup> *De Funis v Odegaard*, 416 US 312, 330 (1974) (Douglas dissenting).



Bowen points out in his expert testimony in the Michigan case, recapitulating what Powell cites him for in *Bakke*:<sup>84</sup> the first is to use a single metric for all applicants but to consider each individually and in isolation, and the second is to give some attention to the shape of the class as a whole, seeking diversity along a number of fronts—balancing the percentage of athletes and musicians, and, on a finer grain, making sure that, among musicians, there aren't a dozen cellists and no timpanist, and among athletes not a dozen linebackers and no quarterback. As Bowen acknowledges, this means that in any given year, as compared with any particular applicant pool, an individual's chances, given his or her mix of talents and attributes, will be affected by the talents and attributes of others in the pool in ways much more complicated and nuanced than in simple head-to-head competition.<sup>85</sup>

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<sup>84</sup> Expert report of William G. Bowen in *Gratz* (1999) at 147.

[T]he task of an admissions officer is not simply to decide which applicants offer the strongest credentials as separate candidates for the college; the task, rather is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse amalgam of individuals who will contribute through their diversity to the quality and vitality of the overall educational environment.

This concern for the composition of the undergraduate student body, as well as for the qualifications of its individual members, takes many forms. While a school is of course interested in enrolling students who are good at a great many things and not one-dimensional in any sense, it should also try to enroll students with special interests and talents in the arts and in athletics; it should seek a wide geographical representation; it should admit foreign students from a variety of countries and cultures; it should recognize the special contribution that the sons and daughters of alumni can make by representing and communicating a sense of the traditions and the historic continuity of the university; it should enroll students from a range of socioeconomic backgrounds; and it should work consciously and deliberately to include minority students, who themselves represent a variety of experiences and viewpoints.

We must accept it as a fact of life in contemporary America that the perspectives of individuals are often affected by race as by other aspects of their background. If a university were unable to take into account the race of candidates, it would be much more difficult to consider carefully and conscientiously the composition of an entering class that would offer a rich educational experience to all its members.

<sup>85</sup> Compare *Wygant*, 476 US at 318 (Stevens dissenting) (the loss “to petitioners is not based on any lack of respect for their race, or on blind habit and stereotype. Rather, petitioners have been laid off for a combination of two reasons: the economic conditions that have led Jackson to lay off some teachers, and the special contractual protections intended to preserve the newly integrated character of the faculty. . . . Thus, the same harm might occur if a number of gifted young teachers had been given special contractual protections because their specialties were in short supply. . . . A Board decision to grant immediate tenure to a group of experts in computer technology, an athletic coach, and a language teacher, for example, might reduce the pool of teachers eligible for layoffs during a depression and therefore have precisely the same impact as the racial preference at issue here.”).

Does it follow that whites are entitled to comparable preferences? Ordinarily not. Whiteness is not the salient characteristic, the source of diversity or community for most whites. The claim is not that blacks denied an opportunity for affirmative action preference are disadvantaged vis-à-vis those of other races, but vis-à-vis those who offer another basis for inclusion. Just as in *Rosenberger*, *Lamb's Chapel* and the school club cases the claim is that the religious are disadvantaged, not as compared to the unreligious, atheists, or those of another religion, but as compared to, for example, chess players,<sup>86</sup> so here the claim is that blacks denied a preference opportunity in admissions are disadvantaged as compared with legacies, farm kids, Nebraskans,<sup>87</sup> tuba players, and quarterbacks; and in districting as compared with farmers, Republicans, city dwellers, and Polish-Americans. There might be a reason to offer scholarship opportunities or admission preferences for whites at historically black colleges ("HBC"s), but not at Texas, because whiteness is not a salient characteristic for applicants to Texas. There might also be some reason to consider concentrated groups of white supremacists to be a "community of interest" for districting purposes, for example, in Metairie, Louisiana, where electoral support for David Duke was concentrated.<sup>88</sup>

Of course, if excluding only religion or race is a problem, including it alone may also be.<sup>89</sup> In both districting and law school admissions, Texas paid unique attention to race.<sup>90</sup> This predominance

<sup>86</sup> See *Mergens*, 496 US at 254.

<sup>87</sup> Although there is something to be said for geographical diversity as a value, the sinister antisemitic origins of some of Harvard College's own emphasis on geographical diversity should not be forgotten. "Those aren't doughnuts, they're bagels," was the retort Harvard admissions dean Chase Peterson got from a Jewish faculty member in 1971, when he acknowledged that Harvard might be taking fewer students from what Peterson called the "doughnuts around the big cities." See Nora Sayre, *Sixties Going on Seventies* 107 (1973).

<sup>88</sup> See Neil Gotanda, *A Critique of "Our Constitution Is Color Blind,"* 44 Stan L Rev at 64-68 (suggesting "free exercise of race" includes "the attachment of many white southerners to the Confederate flag").

<sup>89</sup> Compare *Arizona Governing Committee v Norris*, 463 US 1073, 1077 (1983) (holding retirement scheme violated Title VII when "[s]ex is the only factor that the tables use to classify individuals of the same age; the tables do not incorporate other factors correlating with longevity such as smoking habits, alcohol consumption, weight, medical history, or family history"); *L.A. Dept. of Water and Power v Manhart*, 435 US 702, 712-13 (1978) (holding pension scheme with "an actuarial distinction based entirely on sex" violated Title VII).

<sup>90</sup> In *Bush v Vera*, it relied on the availability of uniquely detailed racial data, "at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts," 517 US at 961. In *Hopwood*,

or privileging of race, like a comparable predominance or privileging of religion, is harder to justify than the use of race as one of several factors,<sup>91</sup> even if sometimes it is then the determinative factor. The flip side of *Widmar*,<sup>92</sup> which allowed student groups to use school facilities for worship on the same terms as other student groups used the same facilities for other purposes, is *Santa Fe Ind. School Dist. v Doe*,<sup>93</sup> which prohibited selection of a single student specifically to lead a prayer before the assembled spectators at all school football games. The flip side of *Church of the Lukumi*, which prevents the legislature from singling out a religiously motivated activity for special disadvantage, is *Kiryas Joel*, which prevents the

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although it used a larger number of more subjective factors in ultimate admissions decisions, it sorted all candidates initially only by race and by TI score (a weighted index of GPA and board scores), 78 F3d at 935–36.

<sup>91</sup> Compare *Widmar*, 454 US at 277 (“[T]here are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. . . . At least in the absence of empirical evidence that religious groups will dominate UMKC’s open forum, . . . the advancement of religion would not be the forum’s ‘primary effect.’”) (citations omitted); *Mergens*, 496 US at 250 (“To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.”); *Estate of Thornton v Calder*, 472 US 703, 711 (1985) (O’Connor concurring) (“The statute singles out Sabbath observers for special, and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees”); *Adarand*, 515 US at 258 (Stevens dissenting) (“Unlike the 1977 Act [at issue in *Fullilove*], the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to rebuttable presumption of social disadvantage which . . . gives rise to a second rebuttable presumption of economic disadvantage. . . . But a small business may qualify as a [Disadvantaged Business Enterprise] by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. . . . Thus, the current preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.”); *Metro Broadcasting v FCC*, 497 US 547, 621 (1990) (O’Connor dissenting) (citing *Bakke* for the proposition that “race conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body” and noting that, by contrast, “of all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through the classifications most suspect under the Equal Protection clause”). But see *Corporation of the Presiding Bishop v Amos*, 483 US 327, 338 (1987) (“We find unpersuasive the District Court’s reliance on the fact that Section 702 singles out religious entities for a benefit. . . . Where, as here, the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.”).

<sup>92</sup> See *Chess v Widmar*, 635 F2d 1310, 1316 (8th Cir 1980), aff’d sub nom. *Widmar v Vincent* (“In contrast with a neutral policy, UMKC’s current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. . . . The University’s policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups.”).

<sup>93</sup> 530 US 290 (2000).

legislature from singling out a religiously motivated activity for unique advantage.<sup>94</sup>

Powell's vision in *Bakke*, by contrast, is like the Court majority's vision in *NEA v Finley*,<sup>95</sup> with race or decency, respectively, being a factor but not the predominant factor; given weight, but no fixed weight;<sup>96</sup> necessarily occasionally determinative (imagine two identical proposed museum shows, except one includes Serrano's "Piss Christ" and the other does not; or two otherwise identical candidates one of whom belongs to a racial minority<sup>97</sup>). Both *Bakke* and *Finley* are repudiations of the extremes of doctrinal purity, respectively, of colorblindness and of viewpoint neutrality, made possible by fuzziness around the edges.<sup>98</sup>

Perhaps my argument can only save affirmative action schemes where race really is just one of many salient characteristics.<sup>99</sup> It brings us back to Powell in *Bakke*: "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further the attainment of genuine diversity."<sup>100</sup> My argument

<sup>94</sup> It's no accident that Kennedy writes both *Church of the Lukumi* and *Romer v Evans*—both are about the extraordinary act of singling out. But Kennedy also writes a separate concurrence in *Kiryas Joel*, insisting that "This is not an action in which the government has granted a benefit to a general class of recipients of which religious groups are just one part." 512 US at 722. Compare *Committee for Public Ed. v Nyquist*, 413 US 756, 793 (1973) ("One further difference between tax exemption for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor.").

<sup>95</sup> 118 S Ct 2168 (1998) (upholding requirement that judging of NEA grant applications "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public").

<sup>96</sup> Compare the notion in the districting cases that race may be "a factor" but not "the predominant factor."

<sup>97</sup> See *Taxman*, 91 F3d 1547.

<sup>98</sup> Note both vision metaphors.

<sup>99</sup> On the other hand, there may well be circumstances when no other characteristic has the same salience.

<sup>100</sup> *Bakke*, 438 US 265 at 314 (1978) (opinion of Powell). Let me insist again that a program excluding solely ethnic diversity, as the Fifth Circuit seems to be imposing in *Hopwood*, would also hinder genuine diversity, however.

may help save some nonremedial use of race in districting, but not the UT admissions scheme in *Hopwood*. And it supports the distinction drawn by the district court in *Gratz* between the University of Michigan's now abandoned admissions grids, in which "the only distinguishing factor . . . was the applicant's race," and its current system, which uses race as one of several enumerated plus factors.<sup>101</sup> Those who believe "[t]here are diversities of gifts but the same spirit"<sup>102</sup> may see this as all to the good—diverse conceptions of merit produce a better overall class than single metric reliance on test scores.

*Kiryas Joel* may set a limit on the religion analogies' usefulness in justifying existing affirmative action programs: a program intended to benefit only the Satmar Hasidim could not withstand scrutiny even when put in the form of a generally applicable benefit, as it has been in its last several incarnations before New York courts that struck each down (let alone when extended to the Satmar community by name, as it had been in the earlier case before the Supreme Court). Similarly, a program intended to benefit only blacks or only racial minorities may face difficulty, not only when this is apparent on its face, as in *Hopwood*, but also when they are the only true beneficiaries, as arguably they were in *Bakke*.<sup>103</sup> This may *a fortiori* be true of programs including other groups only after a legal challenge to preferences for racial minorities only. If we hew to the religion analogy, these newly redesigned programs may find themselves in the same trap as the New York legislature's repeated unsuccessful efforts to accommodate Kiryas Joel, in accordance with the Supreme Court's requirements, by

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<sup>101</sup> To "flag" an application so as to keep it in the review pool even when it would not otherwise "pass . . . the initial admit threshold," counselors may use the characteristics, not only of "under-represented race" but also "high school class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage and geography." *Gratz* at 32 and n 17. In computing the selection index score, not only are twenty points added to an applicant's score for belonging to an underrepresented minority group, but "six for geographic factors, four . . . for alumni relationship, . . . three for an outstanding essay, five . . . for leadership and service skills, twenty . . . for socioeconomic status, [and] twenty . . . for athletes," up to a total of forty. *Gratz* at 33.

<sup>102</sup> I Corinthians 12:4. At the risk of stating the obvious, when I refer to believers in this proposition, I don't mean just believers in the New Testament.

<sup>103</sup> On some versions of the facts, for at least one of the years in which Alan Bakke applied to medical school, this was the case at U.C. Davis, where "disadvantaged whites . . . in large numbers" applied to be considered for one of the places set aside for the "disadvantaged" for which they were at least nominally eligible, but all of those admitted under the program were members of racial minorities. *Bakke*, 438 US 265, 273, 275.

laws of general applicability.<sup>104</sup> The New York Court of Appeals has repeatedly held that the legislative efforts are not “neutral law[s] of general application,”<sup>105</sup> because, despite their neutral form, their intent and effect are to “permit the statute’s benefits to flow almost exclusively to the religious sect it was plainly designed to aid.”<sup>106</sup>

Even if redesigned admission plans actually do benefit a broader group, they may be unconstitutionally tainted by their purpose to preserve the availability of racial diversity. If the use of race is as unconstitutional as the *Hopwood* court suggests, there is, for example, little reason under current disparate-impact doctrine to think that the solutions Texas proposes, such as the so-called 10 percent solution,<sup>107</sup> fix the problem. For, if these solutions do not have a disparate impact by race, they will have failed in their purpose, but if they do, they will have been undertaken “because of and not in spite of” their disparate impact, thus risking failure of the Supreme Court’s test for measures that have a disparate impact upon an identifiable group.<sup>108</sup> To use other things as a proxy for race may be no more permissible under the *Hopwood* standards than to use race as a proxy for other things.<sup>109</sup>

<sup>104</sup> See *Grumet v Cuomo*, 90 NY2d 57, 76 (1997) (striking down law general in form, but on the facts covering only the single district of Kiryas Joel because it “would be perceived as an act of governmental favor for the sole benefit of the Satmar sect”); *Grumet v Pataki*, 93 NY2d 677 (1999) (striking down reworked general law, this time covering on its facts Kiryas Joel and only one other district); but cf. *Agostini v Felton*, 521 US 203, 227 (1997) (“Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian schools that happen to receive the otherwise neutral aid.”).

<sup>105</sup> *Grumet v Pataki*, 93 NY at 686.

<sup>106</sup> *Id.* at 690.

<sup>107</sup> See, e.g., David Montejano, *Maintaining Diversity at the University of Texas*, in Robert Post and Michael Rogin, eds, *Race and Representation: Affirmative Action*, 359, 363–67 (1998) (describing plan “for the automatic admission of the top ten percent of each graduating high school class” in the highly segregated Texas public school system “to the Texas university of their choice.”)

<sup>108</sup> See *Personnel Adm. of Mass. v Feeney*, 442 US 256 (1977). But see *Grutter v Bollinger* (note 24 above) (holding that the University of Michigan Law School’s “failure to consider . . . race-neutral alternatives” for “enrolling significant numbers of underrepresented minority students” such as “increasing recruiting efforts, decreasing emphasis for all applicants on undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system, whereby a certain number or percentage of the top graduates from various colleges and universities are admitted . . . militates against a finding of narrow tailoring”).

<sup>109</sup> Nor would it necessarily be determinative that the disparate impact is in favor of minorities. Although *Feeney* itself does speak of “adverse effects on an identifiable group,” and although the plan was adopted to help the identifiable group of minority students rather than to hurt whites, the general emphasis on color blindness and a sense that, admissions being something of a zero sum game, some white applicants stand to lose put the plan at

Would the need to bring other groups into any affirmative action scheme to save its constitutionality resemble the addition of elves, santas, and candy canes to Christmas creche scenes in Establishment Clause cases? Compare *Lynch*,<sup>110</sup> rejecting an Establishment Clause challenge to a public display including, not only a creche, but also “a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa’s sleigh; a live 40-ft. Christmas tree strung with lights; statues of carolers in old-fashioned dress; candy-striped poles; a ‘talking’ wishing-well; a large banner proclaiming ‘SEASONS’ GREETINGS’; a miniature ‘village’ with several houses and a church; and various ‘cutout’ figures, including those of a clown, a dancing elephant, a robot and a teddy bear,”<sup>111</sup> with *County of Allegheny v ACLU*, where a creche standing alone, framed by evergreens, on the grand staircase of the county courthouse was held an unconstitutional establishment. The fact that the grand staircase “occasionally was used for displays other than the creche (for example, a display of flags commemorating the 25th anniversary of Israel’s independence)”<sup>112</sup> was found insufficient dilution of the religious message. This is not the paradox of *R.A.V.* redux—including racial hate speech as part of a generic prohibition on fighting words, as that case required,<sup>113</sup> may too greatly dilute the intended governmental message that racial hatred is particularly obnoxious, and being surrounded by elves may dilute the creche’s spiritual message, but inclusion with violinists, farm kids, and athletes will still benefit minority applicants. If additions dilute the affirmative action message, like the Christmas message, beyond recognition, that may be undesirable from the perspective of racial or religious zealots, but acceptable, even desirable, from a civil constitutional perspective.

The creche cases have more cautionary parallels to recent voting rights cases, however.<sup>114</sup> Justice O’Connor has insisted for the ma-

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legal risk. For discussion, see, e.g., Kim Forde-Mazrui, *The Constitutional Limitations of Race-Neutral Affirmative Action*, 2000 Georgetown L J 2331.

<sup>110</sup> 465 US 668 (1984).

<sup>111</sup> *County of Allegheny v ACLU*, 492 US 573, 595 (1989).

<sup>112</sup> *Id.* at 599, n 50.

<sup>113</sup> See *R.A.V. v City of St. Paul*, 505 US 377 (1992).

<sup>114</sup> The creche and voting rights case also, unfortunately, have in common a tendency to partake of what Pam Karlan has aptly dubbed the new Redrupping. See Pam Karlan, *Still Hazy After All These Years: Voting Rights in the Post Shaw Era*, 26 Cumb L Rev 287, 288 (1996). The Court has shifted its particularistic examination of individual cases in an area

majority in *Shaw v Reno* that “reapportionment is one area in which appearances do matter.”<sup>115</sup> For her, and increasingly for a majority of the Court, the Establishment Clause is another such area.<sup>116</sup> As she first said in her *Lynch* concurrence, “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”<sup>117</sup> This danger of making the favored feel like insiders and others like outsiders<sup>118</sup> carries over to problematic majority-minority districts in voting rights cases, according to O’Connor, and may even shift from perception to more concrete reality: “The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are

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for which it has been unable to articulate a workable test of general applicability from the counting up of body parts and their distance from one another in dirty movies to the counting up of elves and candy canes and their distance from the creche in Establishment Clause cases involving use of public property for religious holiday displays; it also now scrutinizes individually the shape of voting rights districts as it used to scrutinize images on a screen.

<sup>115</sup> *Shaw v Reno*, 509 US at 647 (1993). The appearance O’Connor thinks dangerously reinforced by race-conscious districting is that of “resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike. . . . We have rejected such perceptions elsewhere as impermissible racial stereotypes.” *Id.*

<sup>116</sup> See Pildes and Niemi, *Expressive Harms*, 92 Mich L Rev at 512 (arguing that the “endorsement test” for the Establishment Clause “is grounded on the same concerns as those central to *Shaw*”).

<sup>117</sup> 465 US at 687 (O’Connor concurring). Brennan, dissenting, quotes language from a lower court opinion to the effect that, “Those persons who do not share these holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status.” *Lynch* at 702 n 7.

<sup>118</sup> Although articulating this endorsement test most clearly in *Lynch*, O’Connor does not think the *Lynch* creche flunks it. As a white Christian, and therefore accustomed to being a favored insider in matters racial and religious, she may have difficulty hearing the message outsiders may get. Compare the dissenting Brennan’s observation in *Lynch* at 496 that “because the Christmas holiday seems so familiar and agreeable” the Court’s majority is blinded to the “distinctively sectarian” nature of the creche with Pam Karlan’s assertion that the Court majority can only describe “the most integrated districts in the country” as “segregated” examples of “political apartheid” because they begin, blindly, with the assumption “that only majority-white and, therefore white-controlled, jurisdictions can be integrated.” Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 Chi L Forum 83, 94, 95. Because they begin with a white, Christian default, some members of the Court find it as difficult to see the racialism of familiar white control as the sectarianism of familiar Christian symbols.



more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”<sup>119</sup>

In order to avoid either a racial or a religious establishment, a majority of the Supreme Court, in, respectively, its *Shaw* and its *Lemon*<sup>120</sup> test, has decreed that neither race nor religion shall be a dominant consideration for legislative action. Thus, under *Shaw* and its progeny, the Court will strike down a districting plan when “race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”<sup>121</sup> And, under *Lemon* and its progeny, it will strike down statutes when “the preeminent purpose of the . . . legislature was to advance [a] religious viewpoint. . . .”<sup>122</sup> If accommodating religion can qualify as secular purpose, to what extent will accommodating the Justice Department?

For race and religion, vocal minorities on the Court have belittled the Court’s majority’s fears of establishment, at least when racial minorities or minority religions attract the legislature’s aid. Except perhaps in the extraordinary case of majority-minority government,<sup>123</sup> claiming that whites are marginalized and black supremacy established by affirmative action may be akin to claiming that “after escaping brutal persecution and coming to America with the modest hope of religious toleration . . . , the Satmar had

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<sup>119</sup> *Shaw v Reno* at 648.

<sup>120</sup> See *Lemon v Kurtzman*, 403 US 602 (1971).

<sup>121</sup> *Miller v Johnson*, 515 US at 913. See also *Shaw v Hunt*, 517 US 899, 907 (1996) (“Race was the criterion that, in the State’s view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.”). Note that this approach constructs “race” and “communities of interest” as mutually exclusive. Stevens in dissent replies that he cannot “see how our constitutional tradition can countenance the suggestion that a State may draw unsightly lines to favor farmers or city dwellers, but not to benefit the very group whose history inspired the Amendment that the Voting Rights Act was designed to implement.” *Shaw v Hunt*, 517 US at 949. Compare *Walz*, 397 US at 696 (1970) (Harlan concurring) (“In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.”).

<sup>122</sup> *Edwards v Aguillard*, 482 US 578 (1987). The particular religious viewpoint there at issue was “that a supernatural being created humankind,” advanced by a statute mandating the teaching of “creation science” whenever evolution was taught in Louisiana public schools.

<sup>123</sup> See *City of Richmond v Croson*, 488 US 469 (1989), where blacks were in the majority in the Richmond city government distributing affirmative action preferences.

become so powerful, so closely allied with Mammon, as to have become an 'establishment' of the Empire State," as Scalia mockingly suggests in his *Kiryas Joel* dissent.<sup>124</sup>

But the ability of various minorities to attract the legislature's attention has been a source of fear as well as of comfort in matters of both race and religion. The greatest fear is of civil discord brought on by competition for legislative favor. Compare the dissenting Brennan view of civic strife occasioned by competition among minority religions for government attention<sup>125</sup> with Powell's image in *Bakke* of the nation dissolving into a welter of ethnic minority groups each seeking special treatment.<sup>126</sup> As commentators have noted, however, systematic exclusion of racial or religious interests from legislative attention is at least as likely to lead to political strife.<sup>127</sup>

<sup>124</sup> *Kiryas Joel*, 512 US at 732 (Scalia dissenting).

<sup>125</sup> *Lynch v Donnelly*, 465 US at 702 (1983) (Brennan, dissenting) ("[A]fter today's decision, administrative entanglements may well develop. Jews and other non-Christian groups . . . can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become involved in accommodating the various demands. . . . Cf. *Nyquist* . . . 413 US at 796 . . . ('competing efforts [by religious groups] to gain and maintain the support of government . . . occasioned considerable civil strife')." See also *Lemon's* emphasis on "potential for political divisiveness . . . [in] need for annual appropriations and the likelihood of larger and larger demands as costs and populations grow," 403 US at 623.

<sup>126</sup> *Bakke*, 438 US 265, 294 (1978) ("[T]he white majority itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination. . . . Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a minority of white Anglo-Saxon Protestants. . . . Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of other groups. . . . Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."). For an alternate nightmare vision see the parade of horrors in Stevens's concurrence in *Goldman v Weinberger*, 475 US 503, 512 (1986). According to Stevens, "the interest in uniform treatment for the members of all religious faiths risks being compromised if an observant Jew's request to wear religious head covering in contravention of military uniform regulations is granted" but there is "the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as 'so extreme, so unusual or so faddish an image that public confidence in his ability to perform his duties will be destroyed.'"

<sup>127</sup> See, e.g., Laurence Tribe, quoted in *Mc Daniel v Paty*, 435 US at 640 n 25 (Brennan concurring) ("To view such religious activity as suspect, or to regard its political results as automatically tainted . . . might not even succeed in keeping religious controversy out of public life, given the 'political ruptures caused by the alienation of segments of the religious community.'").

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