# Race, Religion, and Cultural Ideutity: Recouciliug the Jurisprudence of Race and Religion†

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## INTRODUCTION

Although race and religion generally have been treated in very distinct lines of constitutional jurisprudence, government actions with respect to them, in particular toward racial and religious outsiders,[1] raise similar concerns. Recently, these parallels have been acknowledged by the Supreme Court in *Board of Education of Kiryas Joel Village School District v. Grumet*[2] and have led to suggestions by some commentators, such as Neil Gotanda, on how they could be treated constitutionally alike.[3] The similarities of race[4] and religion[5] can be traced

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1. In this Article I use the terms "minority" and "outsider group" interchangeably.

2. 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) ("[G]overnment may not segregate people on account of their race, [as] . . . it may not segregate on the basis of religion"); *see Colloquium on Law, Religion, and Culture*, 26 CUMB. L. REV. 1 (1995-1996) (devoting entire issue to the religion analogue of racial segregation raised in *Kiryas Joel*); Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 57-83 (1996) (arguing that in *Kiryas Joel*, the Supreme Court took an approach to religious accommodation more in line with its stance on affirmative action); *see also* Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994).

3. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 64-68 (1991) (suggesting treatment of racial affirmative action along religious accommodation lines); David E. Steinberg, *Religious Exemption as Affirmative Action*, 40 EMORY L.J. 77 (1991) (suggesting treatment of religious accommodation along racial affirmative action lines).

4. In this Article I use the terms "race" and "skin color" to designate a cultural or ethnic group. *See, e.g.*, Ozawa v. United States, 260 U.S. 178, 197 (1922) (illustrating the use of terms denoting skin color to designate cultural identity). In its strictly scientific conception, race (and skin color) has had little more importance than other particular physical characteristics, such as hair color or height. Thus it is not as a term designating certain primary physiological phenotypes of humans but rather as a cultural and social concept, and in its societal and legal consequences, that "race" has been important in American society. In that respect, it has acquired a meaning entirely independent of its scientific moorings. *See* Gotanda, *supra* note 3, at 28-34 & n.116 (discussing Justice White's description of race in Saint Francis College v. Al Khazraji, 481 U.S. 604 (1987)). For a discussion of the social conceptions of race that have been significant in American history, see *id.* at 36-40, 56-59. *See also infra* text accompanying notes 61-65.

5. Here, I consider the functional aspects of religion as a source of group identity and social cohesion. There are of course important cognitive (explanations of mysterious events), and emotional human need for order and assurance against forces beyond human control—aspects of religion. *See generally* J. MILTON YINGER, RELIGION, SOCIETY AND THE INDIVIDUAL 52-56 (1957). While I do not discuss these aspects separately, they are part and parcel of the cultural value framework that religion contributes to. *See infra* note 50 and accompanying discussion. To the extent that religious beliefs are not closely related to a person's sense of identity, belonging, or cultural framework, such beliefs are much more like ordinary opinions or other beliefs that are also protected under the Free Speech Clause. *See infra* notes 98-99 and accompanying text. In that sense, religious beliefs that are held less deeply or are less central to an individual carry less of the special importance that is oftentimes associated with religion. Of course, my intention in this Article is not to engage in an inquiry into what is or is not part of a religion; rather, it is to assess those qualities commonly associated with religion that make it so different from

to the analogous roles that both play with respect to individuals and their standing in our society.[6] The passion, prejudice, and hatred that both have evoked arise out of differences that cannot be rationally debated,[7] oftentimes involving matters such as beliefs, values, and experiences that simply exist without a logical basis and without a common ground of reference.[8] In fact, racial discrimination frequently cannot be readily distinguished from religious discrimination, and vice versa.[9]

It is not surprising, then, that even though constitutional jurisprudence does not formally combine race and religion, such parallels exist. For instance, government "may not segregate people on account of their race, [as] . . . it may not segregate on the basis of religion,"[10] nor may it use either as a basis for discriminating against a person.[11] Although the constitutional jurisprudence of both race and religion has appealed to the moral imperative of equality in our society, that goal has been elusive in the race context. The discrepancy can, in part, be traced to the unique and severe hostility and prejudice that some racial minority groups, such as African Americans or Native Americans, have encountered in the past. While both racial and religious conflicts continue to exist in our society, racial divisions have a noticeably greater effect on people's everyday lives than religious divisions.[12]

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other beliefs in their significance to individuals.

6. *See* MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE 1-7 (1964).

7. As a historical matter, religious discrimination during colonial and early postrevolutionary times bore many of the same hallmarks as racial discrimination. *See* discussion *infra* Part I.A; *see also* Choper, *supra* note 2, at 492 (pointing out that religion and race have been "the object of public (and private) stereotyping, stigma, subordination, and persecution in strikingly similar ways"); Robert A. Destro, *"By What Right?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion"*, 29 IND. L. REV. 1, 50-51 (1995).

8. The inability to debate such differences in a rational manner is characteristic of such differences.

9. For instance, it may be difficult to determine whether discrimination and stereotyping of Middle Eastern Muslims or anti-Semitism is based on racial or religious prejudice. *See infra* notes 83-85 and accompanying text; discussion *infra* Part I.B.2.

10. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

11. *Compare* Larson v. Valente, 456 U.S. 228, 246 (1982) (prohibiting segregation on the basis of race or religion), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-17 (1995). Of course, on the surface, race and religion appear to deal with entirely different personal attributes—race has been connected to unchangeable, involuntary personal characteristics such as skin color and genetics, whereas religion appears to concern itself with voluntary choices of one's belief system. However, the voluntariness distinction is of little use when one considers that many religious practitioners take their faith not as a matter of choice but of command from their god and thus are as little a master of their beliefs as they are of their race. In our society, race and religion occupy places of similar importance because both greatly affect an individual's self-identity.

12. The salience of race can be experienced in everyday life; however, statistical support also exists. For instance, pursuant to the Federal Bureau of Investigation's hate crime statistics for the years 1992 to 1994, hate crimes motivated by race (including "antiwhite" bias) and ethnicity/national origin constituted 70-72% of all reported hate crimes, whereas religion-motivated hate crimes made up approximately 17-18% of such

Undoubtedly, one important reason for the slow progress toward racial equality has been the historic exclusion of racial minority groups from participation in the shaping of government policies that have burdened them.[13] In contrast, greater tolerance of religious differences has led to the development of a rich jurisprudence over the scope and place of religious rights, a jurisprndence that has proven more inclusive of the views of religious minorities than the jurisprudence of race.[14] Even though the Supreme Court's constitutional jurisprudence has generally shown increased solicitude for governmental accommodations of religious rights, the Court has viewed special governmental help for minority racial groups with much less favor.[15] It is for this reason that an

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reported crimes. *See* CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, 1994 HATE CRIMES STATISTICS 7 (1994); CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, 1993 HATE CRIMES STATISTICS (REVISED) 9 (1993); CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, 1992 HATE CRIMES STATISTICS 9 (1992). However, of religion-motivated bias crimes, the vast majority (over 85%) of all such incidents were anti-Jewish. *See id.* If such anti-Jewish bias crimes are classified as ethnic bias crimes, *see infra* Part I.B.2, the proportion of race/ethnicity/national-origin-motivated crimes climbs to over 85%, and religion-motivated crime drops to about 2%. The remainder of reported hate crimes consists of crimes motivated by sexual orientation (approximately 11%). *See also* Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 373 (1995) (discussing the dangers of religious factions to republican politics); William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 12-25 (1995) (discussing discrimination between immigrants and the "native" class and within immigrant groups); *cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that a compelling interest in eradicating racial discrimination trumps a religious university's frce excrcise claims); JOHN WILSON, RELIGION IN AMERICAN SOCIETY 319-21 (1978) (arguing that religious differences among Protestants, Catholics, and Jews are declining).

Of course, that does not mcan that religious discrimination is no longer a problem. *See* U.S. COMM'N ON CIVIL RIGHTS, RELIGIOUS DISCRIMINATION (1979) (discussing the lack of attention given to religious discrimination issues). However, religious discrimination now appears to have a heavier impact on racial minority groups. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating city ordinance which prohibited religious sacrifice as unduly burdensome and not narrowly tailored to accomplish asserted government interest) In this respect, the lines of racial and religious discrimination tend to blur, and their effects overlap.

13. In fact, the Supreme Court's race jurisprudence, much of it aimed at preventing discrimination against racial minorities, has ncverthcless been criticized as actually bcing harmful to minorities. *See, e.g.*, Gotanda, *supra* note 3 (arguing that a "color-blind" Constitution, as espoused by the Supreme Court, perpetuates oppression of racial minorities because it fails to recognize or incorporate their experiences); Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1414-22 (1993) (arguing that integrationism as a means of combating racial prejudice does not serve the best interests of African Americans).

14. *See infra* Part I.D.1.

15. *See* Timothy L. Hall, *Religion, Equality and Difference*, 65 TEMP. L. REV. 1, 50-52 (1992). *Compare* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (permitting religious discrimination by the Mormon Church as a means of facilitating free exereise), *and* Zorach v. Clauson, 343 U.S. 306 (1952) (holding that a school district's

analytical approach to race using religious rights principles can appear so attractive to civil rights advocates.

My main thesis is that the dichotomy of biology and belief through which race and religion is generally viewed is largely unjustified. Race and religion are important in our society not because of their underpinnings in biology or pure belief, but because of their cultural significance and social implications to the individual. In that respect they are of similar importance because they play equivalent roles in the formation of an individual's conception of the self, sense of belonging, and value framework. As a result, they should be treated alike as a constitutional matter. At another level, this analysis also implies that we should not look at the desire of some minority groups to preserve their distinctiveness, whether based on religious or ethnic characteristics, as threatening to the majority.

In Part I, this Article reviews the functional importance of race and religion with respect to exclusion and discrimination against minority groups, and the similar significance of race and religion in representing aspects of a person's cultural identity. Considered in this light, the protections of the Due Process and Equal Protection Clauses, as they incorporate the protections of the First Amendment Religion Clauses, can be viewed as protecting individuals with a cultural identity different from that of the majority against exclusion and discrimination.[16]

Part II attempts to reconcile the constitutional jurisprudence of race and religion, utilizing religion jurisprudence as a primary model and reference point. In particular, this Article first considers pervasive regulation of race and religion in the segregation and nonentanglement context. It then discusses notions of formal and substantive equality in the treatment of racial and religious minorities by focusing on the availability of mandatory religious accommodations, the impact of *Washington v. Davis*[17] on substantive equality in the race context, and

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policy of permitting children to leave school early in order to attend classes in religious instruction elsewhere is constitutional), *with Adarand*, 515 U.S. 200 (subjecting federal race-based affirmative action program to strict scrutiny), *and* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding municipal race-based affirmative action impermissible under equal protection clause).

In particular, Justice Scalia represents the starkest example of this dichotomy. *Compare Kiryas Joel*, 512 U.S. at 743 (Scalia, J., dissenting) (arguing that a segregated school district drawn for the benefit of a religious minority group should be permissible as a legislative accommodation), *with Croson*, 488 U.S. at 520 (Scalia, J., concurring) (rejecting affirmative action as a means of "compensating for social disadvantages, whether . . . acquired by reason of prior discrimination or otherwise"). This is particularly puzzling when one considers that "the justifications of race-based affirmative action are [much] stronger" than any such policies for religious groups. Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 114 (1996).

16. In this Article I will not address the free-expression-protective components of the Religion Clauses or those aspects of the Equal Protection Clause dealing with fundamental rights or economic relations. For a discussion of the equality principle in the free speech context, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

17. 426 U.S. 229 (1976).

the potential for "cultural" accommodations. Finally, this Article also reviews affirmative action and legislative religious accommodations, and considers the general criticisms directed at affirmative action, the notion of affirmative action as a form of integration, and the religion equivalents to affirmative action.

## 1. SIMILARITY OF RACE AND RELIGION: A FUNCTIONAL APPROACH

### *A. Religious Discrimination and Race Discrimination*

Both religious and racial affiliation have been the basis for exclusion and discrimination throughout the history of this nation, though religious differences have been less a source of large-scale social conflicts in recent times. This is a significant change from colonial and early postrevolutionary times.[18] While I do not wish to engage in a detailed discussion of the history of both, a very brief review clarifies an important parallel in the significance of racial and religious differences.

In the early seventeenth century, religious establishments in the American colonies[19] resulted in restrictions on dissenters' civil rights, including their right to vote, and suppression and persecution of differing religious beliefs. The colonies also enacted laws compelling church attendance, imposed religious oath tests for office, and punished blasphemy.[20] Virginia, the Carolinas, Maryland, and Georgia required everyone to provide tax support to the Church of England.[21]

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18. *See, e.g., Zorach*, 343 U.S. at 318-19 (Black, J., dissenting); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1562-82 (1989); Destro, *supra* note 7, at 50-51.

19. *See generally* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 121-384 (1972). The Church of England was established as the official church in the Virginia settlement in 1611 and in Maryland and the Carolinas in 1702 and 1704, respectively. *See id.* at 185-94, 197; DAVID CHIDESTER, PATTERNS OF POWER 18-19; *see also* Everson v. Board of Educ., 330 U.S. 1, 9-11 (1946); A DOCUMENTARY HISTORY OF RELIGION IN AMERICA 97 (Edwin S. Gaustad ed., 1982) [hereinafter A DOCUMENTARY HISTORY]. Massachusetts and Connecticut established Puritanism. *See* THOMAS J. CURRY, THE FIRST FREEDOMS 106 (1986); JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY at xv (2d ed. 1987).

New York followed a "multiple establishment" system which gave it the power to establish a church, and thus to force even dissenters to financially support one chosen minister, in individual townships. *See* CURRY, *supra*, at 71-72. Rhode Island was the exception, being "the first commonwealth in modern history to make religious liberty (not simply a degree of toleration) a cardinal principle of its corporate existence and to maintain the separation of church and state on these grounds." AHLSTROM, *supra*, at 182.

20. *See, e.g.*, Adams & Emmerich, *supra* note 18, at 1562-82.

21. *See Everson*, 330 U.S. at 9-11; A DOCUMENTARY HISTORY, *supra* note 19, at 97; AHLSTROM, *supra* note 19, at 185-94, 197; CHIDESTER, *supra* note 19, at 18-19; CURRY, *supra* note 19, at 105.

Massachusetts expelled religious dissenters, banishing and executing defiant Quakers.[22]

In this context, Catholics were among the most discriminated-against Christians.[23] And even though toleration among the various Protestant denominations increased during the eighteenth century,[24] Catholics and Jews, as well as other religious minorities, remained the subject of officially sanctioned discrimination, even following the revolution and during the Continental Congresses.[25]

The adoption of the First Amendment did not put an end to government-sponsored religion. The First Amendment imposed restrictions only on the federal government,[26] and barred it from interfering with or being involved in religious communities,[27] including those supported by the states.[28] Only after *Cantwell v.*

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22. *See* CHIDESTER, *supra* note 19, at 21; *see also* CURRY, *supra* note 19, at 6-28; Hall, *supra* note 15, at 29-30. The Massachusetts Puritans demanded religious conformity because religious pluralism was equated with anarchy. *See* CURRY, *supra* note 19, at 6. The Massachusetts Bay Company also restricted the voting franchise to members of the Puritan Church in 1631. *See* AHLSTROM, supra note 19, at 147; WILSON & DRAKEMAN, *supra* note 19, at xxi.

23. *See* A DOCUMENTARY HISTORY, *supra* note 19, at 96-97; AHLSTROM, *supra* note 19, at 331-35; *see also* CURRY, *supra* note 19, at 31-53, 56, 72-73.

24. In 1691, Massachusetts provided liberty of conscience to all Christians, except Roman Catholics. *See* WILSON & DRAKEMAN, *supra* note 19, at xxi. New York provided for complete religious freedom in 1777. *See id.* Virginia passed Thomas Jefferson's Act for Establishing Religious Freedom in 1786. *See* CURRY, *supra* note 19, at 135-46; *see also* THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777), *reprinted in* WILLIAM LEE MILLER, THE FIRST LIBERTY app. 1 (1986) (Virginia Act for Establishing Religious Freedom (1786), introduced by Thomas Jefferson)

25. *See* CURRY, *supra* note 19, at 80, 91, 131-32. (Even in the early eighteenth century, Catholics could be challenged to subscribe to a test or an oath of abjuration to the pope, resulting in their exclusion from public life. Likewise, Jews possessed few civil rights, and even those were subject to challenge. Thus, as late as 1784, Virginia permitted only Christian ministers with a settled congregation to perform marriage ceremonies, and fined people for working on Sundays. *See id.* at 148. Massachusetts protected rights of worship only for Christian denominations, and authorized the legislature to require attendance at religious instruction. *See* Adams & Emmerich, *supra* note 18, at 1571. South Carolina restricted elective office to Protestants and dictated certain doctrines to churches that wanted to be incorporated by the state. *See* CURRY, *supra* note 19, at 150; Adams & Emmerich, *supra* note 18, at 1571. However, South Carolina changed those constitutional provisions in 1790, *see id.*, and in fact in 1791 incorporated a Jewish congregation in Charleston, *see* CURRY, *supra* note 19, at 151. Maryland, though, continued to require religious oaths and maintained a general anti-Catholic and anti-Jewish atmosphere. *See id.* at 157-58.

While most historical accounts of this time period generally do not describe in any detail the treatment of non-Christians, they presumably were equally subject to such discriminatory treatment.

26. *See* Wallace v. Jaffree, 472 U.S. 38, 49 (1985); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609 (1845); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1161 n.25 (1988).

27. But that did not prevent the federal government from diseriminating against some religious groups, such as Mormons. *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49-50 (1890) (repealing charter of

*Connecticut*[29] and *Everson v. Board of Education*[30] were the First Amendment's free-exercise guarantee and establishment prohibition also made applicable to the states through Fourteenth Amendment incorporation.

Thus, the discrimination that religious minorities faced during colonial times is in many respects similar to the system of oppression and discrimination that has been visited on racial minorities.[31] I will not discuss our nation's history of racial discrimination here, in particular discrimination against African Americans, Native Americans, Mexican Americans, or Asian Americans, since it has been the subject of a multitude of works.[32] Suffice it to say that even following emancipation from slavery, African Americans were systematically prevented from taking advantage of civil rights such as voting and jury duty, and, through segregation and Jim Crow laws, otherwise kept from full participation in the economic and social life of the larger society. Similar deprivations of civil rights, though on a lesser scale, also applied to Mexican Americans and Asian Americans,[33] while Native Americans were pressured into assimilation, left oftentimes without the civil rights enjoyed by others, and deprived of ancestral

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Mormon Church because its precepts of polygamy were repugnant to enlightened people); Reynolds v. United States, 98 U.S. 145, 164-66 (1878) (holding Mormon practice of polygamy not protected by First Amendment).

28. As a result, many states continued the practice of supporting a particular church or a system of multiple establishments, as well as the practice of imposing various other religious tests and restrictions. *See generally* CURRY, *supra* note 19, at 193-222.

29. 310 U.S. 296 (1940) (applying the guarantee of the Free Exercise Clause to states through the Due Process Clause of the Fourteenth Amendment).

30. 330 U.S. 1 (1947) (applying the Establishment Clause to states through the Due Process Clause of the Fourteenth Amendment).

31. Of course, religious minorities, including Jews, Catholics, Mormons, and Quakers continued to be victims of discrimination after the American revolution. *See, e.g.*, R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS 25-105 (1986); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990).

32. *See, e.g.*, WINTHROP JORDAN, WHITE OVER BLACK (1968); RICHARD KLUGER, SIMPLE JUSTICE (1976); RONALD TAKAKI, STRANGERS FROM DIFFERENT SHORES (1989).

33. *See, e.g.*, Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 321-23 (1986). For instance, until World War II, the right of Asians to become naturalized U.S. citizens was severely curtailed or abolished by Congress. *See, e.g.*, Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 280-82 (1996). Asians and Mexican Americans were subjected to segregation, *see* Westminster Sch. Dist. v. Mendez, 161 F.2d 774, 780 (9th Cir. 1947), and Asians were prohibited from owning land, *see* Karst, *supra*, at 322. In California, Asians were even prohibited from testifying in court against "whites," *see* People v. Hall, 4 Cal. 399 (1854); *see also* Charles J. McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 548-53 (1984), and were subjected to discriminatory taxes, *see id.* at 539-48, 553-59. Japanese Americans were forced into internment camps during World War II. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also* TRIBE, *supra* note 26, at 1466-74.

lands through government policies that imposed great suffering and caused the deaths of many.[34]

### *B. Race and Religion as Aspects of Cultural Identity*

Beyond the similar experiences of discrimination and exclusion that racial and religious minorities have faced, there are broader structural similarities in the roles that race and religion have played in our society. Both are indicative of an individual's self-identity and sense of belonging to a particular cultural community.

One note about terminology before I move on. The way I use the term "cultural group" in this Article largely overlaps with the description of ethnic groups in that it denotes a group of persons who to a large extent share similar customs, lifestyles, value orientations, religious beliefs, sense of historical continuity, physical characteristics, and/or language.[35] While the term ethnicity encompasses attributes of religious beliefs and is not inherently linked to notions of biology,[36] the term "cultural identity" avoids confusion with the more common notion of ethnicity as primarily describing group affiliations based on race and ancestry. It thus better captures the diversity of relevant factors and provides analytical clarity by avoiding the primary association with race and national origin.[37]

#### 1. The Value of Cultural Identity and Group Membership

Cultural group membership and identity serve two important functions for individuals. According to Will Kymlicka and Kenneth Karst, they provide means by which an individual can achieve "belonging" and self-identification, and they

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34. For a brief history of federal policy toward Native American tribes, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (Rennard Strickland et al. eds., 1982). *See also* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1-21 (1983); TRIBE, *supra* note 26, at 1466-74.

35. *See, e.g.*, CYNTHIA H. ENLOE, ETHNIC CONFLICT AND POLITICAL DEVELOPMENT 15-20 (1973); George A. De Vos, *Ethnic Pluralism: Conflict and Accommodation*, *in* ETHNIC IDENTITY 15, 18-23 (Lola Romanucci-Ross & George A. De Vos eds., 3d ed. 1995); GORDON, *supra* note 6, at 27-28 (discussing importance of race, religion, and national origin in forming ethnic groups); AUDREY SMEDLEY, RACE IN NORTH AMERICA 29 (1993); *see also* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 740 (1994) (Scalia, J., dissenting) (discussing cultural aspects of religious sect membership); Greene, *supra* note 2, at 73 n.293.

36. *See* GORDON, *supra* note 6, at 27-28. Even though ethnic labels may be associated with Bosnian Muslims, Croat Catholics, and Serb Orthodox Christians, groups that are primarily distinguished by religion, ethnicity is not commonly used to describe the religious differences that existed between Puritans, Quakers, and Catholics during colonial times.

37. *See, e.g.*, WILL KYMLICKA, LIBERALISM, COMMUNITY & CULTURE (1989); Karst, *supra* note 33.

form the basic scaffold of values and perspectives by which one evaluates and gives meaning to experiences and actions.[38]

Religion, race, and ethnicity are types of cultural groupings and consequently are important sources of self-definition; they serve as reference points of identity for an individual and others.[39] Cultural group membership ("Where do I belong?"), including ties to family, religion, and an ethnic group, is a precondition to discovery and definition of one's self ("Who am I?").[40] In this respect, a sense of belonging to and identification with a community provides assurance and confidence engendered by group solidarity.[41] It is in their own minds that individuals who share common experiences, values, or perspectives feel bound together. A person identifying himself or herself as African American

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38. *See* KYMLICKA, *supra* note 37, at 162-81; Karst, *supra* note 33, at 306-09; *see also* J. MILTON YINGER, SOCIOLOGY LOOKS AT RELIGION 89-113 (1963) (discussing the social forces involved in religious and ethnic group identification or withdrawal).

Will Kymlicka distinguishes his conception of the value of cultural group membership from that of communitarians in that communitarians "deny that we can 'stand apart' from (some of) our ends," believing instead that individuals are able to examine one's own moral values and ways of life. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 91-93 (1995); *see also* KYMLICKA, *supra* note 37, at 47-70.

39. *See* Karst, *supra* note 33, at 306-09; *see also* Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 449 (1990).

40. *See* Karst, *supra* note 33, at 308.

41. *See* KYMLICKA, *supra* note 37, at 175 ("Cultural heritage, the sense of belonging to a cultural structure and history, is often cited as the source of emotional security and personal strength."); *see also* Randall L. Kennedy, McClesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1395 (1988) (discussing the "propensity for persons to empathize more fully with those with whom they can identify"). Various members of the Supreme Court have recognized the value of belonging, particularly in the religion context. Thus,

> the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "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."

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)); *cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461 (1985) (Marshall, J., dissenting) (arguing that excluding the mentally retarded "deprives [them] of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community"); *Lynch*, 465 U.S. at 709 (Brennan, J., dissenting) ("to be . . . excluded on religious grounds by one's elected government is an insult and an injury that [cannot] be countenanced by the Establishment Clause").

The need for such attachments has variously been attributed to sociobiological causes (as a search for kinship), and to alienation from a large, heterogeneous, rapidly changing society, and has been viewed as a utilitarian means in the struggle for power, status, and income. *See generally* JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP 59 (1994) ("Ethnic identity may be a way for some to make a large, anonymous world a little more intimate."); J. MILTON YINGER, ETHNICITY 43-48 (1994).

or Catholic or Jewish is not merely identifying those characteristics, but making a statement about membership in and belonging to that particular cultural group.[42]

Cultural group membership also provides a person with a system of values, customs, and ways of thinking that give one's life, activities, and choices meaning and significance.[43] These values serve as reference points for how we evaluate and judge our own and others' experiences and activities.[44] "From the moment of [one's] birth the customs into which [one] is born shape [one's] experience and behavior,"[45] and our cultural group accordingly shapes us as persons in ways that we simply cannot disassociate from.[46] It provides "the spectacles through which we identify experiences as valuable" and through which we can meaningfully experience and choose among options about how to plan and live our lives.[47] Culture is thus the basic scaffold, the foundation, on which we build our lives and judge our experiences and goals.

### 2. Religion and Race as Similar Cultural Groupings

It is with respect to the identity and cultural framework function that religion, race, and ethnicity are different from other individual characteristics. Religious beliefs and affiliation delineate communities,[48] symbolize the common identity of community members[49] and provide a cultural value framework for those

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42. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 268 (1995). Karst also discusses the notions of "passing" (for African Americans) and "outing" (with respect to gays and lesbians) as related to the issue of belonging to a cultural group. *See id.*

43. *See* KYMLICKA, *supra* note 37, at 164-66.

44. *See id.*; KYMLICKA, *supra* note 38, at 82-93; *see also* RUTH BENEDICT, PATTERNS OF CULTURE (1934).

> No man ever looks at the world with pristine eyes. He sees it edited by a definite set of customs and institutions and ways of thinking. Even in his philosophical probings he cannot go behind these stereotypes; his very concepts of the true and the false will still have reference to his particular traditional customs.

*Id.* at 2; *see* RONALD M. DWORKIN, A MATTER OF PRINCIPLE 228 (1985); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 6-7 (1973); Karst, *supra* note 33; Margalit & Raz, *supra* note 39, at 448-49.

45. BENEDICT, *supra* note 44, at 3.

46. *Cf.* JOHN RAWLS, POLITICAL LIBERALISM 222 (1993) ("bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration . . . does not suffice to make accepting its authority free [of coercion]").

47. KYMLICKA, *supra* note 38, at 83 (quoting DWORKIN, *supra* note 44, at 227-28).

48. *See* EMILE DURKHEIM, THE SOCIAL FOUNDATION OF RELIGION 432 (1965) ("[B]efore all, rites are means by which the social group reaffirms itself periodically. . . . Men who feel themselves united, partially by bonds of blood, but still more by a community of interest and tradition, assemble and become conscious of their moral unity."); *see also* BETTY R. SCHARF, THE SOCIOLOGICAL STUDY OF RELIGION 73-92 (1970).

49. *See, e.g.*, CHIDESTER, *supra* note 19, at 83-86 (describing the relationship of religion to community formation and maintenance as culture religion); THOMAS F. O'DEA & JANET O'DEA AVIAD, THE SOCIOLOGY OF RELIGION 14-15 (2d ed. 1983); SCHARF, *supra*

members.[50] The result is that the importance of religious beliefs usually reaches far beyond the content of their tenets and distinguishes them from most nonreligious opinions and beliefs.

That is demonstrated for instance in the strong congruence of community and religious beliefs in faiths such as Judaism,[51] Sikhism, Mormonism[52] or the Old Order Amish.[53] In such religious groups, community life oftentimes centers around particular church or religious sect membership.[54] Based on the strength of such religious beliefs and the effects on an individual's cultural value framework

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note 48, at 40-47 (analyzing the overlap of religion and various societal memberships); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7, 39, 41-42; *see also* Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1474, 1477-78 (1984) ("Defined functionally, a religion is a system of belief that is essential to the self-definition of the believer.").

50. *See* GEERTZ, *supra* note 44, at 87-125 (describing religion as a cultural system of symbols and meaning that provides the individual with a conception of the world and a "gloss upon the mundane world of social relationships and psychological events," which renders them thus "graspable"); *cf.* CHIDESTER, *supra* note 19, at 31-33 (describing Puritan theocratic model of government where "church and state were seen as two aspects of a single order").

It is based on the value-generating quality of religion that conservative Christians have sought and justified greater influence of Christianity in the schools and other aspects of public life.

51. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (involving self-isolation from the rest of society of a community of orthodox Jews); SCHARF, *supra* note 48, at 42-44; YINGER, supra note 41, at 288 (discussing racial heterogeneity of Jews in Israel but overarching commonality of religion); Gustav Niebuhr, *Short Course in Judaism, Especially for New Year*, N.Y. TIMES, Sept. 13, 1996, at B6 (discussing judaism in context of community and identity).

52. *See* SCHARF, *supra* note 48, at 43-44.

53. *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) ("for the Old Order Amish, religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community").

The unifying function of religious beliefs was especially important during colonial times. At the time of the American revolution, "[a]fter a century and a half of colonial settlement in which the overwhelming majority of citizens were Protestant, a contemporary would in many instances have been hard put to define where [the religion of] Protestantism cnded and secular life began." CURRY, *supra* note 19, at 218. For instance, Calvinist theology and the associated perspectives imbued everyday life to such a degree that on the basis of that shared morality seventeenth-century Massachusetts Bay Colony Puritan magistrates were able to enforce conformity to established Puritan religious doctrines without the help of Puritan ministers. *See id.* at 7.

54. For instance, in studies conducted during the 1960s and 1970s, three-quarters of American Catholics reported that their closest friends were Catholic. *See* ANDREW M. GREELEY, RELIGION: A SECULAR THEORY 127 (1982); *see also* GORDON, *supra* note 6, at 122-23 (discussing preference for marriage within the religious group). Furthermore, in marriages that cross denominational lines, a frequent phenomenon today, a tendency exists for one of the spouses to convert, usually to the denomination of the more devout partner. *See id.*

and viewpoints, an individual may identify and define himself or herself foremost as a member of the religion.[55]

In the race and ethnicity context, the cultural framework and identity functions have caused the term "race" to acquire a significance and meaning well apart from its scientific moorings as a concept describing genetic ancestry or particular human physiological phenotypes.[56] While segregation and slavery may in part have been justified through pseudoscientific notions of racial superiority, as true scientific concepts, race and its proxy skin color have had little or no relevance in American society, as, for instance, the rule of "hypodescent"[57] or shifting judicial determinations of the meaning of "caucasian" and "white" have demonstrated.[58] Instead, race has been used in American jurisprudence as a cultural and social concept, important because of its social implications in public life and private interactions,[59] because it is one of the most visible symbols of

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55. Different religious communities have different voting patterns and usually form social reference groups for their members. *See* Robert P. Swierenga, *Ethnoreligious Political Behavior in the Mid-Nineteenth Century: Voting, Values, Cultures, in* RELIGION AND AMERICAN POLITICS 146 (Mark A. Noll ed., 1990). It has even been argued that in fact "'theology rather than language, customs, or heritage was the foundation of cultural and political subgroups in America.'" *Id.* at 150 (quoting RICHARD J. JENSEN, THE WINNING OF THE MIDWEST 89 (1971)).

56. Physiological characteristics and even diseases may be statistically correlated with certain races and ethnic groups, such as sickle-cell anemia with African Americans or Tay-Sachs disease with Eastern European Jews.

57. Under this rule, also called the "one-drop rule," a person with even one drop of "black" blood, that is, regardless of the proportion of African ancestry, was considered "black." For a discussion of the rule of "hypodescent," see Gotanda, *supra* note 3, at 23-26.

58. The Supreme Court itself acknowledged that determinations of skin color under the law is not a matter of biology but of sociological and political factors. Thus, testing "whiteness" by

> the mere color of the skin of each individual is impractical as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.

Ozawa v. United States, 260 U.S. 178, 197 (1922). *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW 79-92 (1996) (discussing Supreme Court holding that Asian Indians, even though caucasian, were not "white" for purposes of naturalization law, even though its ruling issued only a few months earlier had defined "white" as "caucasian" in a naturalization case involving a Japanese immigrant); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). This statement in itself can be seen as an attempt by the Court to draw "race" lines based on characteristics other than biology.

59. *See, e.g.*, STEVEN J. GOULD, THE MISMEASURE OF MAN (1981); Gotanda, *supra* note 3, at 23-36; Karst, *supra* note 42, at 306-08; Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987); López, *supra* note 58; *cf.* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (holding that private college's alleged discrimination against Arabs constituted

cultural group membership and identity.[60] Differing physical characteristics, like differing religious or cultural practices, simply mark those who are different as outsiders.[61]

Because of their social importance, racial and ethnic groups have been important in providing their members with a distinct sense of identity,[62] as well as a particular cultural frame of reference. The formation of ethnic enclaves, such as Chinatowns or Little Italies in urban areas, or ethnic German communities in Pennsylvania during colonial times, is testimony to that quality of racial and ethnic identity. The influence of ethnic and racial group membership in shading views and perspectives is readily apparent as well. Just as a conservative Southern Baptist's view of American society and politics may be shaded by his or her religion-based cultural background, so can the perspective of a Japanese American be shaded by Japanese culture and World War II internment, and that of an African American by our country's history of slavery, segregation, and discrimination.[63]

Of course, religion is largely thought of as a changeable characteristic because it is a form of belief. In contrast, race is generally viewed as unchangeable because of its derivation from biology. But religious beliefs are in many ways just as unchangeable as racial and other physical characteristics. Religious beliefs are

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racial discrimination forbidden by 42 U.S.C. § 1981); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (animus against Jews is the equivalent of racial animus for purposes of the prohibitions of 42 U.S.C. § 1982).

60. In contrast, other immutable physical characteristics, such as eye color, height, or shoe size lack the social symbolism of race. Given the social symbolism of race, it is not surprising that the term "race" has been used interchangeably with "ethnicity." *See Saint Francis College*, 481 U.S. at 611-13 (discussing post-Civil War congressional debates that referred to various ethnic groups as separate races, including Scandinavians, Anglo-Saxons, Germans, Jews, Latinos, Mexicans, Spaniards, Chinese, Mongolians, and Gypsies).

61. *Cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 (1985) (Marshall, J., dissenting).

> The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social or cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

*Id.* at 472 n.24 (Marshall, J., dissenting).

62. This perspective explains why it makes more sense to permit people to self-identify with a racial group rather than to assign racial group membership based on skin color. Only self-identification can capture the sense of belonging that is necessary to ethnic identity.

63. *See* Johnson, *supra* note 13, at 1414-22 (opining that African American community is a unique ethnic group); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

usually instilled at an early age, transferred by family, and taught as part of a person's value and belief system. Thought of by many religious practitioners as an integral part of the adherents' self-identity, religious beliefs are accordingly "something they did not choose, but which chose them."[64] Thus while racial "differences" may be viewed as imposed by biology, so in the religion context, differences can be equally outside of the voluntary control of the individual, imposed by one's god.[65] In that sense, religious affiliation can for social purposes be just as immutable as racial affiliation.

In addition to its importance to individuals, the cultural identity function of race and religion serves important roles in supporting a vibrant community and society. Differing cultural frameworks can further goals of pluralism as embodied in the Free Speech and the Free Association Clauses. Both religious and racial minority groups can serve as incubators for views that are different and contribute to the robust exchange of ideas in a democracy.[66] Cultural pluralism thus contributes to the cultural diversity and richness of the mainstream culture[67] that can strengthen our system of democracy.

But while religious and racial affiliation can contribute to the sense of community, religious and racial identification and distinctiveness can also prove divisive and lead to discrimination[68] and exclusion.[69] Indeed, such exclusion and discrimination motivated Puritans and others to come to the American colonies in the first place, and, in turn, led them to discriminate against dissenters and nonmembers of their religion.[70] In fact, formation or reinforcement of ethnic groups, such as Asian Americans[71] or African Americans[72] can be traced in part

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64. Hall, *supra* note 15, at 62; *see also* Brownstein, *supra* note 31, at 109-10; Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1215 (1996). The inclusion of religious affiliation as a suspect classification is consistent with this view.

65. It is for this reason that forcing somebody to violate their religious beliefs inflicts peculiar harms. *See* Hall, *supra* note 15, at 32-36.

66. *See, e.g.*, KYMLICKA, *supra* note 38, at 84-93; Greene, *supra* note 2 (noting importance of religion in forming nomic community); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87 (1992).

67. *See* KYMLICKA, *supra* note 38, at 123.

68. *See* O'DEA & AVIAD, *supra* note 49, at 18 ("Moreover, by sacralizing the identity it provides, [religious identification] may worsen and in fact embitter conflict, and build deeply into the personality structures of people a recalcitrance to come to terms with an opponent."); *see also* Hall, *supra* note 15, at 57-61. *See generally* Lawrence, *supra* note 59.

69. *See, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985); *see also* TRIBE, *supra* note 26, at 1163 n.38; Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 194 (1992); *cf.* Perry Miller, *Puritan State and Puritan Society, reprinted in* WILSON & DRAKEMAN, *supra* note 19, at 25-27 (discussing strong community basis of puritanism and exclusion of those of a different religion).

70. *See generally* CURRY, *supra* note 19.

71. It has been suggested that the formation of an Asian American group identity has been the result of the shared experience of discrimination. *See* Karst, *supra* note 42, at 297 & n.152. That is a significant observation since many immigrant Asians tend not to view themselves as part of a larger Asian ethnic grouping but instead as part of

to defensive efforts by those excluded and discriminated-against to recapture some of the dignity and self-worth lost by discrimination.

In this respect, members of both religious and racial minorities have depended on their groups to shelter them from the indignities imposed by the majority and to fight discrimination and marginalization.[73] Recognition of the peculiar significance of religious groups to individual members has led to special government deference to religious organizations and churches.[74]

However, exclusion and discrimination as factors contributing to ethnic group distinctiveness are not much different from other factors, such as urbanization or the necessity of local communal institutions and services, that create a desire for individuals to belong to and obtain the support of a communal group.[75] In that respect, ethnic identity and culture arising out of experiences of exclusion are not

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communities based on their national origin. In fact, until recent times, there arguably was no such thing as an Asian American identity, only separate Japanese American, Korean American, Filipino American, or Chinese American identities. Only recently has such an identity emerged based on political organizing. *See, e.g.*, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243 (1993); L. Ling-chi Wang, *The Politics of Ethnic Identity and Empowerment: The Asian-American Community Since the 1960s*, ASIAN AM. POL'Y REV., Spring 1993, at 43.

72. *See, e.g.*, ENLOE, *supra* note 35, at 24-25; TRIBE, *supra* note 26, at 1518 (discussing subjugation of black Americans through slavery and segregation and the role color played in institutionalizing that system); *see also* LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS (1977); MOORE, *supra* note 31, at 173-200; *cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148-55 (1976). *See generally* NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT 52 (1963) (arguing that slavery, prejudice, discrimination, and associated factors have created a communal group out of African Americans); JORDAN, *supra* note 32 (exploring attitudes of society toward African Americans and association of race with social status as slaves).

Ronald Taylor has argued that black ethnicity is not purely the result of exclusion, but has been and is also influenced by migration, urbanization, and intergroup conflict, influences similar to those that promoted the development of ethnic identities and communities among European immigrants. *See* Ronald L. Taylor, *Black Ethnicity and the Persistence of Ethnogenesis*, 84 AM. J. SOC. 1401 (1979).

73. *Cf.* NAACP v. Alabama, 357 U.S. 449, 460 (1957).

74. *See, e.g.*, Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). Of course, a particular religion may be practiced by a single person in a nonorganized fashion and still be entitled to the protections of the Religion Clauses. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

75. Other structural conditions that have been pointed to as reasons for new immigrants and even American-born individuals to join ethnic communities are de facto residential segregation and occupational concentration in particular fields. *See generally* Claude S. Fischer, *Toward a Subcultural Theory of Urbanism*, 80 AM. J. SOC. 1319, 1330-38 (1975) (arguing that urbanization is a cause of ethnic identity formation); William L. Yancey et al., *Emergent Ethnicity: A Review and Reformulation*, 41 AM. SOC. REV. 391 (1976).

any less authentic or valuable than ethnic groupings that arise out of other influences.[76]

These commonalities demonstrate not only that race and religion are similar, but that discrimination on those bases is fundamentally the same in nature. Discrimination based on religious or racial affiliation is simply a specific form of discrimination against those who do not belong and who have a differing cultural identity. Since certain religions have been associated closely with particular ethnic/racial groups as a historical matter, it is not surprising that religious-outsider status has frequently gone hand-in-hand with racial- and ethnic-outsider status.[77] At one time, "national or ethnic origin was bound so closely to . . . religious affiliation that Irish-Catholic, Swedish-Lutheran, or Russian-Jew were descriptive of single identities to a great degree."[78] American slavery provides the most palpable example of this close correlation. When African slaves were initially brought to the American colonies, their enslavement was justified by their religious beliefs: as heathens, they were not fully human and simply not entitled to the rights of other Christians.[79]

### *C. Religion Clauses and Equal Protection Clauses as Protection for Individual Cultural Identity*

It is with this history of religious and racial discrimination and the cultural and social significance of race[80] and religion in mind that one must consider religion

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76. For instance, African American culture has over time acquired many of the same characteristics associated with other cultures, including distinctive arts and music, a special holiday "Kwanzaa," *see generally* CEDRIC MCCLESTER, KWANZAA (1990), by some accounts even a unique English dialect, *see* YINGER, *supra* note 41, at 307-11 (discussing forms of and studies about African American vernacular English language), and a distinctive form of Christianity, *see id.* at 265-68 (discussing recent studies of early African American religions that characterize those religions as "distinctive form[s] of Christianity"); *see also* MOORE, *supra* note 31, at 173-200.

77. With respect to ethnicity, significant, if not complete, overlap is to be expected since ethnic groups oftentimes are defined or define themselves in large part along religious lines.

78. YINGER, *supra* note 38, at 89-90. Suppositions about the overlap of religious and ethnic/racial affiliation has in the past also led to (mis)labeling of particular racial groups. For instance, Asian Indians were referred to generically as "Hindus" even though "only a small fraction of the Asian-Indian immigrants were actually believers of Hinduism. One third were Muslim, and the majority were Sikhs." TAKAKI, *supra* note 32, at 295.

79. *See* JORDAN, *supra* note 32, at 20-24, 40-43 (arguing that justification for slavery arose out of the view that African Americans were heathens). Jordan notes that slavery was also justified based on the alien cultural practices of African Americans. *See also* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2072-75 (1993) ("[I]n the seventeenth century, when English settlers first adopted slavery, the very 'heathenism' of Africans made them subject to slavery."); Gotanda, *supra* note 3, at 33.

80. From this point forward, I will use the term "race" in the discrimination context to refer to both racial as well as ethnic and national origin/ancestral discrimination. The Supreme Court has applied the same scrutiny to such discrimination. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-24 (1995); Hernandez v. Texas, 347 U.S. 475, 479 (1954); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). *But see* Juan F.

and race jurisprudence. Concerns about the rights of religious and racial minorities and outsider groups were of sufficient national magnitude in the context of their times to prompt constitutional amendments.[81] In both situations, the history of discrimination against both types of minority groups had been well known at the time of the adoption of the constitutional amendments.[82]

In the First Amendment context, concerns over federal interference with religious practices were translated into prohibitions against federal establishment of religion as well as a guarantee of religious free exercise.[83] The focus on religious liberty makes sense in light of the cultural divisions during colonial and early postrevolutionary times—cultural group lines fell largely along religious

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Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995) (arguing that ethnicity is not fully protected). References to ethnicity will be made to refer to ancestral notions of cultural groups. I also like to avoid the use of the term "black" and "white," unless called for in the particular context or used by others, because they create a false dichotomy and are not very descriptive of the cultural issues addressed here. *But see* Gotanda, *supra* note 3, at 4 n.12. In that same sense, religion jurisprudence does not speak in terms of Christian versus non-Christian religions.

81. Modern revisionist interpretations of the Religion Clauses have ascribed to the framers of the Constitution only two principles: "to protect state religious establishments from national displacement, and to prevent the national government from aiding some but not all religions." TRIBE, *supra* note 26, at 1161. *But see* CURRY, *supra* note 19, at 207-22. Whether that view or the traditional view, that the Religion Clauses were intended to erect a wall of separation between church and state generally, *see* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971); TRIBE, *supra* note 26, 1278-82; Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 273 (1968), is correct is of little importance to the analysis here.

82. *See* CURRY, *supra* note 19, at 222; WILSON & DRAKEMAN, *supra* note 19, at 76 (quoting 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789)) (statement of Madison expressing opinion that purpose of the Religion Clauses should be to prevent preeminence of one or two sects and compulsion to conform to those sects); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("'historical instances of religious persecution and intoleranee . . . gave eoncern to those who drafted the Free Exercise Clause'") (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986) (omission added). The adoption of the Fourteenth Amendment was, of course, the result of slavery and the Civil War.

83. The individual need only show that the religious belief is sincerely held; inquiry into its substantive truth is prohibited. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944). The prohibition guards against impermissible restrictions on the free exercise of religion, *see* TRIBE, *supra* note 26, at 1181-83, or impermissible establishment of particular forms of religions. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 579-80 ("Indeed, the very idea of a legal definition of religion may be viewed as an 'establishment' of religion in violation of the first amendment.") (citation omitted); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 240 (1989). *But see* United States v. Seeger, 380 U.S. 163, 166 (1965) (construing conscientious-objector exemption of the selective serviee statute, which specifically only referred to religious objections, to cover nontheistic and other belief systems that "occup[y] a place in the life of its possessor parallel to that filled by the orthodox belief in God").

beliefs.[84] Thus, as protective devices for religious minorities, the Religion Clauses parallel the function of the Equal Protection Clause, as described in footnote four of *United States v. Carolene Products Co.*[85]

Of course, invidious discrimination and prejudice against others is not directed at cultural outsiders alone. Feelings of superiority and hostility against others can be caused by any number of rational and irrational reasons other than the other's outsider status. And to some extent, those kinds of unreasonable and irrational beliefs, as we may perceive them, are protected by the Constitution through the Free Speech Clause and the Religion Clauses.[86] The justification for providing special protections to cultural minority groups arises out of the nature in which cultural outsiders are different and out of their peculiar susceptibility to prejudicial treatment and exclusion.[87]

The differing values and perspectives of members of a different cultural group can make disagreements traceable to such differences difficult to resolve. Unlike debates that are based on shared assumptions and values, such as by scientists over the interpretation of the results of a particular experiment, debates that are not based on such common starting points are almost nonsensical. Inherently, the bases of cultural differences, such as the merit or truth of various religious doctrines or the validity of the perceptions and experiences of different racial groups, cannot themselves be the subject of logical and rational debate. Such matters deal in issues of faith and a cultural community's basic values and experiences. None of these can be objectively "wrong"—only different; nor can

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84. *Cf.* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2099-101 (1996).

85. 304 U.S. 144 (1938).

> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* at 153 n.4 (citations omitted); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 135-79 (1980). Both the Free Exercise Clause and the Establishment Clause, even though distinct and separately set out, have been characterized as complements of each other in providing for religious equality. *See* Hall, *supra* note 15, at 50 (suggesting that the Equal Protection Clause and Religion Clauses converge in the suspectness of the use of either religion or race for classification purposes).

For a critique of *Carolene Products*'s conception of "diserete and insular minorities," see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

86. *See, e.g.*, Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, ___, 115 S. Ct. 2440, 2450 (1995) (holding Ku Klux Klan-erected cross on public property protected by Free Speech Clause); *see also* Gotanda, *supra* note 3, at 10-12.

87. *See, e.g.*, Robert M. Cover, *The Origin of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982) ("'Discrete and insular' minorities are not simply losers in the political arena, they are perpetual losers. Indeed, to say that they lose in the majoritarian political process is seriously to distort the facts: they are scapegoats in the real political struggles between other groups."); *see also* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 732-33 (1974).

they be logically justified—they simply exist. Moreover, because our surrounding culture begins to shape us in childhood, it may be very difficult to consider the values, assumptions, and experiences of another cultural group in a manner unbiased by one's own cultural assumptions and values.[88] What is known about members of the other group is often based on stereotype, myth, or ignorance.[89] The ignorance, myth, and stereotypes in turn create an image of the other group that is alien and usually inferior.[90]

Yet, while it may be conceded that religion and race are closely related in their significance to individuals as a social, scientific, and philosophical matter, some may be skeptical about the relevance of this to those individuals' treatment by the law.[91] In order to simplify that inquiry, I focus on the unique self-definition and value-framework functions of religion that are protected by the First Amendment, and as incorporated into the Fourteenth Amendment. While the Religion Clauses protect other aspects of religion as well, such as the expressive aspects, (proselytizing or invoking religion in public debate), and associational aspects, (churches and group worship), these protections are not unique to the Religion Clauses; they are also protected by the Free Speech and Free Assembly Clauses, respectively.[92] Therefore, the aspects of religion that would specifically suffer harm from government actions if the Religion Clauses did not exist would be the identity and value-framework aspects.[93] Yet, these functions are also the functions

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88. *See* DWORKIN, *supra* note 44, at 228; RAWLS, *supra* note 46, at 222.

89. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1071-72 (1991). It is also in this sense that African Americans may be "invisible" to the rest of society—attempts at self-definition are ignored, and instead what is known about African Americans is only what a "white"-dominated culture perceives of them. *See id.* at 1069-70.

90. *See, e.g.*, Lawrence, *supra* note 59, at 331-36.

91. Of course, social, scientific, and philosophical approaches to the law, such as law and economics, have been used widely.

92. In fact, up until the 1960s, the primary vehicle for protecting religious freedom was the Free Speech Clause. *See, e.g.*, Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, ___, 115 S. Ct. 2440, 2446 (1995). The importance of protecting religious beliefs under the Free Speech Clause is also recognized in the political discourse of our nation. *But see* Ingber, *supra* note 83, at 244-45 (arguing that the scope of protection for religion is more expansive than that for speech, assembly, and equal protection); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 852-54 (1984).

Some commentators have argued that even the Free Speech Clause protects aspects of personal identity. *See, e.g.*, David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 330-35, 337-41 (1994).

93. This aspect of the Religion Clauses was most prominently implicated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where application of the Free Speech Clause might not have provided sufficient protections. *See also* discussion *infra* Part I.D.3. Religious belief, in contrast to many other types of beliefs or opinions, by being the result of an inner compulsion without an alternative, is thus constitutive of the self. *See* Dorf, *supra* note 64, at 1215; Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 92-94 (1995).

Another indication that it is the identity function of religion that is of great concern to the Court has been the cases involving conscientious objectors to the draft. In those cases

of race that the Equal Protection and Due Process Clauses protect with respect to members of racial minority groups. They protect individuals against discrimination on the basis of "who one is."[94]

Considering the Religion Clauses and the Fourteenth Amendment as means of protecting the cultural identity of individuals and preventing discrimination against outsiders is useful to the perennial question raised by *Carolene Products*: What kind of minorities are "discrete and insular" such that they qualify for special protections under the Fourteenth Amendment?[95] Focusing directly on the nature and some of the causes of prejudice provides one answer to that question: cultural minorities.[96] It also suggests that an important purpose of the First and Fourteenth Amendments is to protect and promote the cultural identity of individuals—not simply to prohibit the governmental use of race or religion as criteria for regulation or benefits eligibility.[97] Finally, it also suggests that the

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the Court found, after greatly contorting the statutory language, that the exemption applied even though the individual seeking the exemption did not hold the statutorily required *religious* belief, but did oppose war on deeply held grounds that were integral to his conception of existence and thus his self-identity. See *Welsh v. United States*, 398 U.S. 333, 339-40, 342 (1970), in which a conscientious objector justified his refusal to serve as, "I can only act according to what I am . . . ." *See also* United States v. Seeger, 380 U.S. 163, 185 (1965).

94. While a religious practitioner may technically be able to separate the overt religious practices from himself or herself to avoid discrimination, free exercise prevents the government from using the power of "punishment" based on an activity as an alternative means to the power of "punishment" based on status (as a certain religious adherent). *But see* Reynolds v. United States, 98 U.S. 145, 164-66 (1878).

95. *See* Ely, *supra* note 87, at 729-30. The defeat of a group's interest in the political process does not automatically make it a discrete and insular minority, just as remedial legislation as an act of grace from the majority does not translate into equal political participation. *See id.* at 729. It is therefore necessary to look beyond the mere loss of a particular legislative battle to determine which groups are discrete and insular.

96. Defining relevant aspects of cultural identity, in addition to race, ethnicity, and religion and the exact boundaries of that concept, is beyond the scope of this Article though language and maybe cultural dress would probably be covered. *See also infra* discussion accompanying notes 202-04. However, Avishai Margalit and Joseph Raz have identified criteria of cultural distinctiveness in a related context—justifications for political self-government rights—that are instructive here. *See* Margalit & Raz, *supra* note 39, at 439. Some of the criteria that might be appropriate here are: (1) possession of a shared common character or culture, (2) characteristics that permit mutual recognition, (3) group membership that is integral to self-identity, and (4) membership that is a matter of belonging and not of achievement. *See also* YINGER, *supra* note 41, at 3-5, 141-44 (discussing types of socially and psychologically significant ethnic groups as opposed to administrative or classificatory groupings). Furthermore, the relationship between the majority and minority groups, the "cultural distinctiveness" of the minority from the majority, may be relevant as well. *See* Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381, 408 (1991).

97. The Supreme Court's jurisprudence has continued to emphasize that the rights protected under the Fourteenth Amendment are individual rights rather than rights of a group. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Regents of the Univ. of Cal. v. Bakke, 438

constitutional protections afforded to members of racial and religious minorities should be equivalent. The question that remains is whether this perspective is supported by the jurisprudence of race and religion.

### *D. Race and Religion Under the Constitution*

#### 1. The Equality Principle

The notion of equality of all persons reaches as far back in our country's history as the Declaration of Independence: "We hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[98] And it is the principle of equality[99] that has thoroughly permeated the jurisprudence of race and religion.[100] Protection for religious liberties under the First Amendment and the Fourteenth Amendment Due Process Clause has revolved around equality concerns.[101] The Establishment Clause and its due process analogue generally prohibit preferential treatment of or aid to one religion over others, or religion in general over irreligion.[102] The Free Exercise

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U.S. 265, 289-94 (1978). Ascribing significance to an individual's membership in a particular cultural group does not speak to the rights of the group, only to the rights of the individual. In this sense, protections or benefits accruing to an individual are not based solely on "membership in a particular group," *Bakke*, 438 U.S. at 299, but rather on the specific harm suffered by the individual—due to and connected to membership in a particular group. Considering cultural group membership as important to individuals does not conflict in any way with the individual-centered focus of the Equal Protection Clause. *See* David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatives or Conservative Justices?*, 91 COLUM. L. REV. 790, 798-99 (1991).

98. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

99. In the religion context, the terminology for "equality" has frequently been couched in that of "neutrality," though for the purposes here, the meaning is the same. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring). *See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). I will use the term "equality" to refer to neutrality as used in the religion context.

100. *See, e.g.*, CURRY, *supra* note 19, at 199; *see also Church of the Lukumi*, 508 U.S. at 532; Larson v. Valente, 456 U.S. 228, 244-45 (1982); Hall, *supra* note 15, at 77-88 (discussing the influence of the equality principle in the religion context); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996).

In that sense, both establishment and free exercise form complementary notions of religious equality, both providing guarantees against religious discrimination and thus protecting religious liberty. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 256-59 (1962) (Brennan, J., concurring).

101. *See, e.g.*, Hall, *supra* note 15; Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

102. *See* Wallace v. Jaffree, 472 U.S. 38, 52-53 (1984); *Larson*, 456 U.S. at 244; Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

Clause prohibits discrimination through the imposition of obstacles to a particular person's practice of his or her religion.[103] In fact, the Court has noted that equal protection claims of invidious discrimination rooted in religious differences overlap with establishment claims.[104] Similarly, equal protection analysis has found its way into free exercise jurisprudence.[105]

The desire to achieve religious equality has been so strong, in particular to ensure that members of minority religions are truly equal to those of the majority, that traditional "wall of separation" advocates like former Justice Brennan, endorsement-approach supporters like Justice O'Connor, and conventional-deference advocates like Justice Scalia, would all permit state actions that provide special dispensations to minority religion followers from generally applicable laws that otherwise would unduly impact those minorities.[106]

Equality has also been the guiding principle of race jurisprudence.[107] In this respect, the purpose of the Equal Protection Clause was to "secure[] equality of rights among all the citizens of the United States"[108] and to "make an equality in

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103. *See Church of the Lukumi*, 508 U.S. at 532; *Larson*, 456 U.S. at 245 ("Madison's vision . . . naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs."); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1982) (noting it is well settled that neither state nor government may favor one religion over another).

104. *See* Gillette v. United States, 401 U.S. 437, 449 n.14 (1971) (noting that the equal protection claim is "not an independent argument in the context of these cases"). In *Walz v. Tax Commission of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring), Justice Harlan stated that religious neutrality "in its application requires an equal protection mode of analysis." *See also* Paulsen, *supra* note 101, at 315 (suggesting an equal protection approach to Establishment Clause adjudication).

105. *See Larson*, 456 U.S. at 246-47; *infra* note 109. The extent to which the Supreme Court's statements regarding religion as a suspect form of classification under the Equal Protection Clause and those regarding religious discrimination as violative of due process are distinct lines of reasoning (or are one and the same) is unclear. However, since the Due Process Clause contains an equal protection component out of which protection against invidious religious discrimination springs, there should be no distinction between the analysis under either. Thus, it is irrelevant whether one proceeds under the Due Process Clause or the Equal Protection Clause.

106. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Choper, *supra* note 2, at 504. *But see* Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding the Free Exercise Clause permits the State to prohibit sacramental peyote use).

107. The principle "equal protection of the laws" was "so clearly within the spirit of the Declaration of Independence . . . that no member of this House [could] seriously object to it." CONG. GLOBE, 39th Cong., 1st Sess. 2510 (1866) (statement of Rep. Miller), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES 215 (Alfred Alvins ed., 1967) [hereinafter RECONSTRUCTION AMENDMENTS].

108. *Id.* at 2502 (statement of Rep. Raymond), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 214; *see also id.* at 2539 (statement of Rep. Farnsworth) (recognizing a general notion of equality arising out of the Equal Protection Clause), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 217.

every respect between the two races."[109] Debates about the constitutional amendment on the House floor repeatedly indicated that the substance of the Amendment only embodied that which was already present in the *Declaration of Independence*, the reference that "all men are created equal."[110] This legislative history indicates that the framers of the Fourteenth Amendment did not intend to confine equal protection to equality of treatment but sought to achieve treatment of each individual as an equal, the same principle that underlies religious equality.

However, even though both the Religion Clauses and the Fourteenth Amendment contain the same principle of equality,[111] the Supreme Court has not treated classifications by these two types of groups in the same manner. Inherent in the principle of equality are the notions that (1) like cases should be treated alike and (2) different cases should be treated differently.[112] But it is only in the

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109. *Id.* at 2530 (statement of Rep. Randall) (stating "[t]he first section proposes to make an equality in every respect between the two races," even though he opposed it), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 216; *see also id.* at 2961 (statement of Sen. Poland) ("[This amendment] is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution."), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 230; *id.* at 2766 (statement of Sen. Howard) ("[This amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 220; *id.* at 2539 (statement of Rep. Farnsworth) ("I . . . hope that Congress and the people of the several States may yet rise above a mean prejudice and do equal and exact justice to all men, by putting in practice that 'self-evident truth' of the Declaration of Independence."), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 217.

110. *See id.* at 1034 (statement by Rep. Bingham, drafter of amendment) ("[E]very word of the proposed amendment is to-day in the Constitution of our country."), *reprinted in* RECONSTRUCTION AMENDMENTS, *supra* note 107, at 150. Congressional debates over the Freedmen's Bureau, which was designed to help only the former slaves during the Reconstruction period and not all others in the former confederate southern states, support that view. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 397-98 (1978) (Marshall, J., dissenting); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 784-88 (1985).

111. *See, e.g.*, Hall, *supra* note 15; Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 42 (1977); Paulsen, *supra* note 101, at 315.

112. *See* Karst, *supra* note 111, at 5 (discussing equality of citizenship as an underlying principle of the Equal Protection Clause); *cf.* Jenness v. Fortson, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .") (construing Williams v. Rhodes, 393 U.S. 23 (1968)); TRIBE, *supra* note 26, at 1438-39, 1514-16 (discussing equality in terms of treating people as equals and subjecting them to identical treatment, and the prohibition on subjugation of others); Pepper, *supra* note 49, at 50 (arguing that the Free Exercise Clause can be viewed as a "guaranty of *substantive* rather than merely formal equality") (emphasis in original).

From a different perspective, these two components of the equality principle constitute the ideal of equality and its social reality that Richard Wasserstrom has analyzed in the context of racism and sexism. *See* Richard A. Wasserstrom, *Racism, Sexism, and*

religion context that the Court has fully incorporated both notions and taken a substantive approach to equality.[113] For instance, the Court has rejected a truly religion-neutral Establishment Clause test whereby the government could not utilize religion as a criterion for action or inaction. Instead, the Court has specifically recognized that religion-neutral laws may affect different religions in dramatically different ways.[114] In contrast, the Court has, with some exceptions,[115] largely ignored the tenet that different cases be treated differently in the race context.[116] But whether one justified slavery of African Americans on the basis of race or religion,[117] or whether discrimination against the Santerian religious practices of Cuban Yorubans[118] was the result of their racial or religious minority status is in the end irrelevant—both forms of discrimination are invidious and based on prejudice arising from the alien nature of the group discriminated against.

Of course, textualists might justifiably raise the point that different constitutional treatment is arguably justified by the textually different language of the First and Fourteenth Amendments. Religion is specifically mentioned in the First Amendment as a subject of constitutional protection. Since no such corresponding reference to race exists in the Fourteenth Amendment, concerns of race might arguably be considered of lesser constitutional importance. But the First Amendment's textual language itself applies only to the federal government. Protections against the states arise out of the First Amendment's incorporation into the Fourteenth Amendment's Due Process Clause.[119] Thus, while religion might be "singled out" as a special right under the First Amendment, it is not so

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*Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

113. *See* Sherbert v. Verner, 374 U.S. 398 (1963); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559-63 (1993) (Souter, J., concurring). One commentator has argued that unlike religion jurisprudence, where the Court has been "concerued with both aspects of the formal principle of equality . . . that the similar be treated similarly and the different be treated differently," in the equal protection context the Court has been "oriented toward a difference-denying perspective," that everybody should be treaty similarly. Hall, *supra* note 15, at 50-52.

114. *See* Bowen v. Roy, 476 U.S. 693 (1986); *Sherbert*, 374 U.S. at 398 (permitting governmental consideration of religion as a means of accommodating free exercise); Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd per curiam sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985); *see also* TRIBE, *supra* note 26, at 1163. *But see* Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

115. Thus in *Brown v. Board of Education*, 347 U.S. 483, 486-88 n.1 (1954), the defendant school board improved the segregated school's facility during the course of the litigation so that by the time the case reaehed the Supreme Court, the physical facilities were considered equal in their physical aspects. However, "separate but equal" in the context of segregation could never satisfy the requirements of the Equal Protection Clause in spite of the equality of available educational facilities because of the message and badge of racial inferiority it imposed on African Americans. *See id.*; *see also* Karst, *supra* note 33, at 323 (suggesting that "separate but equal" has a stigmatizing effect).

116. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230-31 (1995) (prohibiting differing benign treatment of minorities under the Equal Protection Clause).

117. *See supra* note 85 and accompanying text; *supra* Part I.B.2.

118. *See Church of the Lukumi*, 508 U.S. at 524-25.

119. *See supra* text accompanying notes 29-30.

singled out under the Fourteenth Amendment. And with regard to the text of the Fourteenth Amendment, religion simply does not occupy a place any more significant than race.[120] In fact, race discrimination was the primary object of the Fourteenth Amendment and thus should enjoy preferred treatment over religion. That its language does not specifically refer to race should not make that focus any weaker in light of the amendment's historical context and legislative history.[121]

This, of course, raises another potential objection. Under an "originalist" view of the Fourteenth Amendment, the Amendment was meant to address racial discrimination, and expansion of Fourteenth Amendment protections to other concerns might reach matters outside of the scope of what was intended by the Amendment's drafters. Yet, the Supreme Court has already rejected such a narrow reading of the Fourteenth Amendment. In particular, it has rejected a reading that would arguably restrict the beneficiaries of the Equal Protection Clause to African Americans alone. Instead, the Equal Protection Clause is applicable to all.[122] Similarly, it has interpreted the Fourteenth Amendment guarantee of equality and liberty in a functional manner with respect to religious freedoms.[123] In spite of the Fourteenth Amendment's focus on racial equality, the case law has not made a distinction between the protection of religion from federal, as opposed to state, actions.[124] Fourteenth Amendment incorporation has simply resulted in guarantees that are coextensive.[125] The legal result has been

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120. It has been suggested that the authors of the Fourteenth Amendment did not intend to incorporate and extend the applicability of the Establishment Clause to the states. Because a subsequent constitutional amendment proposal (the "Blaine Amendment") sought to achieve such a result explicitly, such an amendment "would have been superfluous . . . if the Fourteenth Amendment had already made the Establishment Clause binding upon the States." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 257 (1962) (Brennan, J., concurring). Justice Brennan replied to this argument, arguing that the Establishment Clause and the Free Exercise Clause work together to guarantee religious liberty as it was incorporated into the Fourteenth Amendment, and that the "religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress." *Id.* at 258 (Brennan, J., concurring).

121. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954). Moreover, the Fifteenth Amendment, by making specific reference to race, makes explicit what is implicit in the Thirteenth and Fourteenth Amendments—that race is a subject of particular concern to the Constitution.

122. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-97 (1978).

123. *See supra* note 120.

124. *See, e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 334-40 (1987) (involving an Establishment Clause challenge to federal legislation and citing religion cases involving state actions, including Lemon v. Kurtzman, 403 U.S. 602 (1971), as precedent for holding); Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (same); *see also* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (involving an Establishment Clause challenge to state legislation and citing *Amos* in support).

125. *See* Cantwell v. Connecticut, 310 U.S. 296 (1990) (applying the Free Exercise Clause to the states through the Due Process Clause of the Fourteenth Amendment); Everson v. Board of Educ., 330 U.S. 1 (1947) (applying the Establishment Clause to the

that the protections afforded to individuals under the Fourteenth Amendment are sufficiently broad to encompass all of the protections under the Religion Clauses.

Courts have taken a similar approach with respect to protections against race discrimination by states and the federal government. Because the Fourteenth Amendment's Equal Protection Clause only protects against actions by states, equal protection is made applicable to the federal government by the Fifth Amendment's Due Process Clause. Nevertheless, the "'Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.'"[126] Thus, the scope of racial equal protection with respect to state and federal government actions, just like the protection of religious rights, is congruent.[127]

Of course, the Fifth Amendment's Due Process Clause is the same as the Fourteenth Amendment's Due Process Clause. Accordingly, their protections should be congruent as well. The conclusion one can thus reach is that just as the state action protections of the Fourteenth Amendment for both religious and racial minorities are congruent with the protections from federal government actions,[128] the discrimination protections and notions of equality guaranteed with respect to race are the same as those guaranteed with respect to religion. To the extent that the Fourteenth Amendment applies certain notions of equality in the religion context, those notions ought to be applicable to the race context as well, unless there are inherent differences between race and religion that justify differential treatment. In other words, the Fourteenth Amendment *itself*, the nexus

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states through the Fourteenth Amendment).

126. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)). *See generally* Kenneth L. Karst, *The Fifth Amendment Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977) (tracing the evolution of equal protection as it arose from the Fifth Amendment). The Supreme Court has noted that equal protection guarantees under the Fifth Amendment may be applied differently where the federal governmcnt aets in accordance with "overriding national interests." Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); *see* Karst, *supra*, at 560-62. One such exception may be Congress's special constitutional power over aliens. *See Hampton*, 426 U.S. at 101-02 n.21.

127. *See Adarand*, 515 U.S. at 224; Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."). Kenneth Karst has called this overlap in functions the "congrucnce" of the Due Process Clause with thc Equal Protection Clause. *See* Karst, *supra* note 126, at 552-58. "Thus, to the degree that a statute is (in equal protection language) 'overinclusive,' it also invites a due proccss attack, since it restricts liberty without justification." *Id.* at 547; *see also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 363 (1949) (noting the overlapping guarantees of the Due Process and Equal Protection Clauses). Thus, whether the protection of religious rights might come under an equal protection category of protected fundamental rights or a suspect classification, the distinction is largely irrelevant sincc the protections are the same.

128. Akhil Amar has argued that completc incorporation of the Rcligion Clauses into the Fourteenth Amendment has actually changed the understanding of thc Religion Clauses, and focused the guarantees of the Religion Clauses more on the interests affecting the individual. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-62 (1991).

of protections for religious and racial minority groups, does not present an impediment to, and does not require application of, a different notion of equality in the race and religion contexts. To the contrary, to the extent that race and religion are similar, they ought to be treated the same.

A review of how equal protection and due process have been and can be viewed to provide similar protections to race and religion is in order.

### 2. Equal Protection

One of the main principles of religion and race jurisprudence is that government classification based on religion or race is considered suspect under the Equal Protection Clause[129] and subject to the same strict-scrutiny review.[130] In both instances, strict scrutiny review serves to screen out impermissible government purposes in discriminating against minorities, including prejudice or other invidious motives. To survive strict scrutiny review in both the religious discrimination and the race discrimination context, a racial or religious classification must be justified by a compelling governmental interest and be narrowly tailored to its purpose.[131] Legislative intent for religious discriminatory

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129. *See* United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996) (upholding equal protection component of Fifth Amendment Due Process Clause); McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987) (stating Equal Protection Clause is violated if criminal enforcement is based on an "'unjustifiable standard such as race, religion, or other arbitrary classification.'") (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)); *see also* Burlington N. R.R. v. Ford, 504 U.S. 648, 651 (1992) (observing that Montana's venue rules do not classify "along suspect lines like race or religion"); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting that race, religion, and alienage are "inherently suspect distinctions"); *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

130. *See* Choper, *supra* note 2, at 493-500; *cf.* Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872, 886 n.3 (1990) (restating principle that laws burdening religious exercise are subject to same scrutiny as racial classifications). *Compare* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 579 (1993) (Blackmum, J., concurring) ("When a law discriminates against religion . . . , it automatically will fail strict scrutiny . . . .") (citing Sherbert v. Verner, 374 U.S. 398, 402-03, 407 (1963) (omission added)), *and* Larson v. Valente, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a . . . law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny."), *with Adarand*, 515 U.S. at 200, *and* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[L]egal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.").

131. *See Smith*, 494 U.S. at 901 (O'Connor, J., concurring in the judgment) ("[T]he First Amendment unequivocally makes freedom of religion, like freedom from race discrimination . . . a 'constitutional norm,' not an 'anomaly.'"); *Verner*, 374 U.S. 398 (suggesting that the compelling interest test is applicable to discrimination against religious praetices). *Compare Larson*, 456 U.S. at 247 ("[A] rule must be invalidated unless it is justified by a compelling governmental interest . . . and unless it is closely fitted to further that interest . . . ."), *with Adarand*, 515 U.S. at 227 (holding that all racial "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

laws has also been subjected to judicial scrutiny similar to that for racially discriminatory legislation.[132]

Finally, it has even been argued that the secular-purpose prong of the *Lemon v. Kurtzman*[133] test of the Establishment Clause has a parallel in equal protection.[134] The "secular" purpose requirement of *Lemon* renders governmental actions with "religious" purposes unlawful because of a lack of a lawful objective.[135] "The requirement of secular purpose thus translates into an injunction that government avoid pursuing objectives that manifest either disrespect or favoritism for any particular religious affiliation or tradition."[136] The equivalent restriction in equal protection doctrine—the absence of an invidious motive to the disadvantage of a particular racial group—is "expressed in the language of legitimacy" and in the requirement that "a classification . . . be explicable in light of an identifiable public good."[137]

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132. *See Church of the Lukumi*, 508 U.S. at 540. Justice Kennedy analyzes the legislative history of the religiously discriminatory statute at issue in a fashion similar to that used in the equal protection context. *See id.*

The Court's opinion in *Church of the Lukumi* is somewhat unclear because even though the justices were unanimous in the result, several concurring opinions arose. *See id.* at 522, 557-59. Because only Justice Stevens specifically joined the legislative intent analysis of Justice Kennedy's opinion, and because Chief Justice Rehnquist and Justice Scalia specifically did not join in this part, it is unclear to what extent legislative intent analysis for religious discrimination claims enjoys support from the Court.

133. 403 U.S. 602 (1971). To avoid running afoul of the Establishment Clause, *Lemon* requires that (1) the government action have a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. *See id.* at 612. The *Lemon* test has been the subject of criticism by members of the Court and commentators. *See e.g.*, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720-721 (1994) (O'Connor, J., concurring); TRIBE, *supra* note 26, at 1210-13.

134. *See* Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 742-49 (1986). However, Ira Lupu also asserts that there are significant differences between the two fields. *See id.* at 749-55, 761-69. Thus, Lupu argues that a compelling state interest exists as a defense to a claim of race discrimination, while no defenses to Establishment Clause claims exist. *See id.* at 753-54. A finding of establishment, of course, is a legal conclusion that ends the Establishment Clause inquiry, whereas a finding of race discrimination may not. But while labeling a relevant factor in a legal analysis as a justification defense to a claim as opposed to an element of the claim has ramifications on who bears the burden of proof in a trial (and as a result may affect the substantive outcome), such labels are of little importance in determining the substantive legal merits of a claim. All factors must still be considered. The Court appears to have essentially condoned the establishment of religion under a "long-standing-practice" justification. *See e.g.*, Epstein, *supra* note 84, at 2086. The legal significance of discriminatory impact in both contexts is discussed *infra* Part II.C.

135. *See* Lupu, *supra* note 134, at 744.

136. *Id.* at 746. This prong of the *Lemon* test also promotes substantive equality between religious practitioners and nonpractitioners. *See also* Paulsen, *supra* note 101, at 326-31.

137. Lupu, *supra* note 134, at 744-45.

### 3. Liberty and Due Process

The Due Process Clause not only provides procedural safeguards against arbitrary treatment but also grants substantive protections aimed at preserving personal dignity and autonomy. Guarantees of liberty also apply to "the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[138] In the free exercise context, this liberty guarantee has, like the Equal Protection Clause, provided protection against discriminatory treatment.[139] But unlike the Equal Protection Clause, the liberty guarantee has given rise not only to the negative duty of avoiding discriminatory treatment, but also to an affirmative duty to tailor government actions to relevant individual religious differences.[140]

Despite the prominence that religious liberty has occupied in this context, the liberty guarantee of the Due Process Clause has also been applied more broadly to protect an individual's cultural and ethnic self-definition. Thus, in *Meyer v. Nebraska*, the Supreme Court invalidated a post-World War I prohibition on the teaching of the German language before the eighth grade because it impeded the ability of parents of German ancestry to impart their cultural characteristics, for example, the German language, to their children.[141] Even though the regulation appeared to affect the children most directly, the prohibition also violated the parents' liberty interests because of the close connection between parent and child.[142] Because controlling the cultural upbringing of one's offspring involves the definition of one's self as it is passed on to one's children, interfering with a parent's right to bring up his or her child interferes directly with the parent's identity. Just as ancient Sparta's custom of withdrawing young boys from the care of their families so as to "submerge the individual and develop ideal citizens" by educating and training them in a uniform manner through the custody of the state

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138. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

139. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

140. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 138 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

141. *See Meyer*, 262 U.S. at 399, 401-03; *see also* Martha Minow, *We, the Family: Constitutional Rights and American Families*, *in* THE CONSTITUTION AND AMERICAN LIFE 299, 303 (David Thelen ed., 1988). The law was targeted at immigrants, whose primary language was not English. By forcing them to give up part of their cultural distinctiveness, the law sought to force quicker assimilation. *See Meyer* 262 U.S. at 401-03; *see also* Yu Cong Eng v. Trinidad, 271 U.S. 500, 524-25 (1925) (holding Philippine law prohibiting Chinese merchants from keeping their books in Chinese, even if that was their only language, violative of the Philippine equivalent of the Fourteenth Amendment Due Process Clause).

142. *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (citing *Meyer* as authority).

would violate due process of law, so too, the *Meyer* Court noted, did Nebraska's prohibition on the teaching of the German language.[143]

Only a short time thereafter, the Court intervened again in *Pierce v. Society of Sisters*[144] to invalidate a government prohibition on parochial school attendance. Again, the state law interfered with parental rights to impart their sense of identity and religious values to their children. In *Pierce*, the Court stated that the government does not have any general power "to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[145] In this respect, "[t]he duty to prepare the child for 'additional obligations' . . . include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship."[146] These elements are all integral to forming a child's conception of self.

Both *Meyer v. Nebraska* and *Pierce v. Society of Sisters* acknowledged the limits that the Due Process Clause imposes on the state's power to interfere with an individual's cultural identity. At the heart of liberty protected by the Due Process Clause "is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."[147]

In that respect, protection of the family and an individual's intimate relations, including those of marriage[148] and procreation,[149] is a means of protecting those human relationships which are integral to individual self-identity[150] and of safeguarding "the ability independently [from unwarranted state interference] to define one's identity[, an interest] that is central to any concept of liberty."[151] A

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143. *Meyer*, 262 U.S. at 402.

144. 268 U.S. 510 (1925).

145. *Id.* at 535.

146. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).

147. *Casey*, 505 U.S. at 851.

148. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding state prohibition on interracial marriage not only void based on equal protection grounds but also void based on its deprivation of a liberty interest protected by the Due Process Clause).

149. *See Casey*, 505 U.S. at 835 (citing as authority Griswold v. Connecticut, 381 U.S. 479 (1965)).

150. *See* Kenneth L. Karst, *The Freedom of Intimate Associations*, 89 YALE L.J. 624, 635-37 (1980).

151. Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984). Thus, family life plays a role in any definition of liberty:

> [T]he personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.

*Id.* at 619-20 (citations omitted); *see also* Bowers v. Hardwick, 478 U.S. 186, 203-06

child, as a being created by the parents, is as much a part of each parent's conception of self as each parent's own individual identity.[152] Governmental interference with the transmission of cultural identity and values from parent to child directly interferes with the parent's conception of identity and cultural values.[153]

Protection of religious aspects of cultural identity has matured since the incorporation of the Religion Clauses into the Fourteenth Amendment. *Pierce* can accordingly be seen as a precursor to full incorporation. However, *Meyer* dealt more broadly with conceptions of cultural identity, in particular with aspects of language and ethnic identity. And with respect to conceptions of identity other than religion, *Pierce* and *Meyer* continue to be of strong precedential value and retain great vitality.[154]

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(1986) (Blackmum, J., dissenting). In *Bowers*, the Court refused to recognize such a right in regard to one's sexual orientation. *See id.* at 194-96. However, the Court did allow states to accord some protection to orientation in *Romer v. Evans*, 116 S. Ct. 1620 (1996).

152. It is also this relationship between parent and child that was of crucial importance to the Old Order Amish. *See* Wisconsin v. Yoder, 406 U.S. 205, 222 (1972) (construing *Meyer v. Nebraska* to suggest that exemption from compulsory education beyond eighth grade may be necessary because education is "viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish Faith"). The right asserted there was that of the Amish parents to shape their children in their own faith so that the children could be more easily integrated into Amish society. Because religious beliefs and values were so central to Amish identity and because public education beyond the eighth grade, when values incompatible with the Amish way of life would be taught, would have interfered with formation of Amish beliefs and values, public high school education was objectionable. *See id.* at 211-12. Only basic education that "does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period" was acceptable. *Id.* at 212. Compulsory high school education would have destroyed the Old Order Amish church community. *See id.* at 211.

153. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our cherished values, moral and cultural."); *see also* Block v. Rutherford, 468 U.S. 576, 599 (1984) (Marshall, J., dissenting) (noting the constitutionally protected freedom to "cultivate familial relations"); Smith v. Organization of Foster Families, 431 U.S. 816, 843-44 (1977) ("'[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.'") (quoting *Griswold*, 381 U.S. at 486).

This view assumes of course that a child is an empty vessel, with no interest in cultural identity independent of the parent. Limits to parental control over children and the legitimacy of governmental concern over the rights of children with respect to their parents have been recognized, *see* Prince v. Massachusetts, 321 U.S. 158 (1944); *see also* TRIBE, *supra* note 26, at 1299-1300, and include interests in ensuring that children are not neglected or abused, *see* Parham v. J.R., 442 U.S. 584, 604 (1979), and that the rights of others are not interfered with, *see* Runyon v. McCrary, 427 U.S. 160, 176-79 (1976).

154. *See, e.g.*, *Casey*, 505 U.S. at 848 (relying on *Pierce* and *Meyer* as governing authority). The Court's willingness to extend the conscientious-objector exemption from the federal draft to persons who oppose military service based on beliefs similar in nature to religion, but not religious in nature, *see* Welsh v. United States, 398 U.S. 333, 340-41 (1970), can be justified under this interpretation of the Due Process Clause.

However, Juan Perea has discounted *Meyer* as precedent for protections accorded to

In spite of the Due Process Clause's interpretation as protecting an individual's religious and racial/ethnic identity,[155] and in spite of the continued reliance on this interpretation, it is only in the religion context that the affirmative-liberty guarantee of due process has played a significant role.[156]

## II. RECONCILING THE JURISPRUDENCE OF RACE AND RELIGION: TOWARD AN INTEGRATED APPROACH TO CULTURAL IDENTITY

### *A. Religion as the Primary Model*

While a cultural model of religion and race in the law can bring a different perspective to and illuminate difficulties in a number of doctrinal areas in race and religion jurisprudence, it is also appropriate at this point to consider why it might be justified as a normative matter to consider race issues through the analytical frameworks created by the Court's religion jurisprudence.[157] After all, the above comparison of religion and race jurisprudence shows that even though both are similar in many respects, there are a number of doctrinal areas in which religion is clearly a subject of preferred treatment over race.

First, as a nation we have had over 100 years' more experience, from the time of the passage of the First Amendment to the Fourteenth Amendment, in dealing with issues of religious equality rather than racial equality. As a result, there is more institutional experience in dealing constructively with religious conflicts

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ethnic identity because of *Meyer*'s connection to the conception of substantive due process born in *Lochner v. New York*, 198 U.S. 45 (1905). *See* Perea, *supra* note 80, at 593. *But see* Ira C. Lupu, *Untangling the Strands*, 77 MICH. L. REV. 981, 988-89 (1979) ("[S]urvival of [*Meyer* and *Pierce*] . . . suggests that the only durable objection to the *Lochner* era's handiwork is that it generally selected the 'wrong' values for protection.").

155. This interpretation also provides a rationale for the equal protection guarantee that the Court has found in the Due Process Clause. Because due process protects cultural identity, it also protects individuals to some extent from being treated in a manner that is totally contrary to their own conception of themselves, that is, treated as inferior and unequal, instead of as full and equal human beings. Naturally, this view of due process and equal protection also shields even nonminority individuals as well as individuals discriminated against based on a mistaken belief. In both instances, the individual's identity is equally harmed.

156. For instance, in *Hernandez v. New York*, 500 U.S. 352, 362 (1991), because of the case's posture as a peremptory strike challenge, foreign language-discrimination claims were resolved under the Equal Protection Clause even though the more appropriate analytical framework would have been the Due Process Clause. For a detailed discussion of *Hernandez*, see Part II.C.

157. A converse approach has been suggested by David Steinberg, who argues that religious accommodations should be analyzed under the Court's affirmative action jurisprudence. *See* David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991). However, such an approach, if generally applicd to religious exemptions, would be highly unsatisfactory since there is no mandatory accommodation equivalent in the race-equal-protection context. *See* discussion *infra* Part II.C.

and frictions, in furthering the goal of equality, and in finding an appropriate role for government in achieving such equality.

Another important reason for adopting religion jurisprudence as the primary model is, as Ira Lupu has put it: "Long before constitutional doctrine recognized the equality claims of racial minorities or women to treatment as equals, white men could perceive the normative force and political efficacy of a requirement that all religious affiliations be afforded equal respect and dignity."[158] That has simply been the result of the much greater societal penetration that religious minority groups have been able to achieve in comparison to racial minorities. Because religious differences have crossed more social lines, the experiences and perspectives of religious minorities accordingly have been more readily accessible to society at large than those of racial minorities,[159] with attendant consequences for what "whites" know about other racial minority groups.[160] Moreover, the numerosity and diversity of Protestant sects has impeded formation of a unified dominant majority religious group in our society.[161] This form of religious "diversity" has arguably led to a situation where perspectives of religious rights are less dominated by a single majority and where society is more sensitive toward religious minority groups simply because those in the majority could more easily relate to the experiences and perspectives of the minority.[162]

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158. Lupu, *supra* note 134, at 745-46; *see also* Larson v. Valente, 456 U.S. 228, 245 (1982) (noting that religious freedom "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations").

159. The United States Supreme Court itself has been more religiously diverse than racially diverse. Although the Supreme Court used to be the province of "white" Protestant men, its first Catholic justice, Roger Taney, was appointed in 1836. Louis Brandeis was the Court's first Jew in 1916. In contrast, the first woman, Sandra Day O'Connor, did not join the Court until 1981. The first African American to join the Court was Thurgood Marshall in 1967. At present, there are three Catholics and two Jews on the Court. There are two women and one African American. There have never been any Asian American, Latin American, or Native American justices. *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993, at 476, 506 (Clare Cushman ed., 1993); Tony Mauro, *The Court's Religious Conversion*, LEGAL TIMES, July 1, 1996, at 8.

160. *See* Aleinikoff, *supra* note 89, at 1071-72.

161. *See* Lupa, *supra* note 134, at 743. In the sense that the overwhelming majority of colonial, and later American, citizens were Christians, there has been one majority religion. Arguably, this has resulted in the acceptance of ceremonial deism by the Court. *See* Epstein, *supra* note 84. However, to the extent that the various Christian religious sects do act monolithically, a countervailing force in the current politics of religion has been irreligionists and other individuals with a weak sense of religious identity (i.e., their interest in resisting movement toward affiliations by government with Christianity or any religion generally).

162. Arguably, the overwhelming support for the congressional enactment of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (1994) (held unconstitutional by City of Boerne v. Flores, 117 S. Ct. 2157 (1997)), passed in response to the Supreme Court's decision affecting a Native American religion in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), demonstrates this greater sensitivity toward religious minorities. *See* Destro, *supra* note 7, at 8. *But see Boerne*, 117 S. Ct. 2157 (holding that the RFRA exceeded Congress's power under § 5 of the Fourteenth Amendment).

Linking the treatment of racial and religious minorities thus incorporates racial minority groups into the existing reciprocity of perspectives between majority and minority.[163] But more importantly, recognition of the similarities of race and religion can help the majority understand what it means to be "on the outside looking in" in the race as well as the religion context.[164]

The religion model has demonstrated that the American ideal of tolerance for differences, more fully implemented at some times than at others, has permitted persons of differing cultural identities to coexist and work together to form a nation. The experience has proven that tolerance and protection of varying individual cultural identities can bring persons together by sending a message of inclusion, as opposed to a message of exclusion and intolerance that is sent by forced assimilation or conversion.[165]

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Of course, it is true that the religious minority groups that have been most successful at integrating with the majority have almost exclusively been "white." Yet, that should not detract from the progress that integration has been able to achieve with regard to these groups. It also arguably demonstrates that racial and religious exclusion are related and simply different facets of the same phenomenon.

163. The lack of a reciprocity of perspectives has arguably been the most important cause for the Supreme Court's sanctioning of discrimination against racial minorities in the past. American history, from *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), to *Plessy v. Ferguson*, 163 U.S. 537 (1896), to *Korematsu v. United States*, 323 U.S. 214 (1944), has borne this out.

In this regard, the Supreme Court's reliance on the continuing vitality of *Korematsu*, the only case where an explicit racial classification was upheld after strict scrutiny review, is very distressing. Even though *Korematsu* is today commonly known as epitomizing the invidious role of racial prejudice in depriving a racial minority group of American citizens of their civil rights, which recently resulted in a congressional apology, *see* 50 U.S.C. § 1989 (1988), *Korematsu*'s proposition that "[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [even though] the standard of justification will remain constant," Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978), and citing *Korematsu*, 323 U.S. at 214), remains unquestioned by the Court. Yet, it was precisely based on politically expedient reasons, reasons based on racial prejudice, that led the Court to uphold internment of Japanese Americans during World War II in spite of the heightened scrutiny. This appears to remain valid even today.

164. Justice O'Connor has written:

> [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "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."

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)); *see also* Lawrence, *supra* note 59.

165. *See* James U. Blacksher, *Majority Black Districts,* Kiryas Joel, *and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407, 431 (1995-1996) ("Those who contend that the Free Exercise Clause endorses affirmative state accommodation of religions . . . point out how well the First Amendment has already accomplished its

Of course, adoption of the religion framework as a primary model does not mean that its use is appropriate in all circumstances. Just as the principle of accommodation in the religion context is applied differently depending on the particular circumstances, the same principle can lead to different results if there are relevant differences between race and religion. And in areas where religion jurisprudence has affected and touched upon treatment of non-Christian religions (e.g., where the fact that the majority religion in this nation is Christianity is significant), such as ceremonial deism, greater circumspection in adoption of that jurisprudence is justified.

### *B. Pervasive Regulation of Race and Religion: Nonentanglement and Segregation*

Considering the functional similarities of race and religion suggests how very closely related the principles underlying the various doctrines in the two fields are. Just as the government is prohibited from being pervasively involved in religion under the First Amendment,[166] the government is also prohibited under the Equal Protection Clause from pervasively regulating race relationships, as the Jim Crow system of segregation did prior to *Brown v. Board of Education.*[167]

However, underlying the simple principle that segregation, whether by race or by religion, is unlawful are deeper concerns related to governmental interference with individual identity and the exclusion from the polity of those with a different cultural identity. At one level, a pervasive regulatory scheme where government defines and polices racial or religious identity impairs the autonomy of individuals and their right to define themselves. Such regulation squarely collides with the autonomy values protected by the Religion Clauses and the Due Process Clause which allow one to define one's own conception of the self.[168] At another level, pervasive regulation of race and religion, by giving the stamp of government approval to imposed labels of racial identity, has the potential for institutionalizing and freezing in time racial and religious divisions, as segregation previously did.[169] Opportunities for and the ability to form cross-

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original objective of forestalling national disunity along religious lines.").

166. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Paulsen, *supra* note 101, at 345-46 (tracing the historical concept of how the prohibition on entanglement prevents undue government influence of religion).

167. 347 U.S. 483 (1954); *see* Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on* Kiryas Joel *and* Shaw v. Reno, 26 CUMB. L. REV. 515 (1995-1996).

168. *See* discussion *supra* Part I.D.3.

169. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE 117 (1990) ("The root of prejudice is the separation between groups that exaggerates difference."). The Supreme Court has frequently expressed its concern about the potential for affirmative action to institutionalize racial divisions. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (Powell, J., plurality opinion) (observing that societal discrimination could be used to "uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298-99 (1978).

racial and cross-religious relationships would be impaired, making it that much more difficult for religious and racial minority groups to bridge differences with other groups[170] and participate successfully in the political process.[171] Thus, some benign forms of segregation, such as that at issue in *Board of Education of Kiryas Joel Village School District v. Grumet*,[172] could in the long run inadvertently re-create a system of oppression for such minority groups.

Yet, while the opposite of segregation—integration—can overcome the physical separation between individuals of different cultural identities, integration as practiced has been criticized as having failed to take into account, and as being ineffective in overcoming, the social and economic inequalities resulting from segregation.[173] Integration in the school desegregation context, for instance, has largely failed to improve educational opportunities for racial minorities. Instead it has provided incentives for those of better means to opt out, leaving only the poor to be integrated. The result has been continued inequality in educational opportunities, marking the formerly segregated group of people with the stigma of inferiority. Of course, that failing alone cannot invalidate the necessity of desegregation efforts. However, considering the underlying reasons for segregation's impermissibility, physical desegregation alone is clearly not an

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However, Karst has argued that present affirmative action programs do not create such a danger. *See* Karst, *supra* note 33, at 344. Neil Gotanda has described "white supremacy" as the Establishment Clause analog in the equal protection context. *See* Gotanda, *supra* note 3, at 67.

170. *See* MINOW, *supra* note 169, at 117 ("Isolation itself may contribute to false views of difference which impede mutual relationships."); Aleinikoff, *supra* note 89, at 1071-72.

171. Viewed from a perspective that fostering commonalities between different cultural groups is a desirable governmental activity, the secular-purpose-and-effect prong of the *Lemon* test ensures that government focuses on purposes and effects that people can agree on independent of their religious beliefs or nonbeliefs. In this sense, secular purpose and effect is not an opposite of sectarian purpose and effect, but rather refers to purposes and effects that transcend those of particular religions or have become so much a part of American civic culture that they have taken on a nonreligious meaning. *Cf.* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (asserting in dictum that display of religious paintings in governmentally supported museums would not be an advancement of religion); benMiriam v. Office of Personnel Management, 647 F. Supp. 84, 86 (M.D.N.C. 1986) (discussing the use of the Christian dating system). Of course, what has beeome so much a part of American civic culture that it has taken on a nonreligious meaning is subject to debate. *See* Choper, supra note 83; Ingber, *supra* note 83, at 310-15 (discussing distinction of nonreligious matters, matters independent of religion/existence of sacred or divine, and irreligious matters, which oppose or are hostile to religion, and arguing that the nonreligious are not subject to the constraints of the Religion Clauses). *Compare* Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."), *with id.* at 797 (Brennan, J., dissenting) (arguing that legislative prayer "is nothing but a religious act").

172. 512 U.S. 687 (1994).

173. *See generally* Johnson, *supra* note 13.

adequate and complete remedy for the effects of prior segregation, contrary to the implications of some of the Court's recent pronouncements.[174]

Instead, remedies to segregation must include promotion of individual self-identity and self-worth, such as through improved educational opportunities. A secure sense of self-identity allows individuals to be more tolerant of racial and religious differences and thus bridge such differences more easily. Minority group members can approach relationships with members of other religious and racial groups as equals. The improvements in interactions[175] can lead to social and political coalitions based on issues of common interest, and can accentuate the commonalities, as opposed to the differences, that the minority and majority share. Resulting tolerance and respect can promote the fading of racial divisions as they largely have for religious divisions.

### *C. Formal vs. Substantive Equality: Mandatory Religious Accommodations, "Cultural" Accommodations, and* Washington v. Davis

In the religion context, the Court has generally approached protections for religious minority groups by considering both tenets of substantive equality—treating "like cases alike" and "different cases differently."[176] Regardless of the motivation for government actions that burden religious free exercise, accommodation of particular religious practices is required where such actions impose an undue burden on free exercise and do not involve a compelling governmental interest, and where an exemption would not substantially hinder the fulfillment of the governmental interest.[177] In this respect, mandatory

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174. *See* Freeman v. Pitts, 503 U.S. 467 (1992); *see also* Greene, *supra* note 2, at 31-35. *But see* Milliken v. Bradley, 433 U.S. 267, 272 (1977) (approving district court decree requiring, in addition to a pupil reassignment plan for Detroit school system, a number of "educational components," including remedial reading, revised testing and counseling programs, and training programs for teachers).

175. *Cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) ("It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process."). It is in this context that affirmative action programs must be considered. *See infra* Part II.D.2.

176. *See* discussion *supra* Part I.D.1. However, Abner Greene has recently argued that the Court is moving toward using the same approach in religion cases that it is presently following in race cases—treating like cases alike. *See* Greene, *supra* note 2, at 63-70.

177. *See* Bowen v. Roy, 476 U.S. 693 (1986) (plurality opinion); Jensen v. Quaring, 472 U.S. 478 (1985); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). The Court has stated:

> Where the state conditions reeeipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981). The availability of mandatory religious accommodation appears to have been restricted

accommodation doctrine[178] has proven itself to be uniquely suited to protect members of religious minorities unable to obtain relief from the unusual burdens of otherwise religion-neutral laws.[179]

But, while the Court has pursued a goal of substantive religious equality by looking to discriminatory effects,[180] race jurisprudence has largely implemented only formal notions of equality, in which "like cases are treated alike."[181] The

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in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), which held that criminal drug prohibitions need not be tailored to provide religious exemptions to a peyote user to ease incidental effects on free exercise rights, regardless of the severity of the burden on the religious practitioner. *See also* City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997) (stating that "Smith held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest") (case name not italicized in original). However, *Smith* has been severely criticized, by, among others, Justice Souter who joined the Court after *Smith* and who has called for its reexamination. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559-77 (1993) (Souter, J., concurring); *see also* Pepper, *supra* note 49, at 35-37. Justice O'Connor, in her concurrence in *Smith*, characterized the decision as particularly involving a significant interest by the state in combating drug dealing and addiction. *See Smith*, 494 U.S. at 904 (O'Connor, J., concurring in the judgment).

Subsequent to *Smith*, the state of Oregon approved a legislative accommodation for religious peyote users. *See* Greene, *supra* note 2, at 78 n.318.

178. Mandatory accommodation is called for by the Free Exercise Clause and is to be distinguished from legislative (or permissive) accommodations that are undertaken by the government on its own. It is neither required by the Free Exercise Clause nor prohibited under the Establishment Clause. *See, e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); Wisconsin v. Yoder, 406 U.S. 205, 222 n.11 (1972) (discussing exemption in 26 U.S.C. § 1402(h) for Old Order Amish from obligation to pay social security taxes); Gillette v. United States, 401 U.S. 437 (1971); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring) (supporting the unconstitutionality of required Bible recitations in public schools); Zorach v. Clauson, 343 U.S. 306 (1952) (holding school district policy permitting children to leave school early in order to attend classes in religious instruction elsewhere is constitutional); McCollum v. Board of Educ., 333 U.S. 203 (1948) (prohibiting religious instruction on premises during school hours). Legislative accommodations are thus related to racial affirmative action programs. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Greene, *supra* note 2, at 70. *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

179. *See, e.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693 (1992); *see also* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) (arguing that Religion Clauses protect only formal religious equality and that mandatory accommodation is preferable over legislative (permissive) accommodation).

180. Of course, the Court's terminology in those cases is cast in the language of burdens on free exercise. *See Sherbert*, 374 U.S. at 403. But in order for the Court to determine whether a burden is truly a burden for free exercise purposes, it has had to resort to comparisons with the treatment of other religions by government. *See id.* at 406; *see also Smith*, 494 U.S. at 879-98 (O'Connor, J., concurring in the judgment).

181. *See supra* Part I.D.1.

landmark case for this approach is *Washington v. Davis*,[182] where the Court held that claims of discriminatory effects alone in government action were insufficient to support an equal protection claim. *Davis* has been the subject of much criticism, and I will not repeat that appraisal here.[183] Suffice it to say that when integral parts of an individual's cultural (racial or religious) identity are involved, actions or laws adopted "in spite of" rather than "because of" the discriminatory effects on members of racial minority groups can demean an individual's dignity just as much as intentional discrimination.[184] And when less burdensome options are available that impose fewer costs on nonminorities,[185] and majoritarian politics decline those options for convenience' sake, the result is little different from a situation where racial hatred is the deciding factor[186]—important concerns of and burdens on minorities are ignored by government because their social and

182. 426 U.S. 229 (1976).

183. It has been suggested that the result in *Davis* was driven by the Court's perception that the relief called for by the effects of past discrimination was beyond the power of the court. *See* TRIBE, *supra* note 26, at 1451, 1511-12 (stressing legitimating function of courts); Hall, *supra* note 15, at 71-72; Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 850-51 (1983) (arguing that innocence of government can serve as limitation on remedy but not as defense to liability); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 89 (1986) (terming this approach the "sin-based" paradigm). But while the Court's holding may have been correct in denying relief for reasons of its inability to remedy general societal and past discrimination, the Court's reasoning and broad holding that a discriminatory effect is irrelevant is not justifiable.

184. Justice O'Connor herself has noted that burdens "that, *in effect*, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community" violate the guarantee of religious equality. *Smith*, 494 U.S. at 897-98 (O'Connor, J., concurring in the judgment) (emphasis added). It is this recognition that neutral laws can impose burdens and thus discriminate against minorities that leaves one puzzled by the Court's statement in *Davis* that "we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory." *Davis*, 426 U.S. at 245.

185. In *Davis*, the Court was asked to adopt the Title VII standard as an Equal Protection Clause test for diseriminatory impact. That test, applicable in employment discrimination cases under the federal civil rights laws, would have imposed a fairly minimal burden and would not have compromised the ability of the government to select qualified candidates, though it would have prevented the use of eriteria irrelevant to the particular government program at issue. *See Davis*, 426 U.S. at 246-47. This test largely parallels the inquiry in the application of mandatory religious accommodations.

While in the particular context of *Davis*, application of such a test would not have changed the result since the Court determined that the program's qualification criteria were relevant for Title VII purposes, *see id.* at 248-52, the use of Title VII itself in the employment discrimination context has proven to be a workable standard designed to eliminate from consideration those criteria that are not related to job qualifications.

186. It is precisely because racial minorities are unable to use the political process effectively to avert such harms, whether imposed "in spite of" less burdensome alternatives or "because of" racial prejudice, that equal proteetion concerns are triggered, as in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and that covert racial discrimination, cloaked in the mantle of majoritarian politics and under the guise of protection of the status quo, can escape the scrutiny of the Equal Protection Clause. *See* Karst, *supra* note 33, at 338.

political isolation prevents them from using their political power in the same way as other groups. In that sense, *Washington v. Davis*[187] bars a race equivalent under the Equal Protection Clause to mandatory religious accommodations.[188]

But while *Davis* has created a bar to requiring substantive equality as a constitutional matter under the Equal Protection Clause, *Davis* has no bearing on equality concerns inherent in due process protections for liberty interests. In fact, the protections of the Due Process Clause for an individual's cultural identity can resolve the tension that *Davis* created with respect to notions of substantive equality.

Because due process protections of liberty interests provide a guarantee of substantive equality that is not available under the Equal Protection Clause, they can provide a constitutional means of assuring substantive equality for racial/ethnic minorities. Thus, just as the Due Process Clause protects religious beliefs and identity, it can also be viewed as protecting other aspects of cultural or ethnic identity more generally.[189] As a result, affirmative constitutional protections along the lines of a requirement for religious accommodation should also apply to personal attributes closely related to one's identity, such as language, family relations, or matters that are of similar importance to an individual. *Hernandez v. New York*,[190] indicates the receptivity of some members of the Court to such a concept of "cultural accommodation,"[191] in particular in the context of accommodating the linguistic quandaries of bilingual jurors.

*Hernandez* involved a Latino criminal defendant's claim of racial discrimination with respect to a prosecutor's use of peremptory challenges to remove English-Spanish bilingual Latino members from a petite jury venire.[192]

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187. 426 U.S. 229.

188. Even though using judicially mandated affirmative action programs as a remedy to discrimination claims, *see* United States v. Paradise, 480 U.S. 149 (1987); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), can be seen as an attempt to remedy past discrimination, that is, treating different cases differently, they are not equivalent to mandatory accommodation. Court-sanctioned affirmative action programs are imposed only upon a showing of intentional discrimination and appear themselves to be subject to the same strict scrutiny test as other forms of affirmative action. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Stuart v. Roache, 951 F.2d 446, 449 (1st Cir. 1991). Thus, except for being imposed by a court, court-sanctioned affirmative action is more similar to ordinary forms of discrimination remedies or legislative affirmative action programs. *See* discussion *infra* Part II.D.

189. *See supra* Part I.D.3.

190. 500 U.S. 352 (1991).

191. Accommodation outside of the religion context, though only mandated by Congress, has made its appearance in the Americans with Disabilities Act. *See* 42 U.S.C. §§ 12,101, 12,112(b)(5)(A) (1994). *See generally id.* §§ 12,101-213 (1994).

192. *See Hernandez*, 500 U.S. at 352. Discrimination against individuals whose primary spoken language is a language other than English can be subject to equal protection scrutiny because language is often used as proxy for race or ethnicity. Those excluded would largely be individuals of non-English-speaking ethnic or racial ancestry. *See, e.g.*, Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269,

The prosecutor justified the peremptory challenges with his belief that bilingual jury venire members might not accept as authoritative the English translation of the testimony of anticipated Spanish-speaking witnesses.[193] Ordinarily, the trial court's acceptance of the prosecutor's race-neutral explanation for the strikes would have been the end of the defendant's *Batson v. Kentucky*[194] claim, because lack of discriminatory intent forecloses an equal protection claim under *Davis*.[195] However, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Souter, refused to focus exclusively on the consequence of the *Davis*-effects analysis, which would have left not only the defendant but also future bilingual jurors with no recourse from being excluded on such a basis.

Instead, the Court avoided the analytical difficulty presented by *Davis* by suggesting that a judge might find a discriminatory intent by the prosecutor if the prosecutor insisted on a challenge "in spite" of court-suggested alternatives to exclusion of such jurors. For instance, the court could permit Spanish-speaking jurors "to advise the judge in a discreet way of any concerns with the translation during the course of a trial."[196] In effect, the Court suggested in *Hernandez* that courts ought to attempt to "accommodate"[197] the obstacles faced by such minorities in becoming jurors.[198]

Of course, *Hernandez* was analyzed as an equal protection claim and not a due process liberty claim, and thus *Davis* was controlling.[199] But *Hernandez* is nevertheless important in indicating the Court's willingness to consider accommodations for ethnic minorities that are equivalent to mandatory religious accommodations in free exercise challenges. *Hernandez* is also one of the few

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350-71 (1992); *cf.* Hernandez v. Texas, 347 U.S. 475 (1954).

193. *See Hernandez*, 500 U.S. at 356-57.

194. 476 U.S. 79 (1986).

195. Washington v. Davis, 426 U.S. 229 (1976).

196. *Hernandez*, 500 U.S. at 364.

197. This is a term Justice Stevens used in describing judicial attempts at facilitating linguistic minorities in becoming jurors. *See id.* at 379 (Stevens, J., dissenting). This statement provides an interesting contrast to Justice Stevens's joinder in Justice Scalia's concurrence in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172-76 (1997) (Scalia, J., concurring inpart), a case which sought to reaffirm *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990). One explanation, which is consistent with the perspective here, may be that Justice Stevens views linguistic accommodations on the same order of necessity and importance as the religious accommodations in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963).

198. By the same token, peremptory challenges bascd on religious beliefs should raise equal suspicions. *See* Davis v. Minnesota, 511 U.S. 1115, 1115-16 (1994) (Ginsburg, J., concurring in the denial of certiorari) ("'[O]rdinarily . . . , inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper.'") (quoting State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (omission in original)).

199. Of course, *Hernandez* also peculiarly involved the special interests of criminal trial defendants to a diverse jury under the Sixth Amendment as well as the court's interest in the integrity and uniform use of and accessibility to the testimony presented by all jurors. *See Hernandez*, 500 U.S. at 361-63.

cases[200] where the Court has emphasized the importance and value of cultural identity, and where it has attempted to protect such cultural attributes of the self, such as language.[201] In the Court's own words, a person's

> preferred language, [is] the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.
>
> . . . .
>
> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.[202]

Thus, the Court recognized that assimilation of non-English-speaking citizens into American society has put them into a catch-22 situation: Unless they speak English, they cannot be eligible for jury service and thus assume all the attributes of citizenship. On the other hand, if they do learn English, they may be subject to potentially discriminatory treatment by a prosecutor.

In following the model of religious accommodations, mandatory cultural accommodations would be triggered whenever neutral government action stifled or repressed aspects of an individual's cultural identity, such as language,[203]

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200. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); *Yoder*, 406 U.S. 205; Meyer v. Nebraska, 262 U.S. 390 (1923).

201. *Hernandez* is also a product of the tension that *Davis* has created between the notion of substantive equality and the Court's assimilation jurisprudence. This tension resulted in even a staunch conservative such as Chief Justice Rehnquist joining Justiee Kennedy's opinion. *See Hernandez*, 500 U.S. at 355.

202. *Id.* at 364, 370.

203. In that sense, English-only laws, such as the state law at issue in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated as moot sub nom. Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), which affirmatively prohibit the speaking of a language other than English, as opposed to requiring English-proficiency, would impair the right of minority cultural group members to maintain their own identity different from that of the English-monolingual culture. *See* YINGER, *supra* note 41, at 315-18. However, in the lower courts, *Arizonans for Official English* has been analyzed only under free speech principles. The Supreme Court itself declined to resolve the substantive issues and vacated the lower court's decision on mootness grounds. *See Arizonans for Official English*, 117 S. Ct. at 1071.

appearance,[204] family relations,[205] or customary dress. Cultural accommodations would be required when no compelling governmental interests are implicated and an exemption would not substantially hinder the fulfillment of the goal.[206] And since the limitation of *Davis* is confined solely to equal protection claims, assertion of rights for ethnic and cultural accommodation under the liberty guarantee of the due process clause would *not* be subject to the *Davis* discriminatory-effect doctrine. None of the race-equal-protection cases, including *Davis* or *Hernandez*, would constitute binding precedents. Instead, such rights would be resolved under the due process line of cases, including those governing religious accommodations.[207]

### *D. Inclusion and Exclusion: Affirmative Action and Legislative Accommodation*

One of the most salient characteristics of affirmative action and legislative religious accommodation is that both are intended to make up for burdens or obstacles that minority group members face because of their minority status. Affirmative action programs, such as in employment, can help racial minority members overcome obstacles, such as hidden personal and subconscious prejudice, that nonminority members do not face in obtaining access to economic opportunities. Similarly, legislative religious accommodations, such as the conscientious-objector provision of the draft, can relieve the burdens of government regulations of general applicability that would otherwise weigh particularly heavily on the religious beliefs and practices of some minority groups (because their lack of political clout prevents their particular concerns from being taken into as much account as the concerns of those in the majority). To the extent such legislation is not the result of the normal interest-group bargaining

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204. *See* Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting) (arguing that governmental control over a citizen's personal appearance forces the individual "to sacrifice substantial elements of his integrity and identity"); New Rider v. Board of Educ., 414 U.S. 1097 (1973) (Douglas, J., dissenting from the denial of certiorari); *see also* J. Harvie Wilkinson & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 600-11 (1977). In *Kelley v. Johnson*, the Supreme Court did not resolve the issue of whether police officers had a constitutionally protected liberty interest in personal appearance, such as personal grooming, because it found a rational relationship between short hair and public safety which trumped any liberty interest the officers may have had. *See Kelley*, 425 U.S. at 244-48.

205. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 498-500 (1977). While the Court declined to adopt sexual orientation as such a liberty interest in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court's most recent ruling in *Romer v. Evans*, 116 S. Ct. 1620 (1996), appears to cast some doubt on that holding.

206. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

207. In contrast, governmental actions explicitly directed at aspects of cultural identity (e.g., like explicit racial or religious classifications), rather than indirectly burdening individuals, would continue to be invalid per se. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

over private benefits, and inasmuch as such legislation represents an attempt at giving substance to overarching public values of substantive equality, both forms of government actions are acts of governmental grace toward racial and religious minority groups.[208] However, while the legitimacy of special governmental treatment for religious minorities has been largely unquestioned, affirmative action continues to be one of the most contentious public policy issues.[209] Part of the contentiousness can be traced to a lack of consensus about what the underlying justifications of affirmative action are[210] and to questions about whether such justifications are legitimate.

Religious accommodations and racial affirmative action are considered by some as necessary because many of the burdens that individuals of religious or racial minority groups have to contend with cannot be remedied through the simple application of constitutional protections. Particularly in the race context, not even the application of antidiscrimination laws is sufficient. That is because the burdens and obstacles that attach themselves to minority status are not simply the consequence of what can be classified as state action subject to constitutional strictures or the result of actions with an identifiable discriminatory purpose, or the actions of a bigoted actor who can be punished. Rather, they are a consequence of past discrimination, subconscious discrimination, discriminatory effects of actions in the past, or forms of private discrimination or preferences that cannot be prohibited by law.[211] To relieve some of these special burdens, government must take actions that lie outside of the scope of what is constitutionally required.

Because both forms of government actions have been the subject of much scholarly discourse,[212] I will focus on aspects where a cultural identity perspective provides additional insights on the Court's approach to these issues. Such an analysis shows that the major criticisms directed at affirmative action have less substance than might otherwise appear when compared to religious accommodations, that diversity affirmative action is a narrowly tailored means to achieving the compelling governmental interest of racial integration, and that the Court's religious endorsement jurisprudence is based on an analytical approach that is equivalent to the rationales underlying racial integration.

The point here, of course, is not to question the legitimacy of religious accommodations generally. Indeed, such accommodations are frequently the

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208. However, the less minorities remain outsiders, the less that characterization stays applicable. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (arguing that heightened scrutiny for city's racial affirmative action program was justified in part by the fact that African Americans made up approximately 50% of city population and held five of nine city council seats).

209. *See supra* Introduction.

210. *See infra* Part II.D.2.

211. *See supra* note 92 and accompanying text.

212. *See, e.g.*, GABRIEL CHIN ET AL., BEYOND SELF-INTEREST 1171-78 (1996); Drew S. Days, III, Fullilove, 96 YALE L.J. 453 (1987) (discussing affirmative action); Lawrence, *supra* note 59 (discussing racial discrimination and unconscious racism); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992) (discussing religious accommodation); McConnell, *supra* note 179 (discussing religious accommodation).

expression of the most noble government ideals as attempts to alleviate undue burdens on the free exercise of religion by small faiths. Rather, it is to demonstrate that the criticisms that have been directed at affirmative action are simply not unique and have been accepted in contexts that raise the same concerns about protection of aspects closely connected to individual identity.

### 1. Criticisms of Affirmative Action: Of Stigmatic Injuries, "Incidental Burdens" on "Innocent Victims," and Free Riders

Even though affirmative action is intended to and does help members of some racial minority groups, it has been criticized as being just as pernicious as invidious forms of racial classification.[213] Yet, religious accommodation jurisprudence demonstrates clearly that the Court has found ways and does distinguish between government actions that burden minorities and those that help them.[214] A comparative examination of three of the most commonly raised criticisms of affirmative action—that it is unacceptable because it (1) imposes stigmatic injuries, (2) imposes incidental burdens on nonbeneficiaries, and (3) provides benefits to free riders—illustrates that affirmative action is little different from religious accommodations. All three imperfections exist in legislative accommodations as well. Yet, they do not raise the same level of concern there because the legitimacy of religious accommodations has not been seriously questioned.

Affirmative action, for instance in employment or education, is criticized for imposing a stigma of inferiority. It is thought to devalue and stigmatize the achievements and qualifications of racial minorities who are targeted beneficiaries of such programs, regardless of whether a particular individual actually benefited from such a program, because such programs supposedly lower eligibility standards or qualification requirements for minorities.

However, this criticism is not uniquely applicable to affirmative action. It also applies to many legislative accommodations that were designed to promote free exercise. One example is the conscientious-objector exemption from the military draft, when it was in effect. While the conscientious-objector exemption was originally designed to further free-exercise rights by relieving from the draft those

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213. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-39 (1995) (Scalia & Thomas, JJ., concurring) (overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)); *Croson*, 488 U.S. at 520-28 (Scalia, J., concurring).

214. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); Wisconsin v. Yoder, 406 U.S. 205 (1972); Zorach v. Clauson, 343 U.S. 306 (1952). Without exception, religious accommodations are benign because they provide more choices and options to religious practitioners. Affirmative action programs do exactly the same. *See Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469; Wygant v. Jackson Bd. Of Educ., 476 U.S. 267 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The religious practitioner or racial minority group member can opt out of the particular program, either by declining to specifically take part in it or by declining to identify oneself as a member of a minority group. In contrast, invidious discrimination restricts choices. Unfortunately, the Court has ignored that important distinction. *See Adarand*, 515 U.S. 200.

religious practitioners who could not participate in war as a matter of religious belief,[215] it also exposed those who did take advantage of it to the potential stigma of cowardice. A similar potential stigma criticism also applies to the "released time" program in *Zorach v. Clauson*,[216] that permitted students to leave the school premises for religious instruction off-premises during regular school hours. Since the "released time" program singled out the students who took advantage of the program, their participation potentially stigmatized such students as individuals who did not belong with the rest of the students—it potentially made them outsiders. Finally, the exemption to the bar on religious discrimination in employment leaves members of religious organizations that use that exemption open to the charge of being religious bigots. Yet, all of these programs and exemptions have been found constitutionally permissible by the Supreme Court.[217]

That, of course, should not come as a surprise. Programs which award benefits on the basis of criteria entirely unrelated to personal "merit" or achievement[218] exist both within and outside government. A few such examples are veterans preferences in government employment,[219] alumni legacy preferences in college admissions,[220] and small-business government-contracting preferences.[221] All such programs have the potential of exposing their beneficiaries to a stigma of inferior ability by virtue of the disjunction of benefit and personal "merit." Yet, such programs are constitutionally permissible.

The reason why legislative accommodations, as well as other special benefits programs, are viewed as legitimate, and concerns about stigmatic harms are not

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215. *See* United States v. Seeger, 380 U.S. 163 (1965); The Selective Draft Law Cases, 245 U.S. 366, 374 (1918). The Supreme Court has held that the conscientious-objector provision covers not only religious-belief-based objections to military service but also beliefs that are equivalent to religious beliefs. *See Seeger*, 380 U.S. at 173. Nevertheless, that does not detract from the fact that the exemption was obviously originally conceived as a religious accommodation with religious objectors in mind.

216. 343 U.S. 306, 309-10 (1952). It is unclear whether *Zorach* would survive Establishment Clause review today. *See* Lupu, *supra* note 212, at 744-45.

217. While *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a mandatory accommodation, the special benefit granted to Ms. Sherbert could have easily subjected her to suspicions of laziness for her refusal to work on a Saturday. *See id.* at 407. Instead, she is commonly viewed as having legitimately been unable to satisfy her job's work requirement of Saturday work because of her religious beliefs. Of course, that is in the nature of accommodations—they are granted based on the recognized legitimacy of free exercise. *See* John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 210-14.

218. Of course, the notion of "merit" itself or its definition varies according to the particular circumstances and can be manipulated.

219. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); *Bakke*, 438 U.S. at 406 (Blackmun, J., dissenting).

220. *See Bakke*, 438 U.S. at 404 (Blackmun, J., dissenting).

221. *See, e.g.*, 15 U.S.C.A. § 636(a) (West 1997) (authorizing Small Business Administration ("SBA") to make loans for qualified small business concerns); 15 U.S.C.A. § 644(i)-(j) (West Supp. 1997) (permitting federal agencies to designate set-aside contracts for small business concerns and mandating such a set-aside for contracts with a value of between $2500 and $100,000); Government Contracting Programs, 13 C.F.R. § 125 (1997) (SBA regulations regarding set-asides).

given much weight, is simple. In its own nature, stigma arises not out of the special benefits that the beneficiary has received, but rather out of continuing prejudice, preexisting beliefs in the inherent inferiority of the affirmative action beneficiary, or unquestioned acceptance of the stigma theory itself. Beliefs of inferiority of another race, and the resulting stigmatic harm, are thus not the result of affirmative action programs[222] per se, but rather a continuing expression of the evil that is to be cured. By continuing to be expressed through the devaluation of the achievements and successes of racial minority members, racial prejudice continues to exist in a covert form rather than in the open.[223]

But while private prejudice is outside the reach of governmental regulation, that alone cannot justify government acquiescence (such as refusal to take remedial actions) to such prejudices. Religion jurisprudence has recognized that important principle in its more general prohibition on the government's adoption or expression of religious tenets of a particular group of citizens.[224] Doing so in the race context would sanction and validate racial prejudice, and the law has not done otherwise.[225] Charges of stigma are largely a disingenuous attempt to undermine otherwise legitimate forms of aid to racial minorities.

Another criticism of affirmative action is its alleged unfairness to those who are ineligible for such programs. Because many of the persons who are ineligible for

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222. *See, e.g.*, *Bakke*, 438 U.S. at 375-76 (Brennan, J., concurring in part and dissenting in part).

223. *See, e.g.*, Aleinikoff, *supra* note 89, at 1091-92 (discussing race-conscious policies); *cf.* BARBARA R. BERGMAN, IN DEFENSE OF AFFIRMATIVE ACTION 138-41 (1996) (arguing that stigma is applied to affirmative action program beneficiaries, in the gender and race contexts, as a means of resisting such programs rather than as an independent indication of the merits of such programs); TRIBE, *supra* note 26, at 1571-77 (discussing use of one gender discriminatory practice to justify another). Charles Lawrence has proposed a "cultural meaning" test to identify subconsciously discriminatory actions. *See* Lawrence, *supra* note 59, at 328, 355-81.

224. Under the Establishment Clause, the government cannot express the values of a particular religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 602-03 (1971). Similarly, even in the sex-discrimination context, government is not permitted to give effect to social stereotypes. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264 (1996) (noting that gender roles are product of culture); Stanton v. Stanton, 421 U.S. 7 (1975).

225. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316-17 (1986) (Stevens, J., dissenting) ("[C]onsideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes [a] valid purpose . . . from a race-conscious decision that would reinforce assumptions of inequality.") (citing Palmore v. Sidoti, 466 U.S. 429 (1984)); *Palmore*, 466 U.S. at 430-34 (holding that child custody could not be denied to white mother based on societal prejudice her child might encounter due to prospective stepfather's race); Brown v. Board of Educ. (Brown II), 349 U.S. 294, 300 (1955) ("[T]he vitality of [the] constitutional principles [set forth in *Brown I*] cannot be allowed to yield simply because of disagreement with them."); *see also* Pennsylvania v. Board of Dirs. of City Trusts, 353 U.S. 230, 230-31 (1957) (per curiam); Shelley v. Kraemer, 334 U.S. 1 (1948) (prohibiting courts from enforcing private racially restrictive covenants on property). It is for these same reasons that rationales of "white backlash" or reinforcement of stereotypes, which also inherently arise out of the evil to be cured, do not justify finding affirmative action programs unconstitutional, though they may bear on legislative policy choices about affirmative action.

affirmative action programs are arguably blameless or "innocent" of the discrimination that necessitates affirmative action in the first place, such programs are viewed as depriving them of legitimately expected benefits. Under this rationale, it is unfair to force an individual who has not contributed to the discrimination that minorities have experienced to bear the burdens that remedying that discrimination entails. For instance, an affirmative action program might be viewed as imposing burdens on "innocent" third parties because it narrows the employment or advancement opportunities of such individuals.[226]

Yet, the notion that government programs might "incidentally" burden those who do not benefit is not uncommon. Even though the Court has demanded in the religious accommodation context that legislative accommodations not unfairly burden the rights of others,[227] incidental burdens on the majority frequently occur and are accepted by the Court as an unavoidable by-product.[228] Indeed, the notion of imposing burdens, such as through taxation or other government regulation, broadly on the citizenry, regardless of individual fault, and distribution of benefits based on criteria other than individual merit or "just dessert," is at the heart of most public-purpose legislation, such as our progressive tax system or welfare laws. In fact, the legislative accommodation programs that the Court has approved in recent times have imposed significant burdens on non-beneficiaries, sometimes far beyond those imposed on non-beneficiaries of affirmative action programs.[229]

For instance, in *Zorach v. Clauson*,[230] the school's released-time program required students who did not participate in released-time religious instruction to spend that hour with no instruction, not even an opportunity for them "to use

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226. The Court has indicated that some burdens on "innocent" persons are acceptable. *See Wygant*, 476 U.S. at 280-81 ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."); *cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230, 235 (1995) (stating that an individual suffers injury when disadvantaged based on his or her race, "whatever that race may be," but declining to indicate whether any such burden would invalidate an affirmative action program); *id.* at 247 (Stevens, J., dissenting) (arguing that the majority's decision to discriminate against a minority is "fundamentally different from [a] decision to impose incidental costs on the majority . . . to provide a benefit to a disadvantaged minority").

The legislative history of the Fourteenth Amendment indicates that programs that were enacted to exclusively benefit the then recently freed slaves did consider unfairness against "whites" but accepted such unfairness as justified. *See* Schnapper, *supra* note 110, at 753. The Supreme Court in *Bakke* rejected this legislative history as no longer relevant today because American society is no longer made only of "black" and "white." *See Bakke*, 438 U.S. at 292-93.

227. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 722, 724 (1994) (Kennedy, J., concurring); *see also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985).

228. *See* McConnell, *supra* note 179, at 702-05.

229. *But see* Texas Monthly v. Bullock, 489 U.S. 1, 18 n.8 (1989) ("[Prior] cases . . . involve[d] legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries . . . .").

230. 343 U.S. 306 (1952).

school hours for spiritual or ethical instruction of a nonreligious nature."[231] In that respect, the so-called "dead hour"[232] was designed to ensure that the released-time students did not miss anything of importance while gone and thus were not put at a disadvantage because of it.

In *Corporation of the Presiding Bishop v. Amos*,[233] the Court held the exemption of religious employment discrimination laws[234] to be permissible even though it permitted religious organizations to engage in religious discrimination not only in their religious activities but also in their secular activities.[235] Even though the rationale—that the exemption removed government from religion and promoted goals of nonestablishment and free exercise—may be easily accepted when the exemption is used to prevent an atheist from suing a Catholic church for being denied a job as a priest, the burden the exemption imposes becomes more difficult to accept and seems unjustified when it reaches clearly secular aspects of a church, for instance where a church discriminates on the basis of religion in filling janitorial positions.

Finally, in *Gillette v. United States*,[236] the Court upheld a military draft exemption, even though the burden on those without religious objection to war (i.e., the increased chance of being drafted and forced to risk one's life in battle) was substantial.[237] To an individual who had to serve and risk his life in combat in the stead of a conscientious objector who was exempted from military service, such a burden would appear to be quite significant. Yet all of these programs were found constitutionally permissible.[238]

Again, just as in the stigma context, incidental burdens on nonbeneficiaries of governmental programs are not unique to the accommodation and affirmative action context. In fact, such incidental burdens also arise in numerous other government programs,[239] including veterans preferences in government employment, SBA-targeted benefits, and alumni legacy preferences in admissions to colleges receiving public funds. The reason for such incidental burdens arises

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231. Welsh v. United States, 398 U.S. 333, 361 n.13 (1970) (Harlan, J., concurring).

232. *See* Lupu, *supra* note 212, at 743-45. *But see Bullock*, 489 U.S. at 18-19 & n.8.

233. 483 U.S. 327 (1987) (upholding exemption for churches from religious discrimination prohibition under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1).

234. *See* 42 U.S.C. § 2000e-1 (1994).

235. *See Amos*, 483 U.S. at 437.

236. 401 U.S. 437, 461-62 (1971).

237. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 725 (1994) (Kennedy, J., concurring).

238. *See e.g.*, Texas Monthly v. Bullock, 489 U.S. 1, 18 n.18 (1989) (suggesting that *Zorach* and *Amos* did not impose substantial burdens on nonbeneficiaries). Even in *Sherbert* the court reasoned that its mandated accommodation of a Sabbatarian was permissible because the accommodation did not impose any burdens on others. Yet, the accommodation imposed a burden on all taxpayers who were not Sabbatarians to support Ms. Sherbert for her different religious belief. In that respect, Sherbert is similar to federally funded race-based scholarship programs.

239. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 318-19 (1983) (Stevens, J., dissenting) (comparing lay-off protections for teachers based on race to lay-off protections that might be afforded to gifted young teachers with specific expertise).

out of the nature of limited benefit programs. Whenever government sets aside scarce resources, provides limited access to such resources, or exempts some, but not all, persons from an otherwise general requirement, those excluded will not have access to those resources or may have to make up for those who are exempted from the general requirement. As a result, nonbeneficiaries will perceive their exclusion from the benefit or the requirement to make up for the exemption of others as a burden.[240] Incidental burdens are plainly not unique to affirmative action.[241]

Of course, these considerations have always been important in the Court's handling of affirmative action programs as well as religious accommodations.[242] How to determine when such burdens become substantial enough to be constitutionally impermissible is the difficult question that the Court has struggled with for a long time.[243]

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240. Of course, incidental burdens on minorities resulting from laws of general application are a common and accepted part of constitutional jurisprudence.

241. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 375 (1978) (Brennan, J., dissenting). *But see* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating a legislative accommodation requiring that Sabbath-day observers be given that day off based in part on the rationale that the employers and other employees would be substantially economically burdened).

Of course this does not mean that being a member of the majority race insulates one against racial discrimination. But it does mean that affirmative action does not impose the stigmatic injury on nonbeneficiaries as invidious forms of discrimination do. *See* Wasserstrom, *supra* note 112, at 592-94 (arguing that segregation of bathroom facilities based on race, as opposed to sex, is objectionable because it degrades "black" persons whereas the same is not true for sex segregation of bathrooms); Ronald Dworkin, *Why* Bakke *Has No Case*, N.Y. REV. BOOKS, Nov. 10, 1977, at 11, 15 (pointing out that while a "white" person with a lower test score might have been accepted if he were "black," "it is also true, and in exactly the same sense, that he would have been accepted if he had been more intelligent, or made a better impression in his interview. . . . Race is not, in *his* case, a different matter from these other factors equally beyond his control.") (emphasis in original).

242. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 276 (1995) (Ginsburg, J., dissenting) ("Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups."); Metro Broad., Inc. v. FCC, 497 U.S. 547, 596-97 (1990) (holding race-conscious programs permissible if they do not "impose *undue* burdens on nonminorities") (emphasis in original), *overruled by Adarand*, 515 U.S. 200; *Wygant*, 476 U.S. at 282-84; *see also* Dorf, *supra* note 64; McConnell, *supra* note 179, at 702-03; Sullivan, *supra* note 183, at 87-89.

243. *Cf.* Dorf, *supra* note 64. The Court has indicated that some interests weigh more heavily in this calculus than others. Thus, one may have a stronger interest in retaining a job than in obtaining a new job. *See Wygant*, 476 U.S. at 282-84. Implicit in such balancing is another judgment about the legitimacy of an expectation and the weight of a long-held expectation. Thus, it has been suggested that:

> Any claim of innocent third parties to be free from harmful consequences rooted in past discrimination is not superior to the constitutional rights of equally innocent black victims. When the burdens of past [and present] discrimination cannot be eliminated entirely, they should be distributed as equitably as possible among blacks and whites alike. Limiting a remedy is

On one end of the spectrum, the most unobjectionable form of affirmative action imposes diffuse burdens on the society at large. This form is most appropriate when disadvantages have been the result of broad societal discrimination. Special government appropriations for programs benefiting minorities, such as certain government-funded, minority-targeted scholarships or other set-asides of public benefits, would fall within this category. Since such programs impose only a diffuse tax burden and create a new program benefit to which no preexisting expectations apply, burdens on third parties would be minimal.[244]

On the other end of the spectrum, affirmative action programs that work by imposing substantial burdens on particular individuals would be the most problematic. At the extreme, government would be attempting to remedy the effects of racial discrimination by asking specific individuals to bear the burden of helping racial minorities. If the government forced the transfer of property from a "white" person, who purportedly benefited from general societal discrimination against African Americans, to an African American in order to even out a wealth differential, that would be clearly impermissible.

Quotas in educational admissions and government set-asides lie between these two ends of the spectrum. Even though the Court has found both to be impermissible in the absence of proven past discrimination,[245] the common belief that such programs burden nonminority group members by depriving them of program benefits, such as university admission or a government contract, is misguided. The burden imposed on individuals ineligible for such programs is not the deprivation of benefits themselves, because such programs do not automatically confer benefits but rely on a selective or competitive process. Rather, the burden consists of a loss or reduction of opportunities in obtaining the benefits.[246]

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appropriate only when that remedy would inflict an injury on third parties that substantially exceeds the harms suffered by the black victims.

Schnapper, *supra* note 183, at 846-47.

Greene has suggested that the balancing of benefits to a minority group against the burdens on others should altogether be left to legislative judgment. *See* Greene, *supra* note 2, at 82.

244. The Supreme Court has yet to rule on the permissibility of race-based scholarships. *But see* Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (holding that any consideration of race or ethnicity by state law school for purpose of achieving a diverse student body was not a compelling interest which permitted law school to discriminate on the basis of race in its admissions procedures), *cert. denied*, 116 S. Ct. 2580 (1996).

245. *See Adarand*, 515 U.S. at 228; Fullilove v. Klutznick, 448 U.S. 448, 475-78 (1980); *Bakke*, 438 U.S. at 289.

246. Perversely, the use of quotas and set asides should actually be less disruptive of expectations in the long run than the more amorphous diversity system cited with approval by Justice Powell, *see Bakke*, 438 U.S. at 315-18, because the official message tells one right from the beginning what to expect—that those few slots are set aside for members of disadvantaged minority groups. Based on that knowledge, no expectation of benefit from that program or the benefits set aside should be formed at all. *Cf. Metro Broad.*, 497 U.S. at 598-99 & n.51.

However, a system of quotas would elevate one governmental purpose over all others even though government programs usually seek to achieve multiple aims through a single

Thus, when a program, such as the admissions set-aside in *Bakke*, guarantees a small number of program benefits for racial minority group members, the burden imposed on all others is the loss of the opportunity to compete for those set-aside benefits in common with all other program applicants. It is only after the process of program beneficiary selection has run its course that a nonminority group member can claim that he or she did not obtain the desired benefit, such as admission to school. Yet, nonminority individuals who did not obtain the desired benefit are, with respect to the unsuccessful bid for the government benefit, similarly situated to minority individuals who did not obtain the desired benefit either, even though eligible and considered for the set-asides. The difference between the two is that the nonminority individual faced a reduced opportunity in obtaining the benefit in comparison to the minority individual. Because the set-asides were small in *Bakke*, for Mr. Bakke to have argued that he was unfairly denied the particular medical school spot seriously misconstrues and exaggerates the burden to which he was subjected.[247] In reality, the burden he faced was only the loss of opportunity.[248] Of course, if the set-aside opportunity had been a significant proportion of the total available opportunities, the substantiality of such burdens would increase and his exclusion would have been much more problematic.[249]

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means. It is in this sense that focusing on race as a single criterion for a set-aside may be so unpalatable, whereas considering membership in a minority group as a "plus" in addition to qualifications valuable for other program goals strikes a more acceptable balance that is in that sense better and more narrowly tailored to the success of an overall program. *See Metro Broad.*, 497 U.S. at 597-98; *Bakke*, 438 U.S. at 317-18.

247. Similarly, Adarand Constructors could not claim that it actually lost the subcontract it sought. Rather its harm was that the winning minority subcontractor was provided with an advantage in obtaining the contract. *See Adarand*, 515 U.S. at 263 (Stevens, J., dissenting) (noting that although contractors are given an incentive to hire minority subcontractors, they are not required to do so). How large the set-aside or diminishment in opportunity will be is a separate question over which people may disagree.

248. In this respect, the outcomes of these cases and the Court's rhetoric about protecting the expectations of innocent third parties that are not protected in any other setting have, in essence, permitted nonminority group members, that is, "whites," to assert a property right in the advantages that being "white" confers. Not only does being "white" mean that one has a right to an opportunity to obtain a government benefit, but in fact a right to the benefit itself. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724-45 (1993) (analyzing "whiteness" as a form of property); Schnapper, *supra* note 183, at 847; *see also* Sullivan, *supra* note 183, at 80 (arguing that the Supreme Court's focus on fault and proven past discrimination permits continued challenges to affirmative action by "innocent victims" of such remedies); *cf.* TRIBE, *supra* note 26, at 1537 ("[B]ecause white expectations formed within a discriminatory historical context are likely to be inflated, if not wholly unfounded, the level of compensation necessary to relieve whites of the burdens properly attributable to affirmative action should be gauged accordingly."). For a discussion that characterizes the Court's activities in this area as a form of conservative judicial activism, see Chang, *supra* note 97, at 810-17.

249. While the Court in *Bakke* recognized that Bakke had only lost the chance to compete for some of the medical school spots, it essentially equated that lost opportunity with the loss of the benefit itself. *See Bakke* 438 U.S. at 319-20. According to the Court, Bakke was

A third criticism of affirmative action is that it permits windfalls to "undeserving"[250] or opportunistic members of racial minority groups. [251]To determine the seriousness of this criticism, comparison to legislative accommodations is again instructive.

Legislative accommodations usually benefit many more than those who actually need it.[252] In fact, any program that does not require proof that the beneficiary has a sufficiently great need is bound to be overinclusive in distributing benefits.[253] Thus, religious accommodation benefits given to an indifferent religious practitioner, such as the additional hiring flexibility approved in *Amos*, increased educational opportunities in *Zorach*, or decreased risk of injury or death in *Gillette*, are simply benefits or opportunities not available to others—such benefits are windfalls.[254]

As a result, permissive accommodations and affirmative action programs may create some incentives for persons to join the benefited group and thus abuse the program. However, such pretextual membership is unlikely. Not only does true membership in such groups carry with it all the burdens that discrimination has imposed and still is imposing on group members, but membership must also be sincere. Just as the sincerity of religious beliefs and practices may be examined in order to weed out pretextual membership,[255] so can the sincerity of an individual's claim to membership in a particular racial minority group be evaluated to screen out pretextual claims.[256]

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> never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class. . . . [W]hen a State's distribution of benefits or imposition of burdens hinges on ancestry or color of a person's skin, [the classification must be shown to be necessary to promote a substantial state interest].

*Id.*

250. Usually, individuals are considered undeserving if they appear not to face any special disadvantage and thus do not appear to have a special need for help.

251. *See Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting); Sullivan, *supra* note 183, at 87-89; *see also* Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 516-20 (1982) (discussing the effect of racial discrimination on minority group members).

252. Of course mandatory accommodations are not subject to this criticism because they must be justified on a specific and compelling basis. *See* Lupu, *supra* note 134, at 741-53.

253. *See* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 384 (1990).

254. *See* McConnell, *supra* note 179, at 701.

255. *See* United States v. Ballard, 322 U.S. 78, 81 (1944).

256. For a discussion of mistaken or pretextual racial identification, see Karst, *supra* note 42, at 335-37. *See also* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (discussing an instance of pretextual use of race and surveying different methods for racial or group categorizations).

What is a greater difficulty in justifying affirmative action is the equivalency or proportionality of potential benefits conferred by affirmative action in relation to the detriments experienced by any particular individual. This feature seems to lie at the heart

### 2. Permissible Forms of Affirmative Action: Diversity as a Means of Integration

Reference to religion jurisprudence can also inform our thinking about permissible forms of affirmative action. Affirmative action programs are clearly permissible if they are implemented directly to remedy proven past discrimination.[257] In contrast, there is much less certainty about the permissibility of other forms of affirmative action, in particular nonremedial forms.[258] Nevertheless, it is outside of the narrow compensatory forms, in the forward-looking programs that seek to address current problems such as ongoing discrimination, that we find the programs most similar to religious accommodations. That is because religious accommodations, mandatory and permissive, are designed to alleviate burdens on religious minority groups resulting from present government actions or regulations. They are not designed to address and compensate for past wrongs. The permissibility of forward-looking programs that target particular religious minority groups for governmental help suggests that similar forward-looking aid designed for the benefit of particular racial minorities ought to be permissible as well.[259]

Diversity programs, recognized as constitutional by the Court in *Regents of the University of California v. Bakke*[260] and *Metro Broadcasting, Inc. v. FCC*,[261] are such forward-looking forms of affirmative action. Of course, *Metro Broadcasting* was overruled by the Court only a few years ago in *Adarand Constructors, Inc.*

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of free-rider arguments against affirmative action. However, just like burdens on others, benefits to those who are unaffected by discrimination or disproportionate benefits should be factors to be weighed in formulating an affirmative action program.

257. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Days, *supra* note 212, at 453.

258. Other grounds that have been cited as justifications for affirmative action include the present effects of past discrimination, and ongoing discrimination that cannot easily be remedied by antidiscrimination laws, such as subconsciously expressed biases. *See, e.g.*, Dunean, *supra* note 251, at 510-29 (discussing compensatory justice, distributive justice, and social utility rationales for affirmative action); *see also* TRIBE, *supra* note 26, at 1521-44; Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Schnapper, *supra* note 183.

However, Title VII of the Civil Rights Act of 1964 is one attempt by Congress to get at biases and discrimination without the speeific proof of discriminatory intent required elsewhere. *See* 42 U.S.C. § 2000e(2) (Supp. 1997); Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971).

259. Arguably, most legislative accommodations do not operate by religious elassifications but by neutral functional criteria that happen to favor particular religions. However, one cannot get around the fact that such accommodations were originally intended to benefit particular religious groups or religion in general. In fact, the conscientious-objector exemption started out as an exemption that applied only to an enumeratcd set of Christian sects. *See* The Selective Draft Law Cases, 245 U.S. 366, 374-75 (1918). To that extent, neutral actions taken with a discriminatory motive are equally suspect as explicit raeial classifications.

260. 438 U.S. 265 (1978).

261. 497 U.S. 547 (1990), *overruled by* Adarand Construetors, Inc. v. Pena, 515 U.S. 200 (1995).

*v. Pena*,[262] potentially casting doubt over the permissibility of diversity programs. However, in repudiating *Metro Broadcasting*'s intermediate-scrutiny standard of review for benign racial classifications, which was relied on to uphold the FCC's broadcasting diversity program in that case, *Adarand* did not reach the question of the constitutionality of diversity programs themselves.[263] In fact, the case law strongly suggests that the diversity rationale for affirmative action programs will survive strict scrutiny analysis.[264]

In particular, as a rationale for university admissions, the Court in *Bakke* indicated that diversity affirmative action programs pass strict scrutiny review.[265] Furthermore, more recent cases, such as *Adarand*, indicate the Court's inclination to continue to find diversity affirmative action programs at the university level constitutionally permissible.[266] The justification can be found in the underlying premise and goal of diversity. Because diversity affirmative action is based on the understanding that student body diversity contributes to the diversity of viewpoints and perspectives, such a program can also promote the "robust exchange [and testing] of ideas," one of the core missions of institutions of higher learning.[267] Because differences in race and ethnicity embody differences in an individual's cultural identity, racial and ethnic differences can and do contribute to the exchange of differing ideas and perspectives. In that respect, racial and ethnic distinctiveness represents relevant differences that ought to be taken into account in such programs.[268]

While diversity programs may promote individual cultural identity by emphasizing the positive aspects of cultural distinctiveness, diversity programs

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262. 515 U.S. at 227.

263. *See id.* at 235.

264. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 237 (quoting Fullilove v.Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

265. *See Bakke*, 438 U.S. at 315-18.

266. *See Adarand*, 515 U.S. at 219 (pointing out that strict scrutiny was actually applied by Justice Powell in *Bakke*); *see also id.* at 257 (Stevens, J., dissenting). According to Justice Stevens,

> [Nothwithstanding the labels given the standard of review,] the FCC program we upheld in [*Metro Broadcasting*] would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today. . . . The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today.

*Id.* (Stevens, J., dissenting) (emphasis in original); *see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[S]tate interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations . . . ."); Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 353-54 (D.C. Cir. 1989), *aff'd sub nom. Metro Broad.*, 497 U.S. 547, *overruled by Adarand*, 515 U.S. 200; Davis v. Halpern, 768 F. Supp. 968 (E.D.N.Y. 1991).

267. *Bakke*, 438 U.S. at 313. Similarly, religious diversity can further similar purposes. *See* Hall, *supra* note 66.

268. *See Adarand*, 515 U.S. at 228 ("[S]trict scrutiny *does* take 'relevant differences' *into account*—indeed, that is its fundamental purpose.") (emphasis in original).

have also been criticized as perpetuating stereotypical views of racial minority group members.[269] Unfortunately, this criticism misunderstands the nature of cultural identity, racial and religious. Designations of race and religion are just as much a shorthand way of referring to an individual's outwardly apparent racial, ethnic, and religious characteristics, including shared beliefs, experiences, and attributes, as they are a statement about belonging.[270] That different sense of belonging, together with the attendant beliefs, values, and sense of identity, can and frequently does provide minority group members with a perspective and outlook different from the majority.[271] What the stereotyping criticism of affirmative action misunderstands is that the resulting outlook need not be uniform.[272] Just as members of the same religious group may differ in important and specific aspects about their religious beliefs, the same can be and is often true of the views of members of the same racial or ethnic group.[273] Group members may share commonalities that color their outlooks and views, yet other aspects of an individual's life experiences shape his or her views as well. Based on those unique experiences and backgrounds, such as social class, each person may interpret and see shared characteristics in a different way.

Of course, diversity programs cannot guarantee the representation of particular points of view because such a point of view may not necessarily coincide with a

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269. *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting) (stating that the diversity rationale is supposedly based "on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"); *see also id.* at 618-19 (O'Connor, J., dissenting) (arguing that diversity "impermissibly equat[es] race with thoughts and behavior").

Concerns of this kind of stereotyping are closely related to the debates about racial essentialism in legal academia, a criticism about "a 'univocal,' monolithic theory . . . in which one reductionist voice claims to speak for all similarly situated." Johnson, *supra* note 63, at 2033; *see also* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (challenging notion that specific ways of thinking or views are associated with race or ethnicity).

270. *See supra* Part I.B. In fact, Will Kymlicka distinguishes this conception of individuals from that of communitarians, in that cultural group members are able to "stand back and assess moral values and traditional ways of life," whereas the communitarian perspective denies that dissociation of constitutive aspects of the self is possible. KYMLICKA, *supra* note 38, at 92.

271. *See* Aleinikoff, *supra* note 89, at 1093-95 (discussing essentialism as a criticism of affirmative action diversity programs).

272. *See* Johnson, *supra* note 63. For instance, during World War II, young individual Japanese Americans responded, based on their own reasons, in vastly different ways to the indignity of internment, some choosing to remain in internment and others enlisting in the United States military to prove their loyalty to the United States. Likewise, Catholics may have widely varying views about abortion or ordination of women, even though the official stance of the Catholic church is to oppose both.

273. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 358-59 (1970) (Harlan, J., concurring in the judgment) ("Common experience teaches that among 'religious' individuals some are weak and others strong adherents to tenets . . . ."); Johnson, *supra* note 63, at 2012-20.

Even within a particular racial group, for example, belonging can differ. On the specific issue of skin color in the African American community, see KATHY RUSSELL ET AL., THE COLOR COMPLEX (1992).

particular racial or ethnic group. Nevertheless, representation of such views is more likely to occur in a setting with a diversity of cultural backgrounds than where all people belong to the same cultural group. Insofar as consideration of cultural background is only *one* factor among other predictive factors or qualifications that are considered in such diversity affirmative action programs, its use can be appropriately weighted in light of its significance or contribution to the institution.[274]

This difficulty with the diversity justification for affirmative action also points to another reason why diversity is important as a tool for achieving racial and ethnic equality. Diversity programs do not only foster diversity of views, they also promote racial integration.[275] It is the goal of integration that distinguishes the benefits of diversity from the potential benefits of cultural uniformity and exclusivity, and it is this significance of diversity that has been recognized as an important public value.[276]

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274. The Court's requirement that race not be the sole factor by which government benefits or burdens are distributed is a simple recognition that government programs and institutions serve a multitude of purposes, one of which may be racial integration. In the education context, diversity programs can contribute to the overall educational mission of the institution. In the employment context, different racial group membership can help a company by providing the multicultural knowledge and skills as well as a multiracial image that can provide greater appeal and marketability in a multiracial American marketplace and a multiracial global economy. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

Even in government contracting, racial diversity can serve an important integrating function. Even though competition for government contracts usually is focused on obtaining the best service or product for the lowest price, that is rarely ever the only goal. *See, e.g.*, 15 U.S.C. § 644(a) (1994). Small businesses must be awarded government contracts if it is determined that it is in the (1) "interest of maintaining or mobilizing the Nation's full productive capacity," (2) "interest of war or national defense programs," (3) "interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns," or (4) "interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns." *Id.*

275. *See* Karst, *supra* note 33, at 341-46; Sullivan, *supra* note 183, at 96; *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 374, 377 (1978) (Brennan, J., concurring in judgment in part and dissenting in part) (stating that the purpose of the school's affirmative action program "is to overcome the effects of segregation by bringing the races together"). This purpose differs significantly from Justice Powell's conception of diversity. *See id.* at 315 (arguing that the sole focus on ethnic diversity can hinder rather than further true diversity).

276. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 601-02 (1990) (Stevens, J., concurring) (arguing that the public value of "an integrated police force . . . is . . . unquestionably legitimate"), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Lynch v. Donnelly, 465 U.S. 668, 691 (1984) ("Celebration of public holidays, [such as Christmas,] which have cultural significance even if they have religious aspects, is a legitimate secular purpose."); *infra* Part II.D.3; *see also* Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996); *cf.* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (prohibiting religious segregation); City of Cleburne v. Cleburne Living Ctr., Inc., 473

Even though cultural group membership has important and positive identity-affirming functions for an individual, a significant negative by-product of such cultural "pride" is exclusion of those who are designated as outsiders.[277] Diversity programs can directly counteract that negative by-product by integrating members of differing cultural groups and by making familiar what is unknown and strange. By showing that regardless of cultural background each individual shares more in common with others than apart,[278] and through emphasis on the benefits that the differences of other cultural groups can contribute, diversity programs can ameliorate the sense that a differing cultural identity is a liability. It encourages people to look beyond those differences to the individual worth of a person.[279] In creating opportunities for and encouraging contact and learning about persons of

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U.S. 452, 472-73 n.24 (1985) (holding that although mental retardation is not a quasi-suspect classification, ordinance expressing an irrational prejudice against the mentally retarded and the absence of any rational basis in record for believing that group home would pose any special threat to city's legitimate interests did not pass rational-basis scrutiny).

277. In that respect, other attributes of membership in a different cultural group, such as economic class background, would also be relevant. *See* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105.

Martha Minow has described the positive as well as negative aspects of such differences as the "dilemma of differences." MINOW, *supra* note 169, at 19-49; *see also* Karst, *supra* note 33, at 311-25 (discussing exclusion as a means of status enhancement for group members).

278. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315-16 (1986) (Stevens, J., dissenting).

> It is one thing for a white child to be taught by a white teacher that color, like beauty is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process. . . . [T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it.

*Id.* at 316 (Stevens, J., dissenting); *see e.g.*, Alcinikoff, *supra* note 89, at 1081-88 (discussing the benefits of taking the perspective of racial minority groups to better understand the relationship between the dominant and the dominated group); Duncan, *supra* note 251.

279. In this regard, even affirmative action in government contracting serves an integrative purpose. In *Adarand*, the affirmative action program provided financial incentives for contractors to subcontract to minority businesses. *See Adarand*, 515 U.S. at 205-09. By encouraging government contractors to work with minority subcontractors and thus giving them a chance to show that their performance is equal to that of nonminority subcontractors, such programs can help overcome discrimination. *Cf. id.* at 261 (Stevens, J., dissenting) (arguing that the "program seeks to overcome barriers of prejudice between private parties—specifically, between general contractors and subcontractors"). However, such programs ought to be potentially limited by the amount of contracts that can be set aside in this fashion. In *Adarand*, it is unclear whether the 10% contract-bid advantage for minority businesses disadvantaged nonminority businesses too much.

different cultural backgrounds, the outsider is made to belong, and discrimination reduced.[280]

Diversity affirmative action programs, as a form of integration, are thus a far more effective means of overcoming latent racial prejudice than abstract teaching about the evils of prejudice.[281] As long as such a program does not make race a dispositive criterion for program eligibility and only imposes incidental burdens on nonbeneficiaries,[282] it is a narrowly tailored means to achieve an important governmental goal—reducing latent racial prejudice and the discrimination that cannot be remedied by existing antidiscrimination laws.[283] Diversity programs are thus a means of redressing discrimination, just like existing antidiscrimination laws,[284] though they counteract discrimination at a different level.[285]

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280. *See* Karst, *supra* note 42, at 336-37. As a result, such programs do not contribute to the hardening of divisions along racial lines as extensive race-based quotas might.

The reality of inherent cultural and racial biases in every person and the salutary effects of racial diversity have already been recognized in the jury venire cases, where the Supreme Court has prohibited the use of peremptory challenges to strike members of racial minorities from the jury. *See* Holland v. Illinois, 493 U.S. 474, 480-81 (1990); Batson v. Kentucky, 476 U.S. 79 (1986); *see also Metro Broad.*, 497 U.S. at 583.

Of course, companies, organizations, and educational institutions may institute programs that seek diversity of employees based on factors entirely unrelated to race or cultural group membership, such as skills or area of expertise. Although these programs are not diversity affirmative action programs of the type discussed here, there is still no reason why they should not be subject to generally applicable antidiscrimination jurisprudence.

281. *Cf. infra* text accompanying note 286 (observing that the Supreme Court has noted that abstract, generalized prejudice is too "'amorphous a basis for imposing a racially classified remedy'") (quoting *Wygant*, 476 U.S. at 276).

282. *See supra* notes 235-56.

283. *See Adarand*, 515 U.S. at 228 ("By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' is legitimate, before permitting unequal treatment based on race to proceed.") (alteration in original) (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)). Such diversity affirmative action programs will hasten the day that "race will become a truly irrelevant, or at least insignificant, factor" for being an equal member of society. *Id.* at 229.

There may, of course, be additional factors that need to be considered on a case-by-case basis. For a discussion of such issues, see Days, *supra* note 212, at 485.

284. *See* Lawrence, supra note 59 (advocating extending antidiscrimination laws to remedy subconscious racism). Integration is a different means of accomplishing the same goal.

285. In this respect, the case for congressional action is especially strong because Congress's Fourteenth Amendment enforcement powers "may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., holding unclear) (emphasis in original); *see also* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."). The scope of Congress's power to act under § 5 was not resolved in *Adarand. See Adarand*, 515 U.S. at 231.

Of course, the Supreme Court has noted that general "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy,"[286] and has required "particularized findings" of past discrimination to justify affirmative action.[287] If affirmative action is viewed only as a remedy for tort-like injuries, such as past discrimination, such a requirement may be appropriate. However, such a narrow use of affirmative action is not appropriate if affirmative action is a means toward achieving a broader societal goal, like reducing latent discrimination.[288]

Affirmative action and legislative accommodations may thus be very similar in how they affect beneficiaries and nonbeneficiaries; however, arguably their underlying purposes differ. By providing exemptions from generally applicable rules of law or regulations, legislative accommodations permit individuals to express their cultural identity freely. They eliminate the pressure to conform to those who are already part of the community and, in that sense, permit individuals to be different. In contrast, diversity affirmative action attempts to overcome differences and integrates outsiders into the community. Affirmative action thus focuses on making an individual with a differing cultural identity part of the community in the first place.

However, even in this respect, an underlying similarity can be discerned. By facilitating the expression of individual differences that are part of a person's cultural identity (and thus that are fundamentally intertwined with a person's conception of the self), the government validates and affirms the importance and value of that individual's sense of self as equal to that of the majority members'. The result is similar to that in affirmative action—individuals who are different are included in the community as equals.[289]

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286. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); *see also Croson*, 488 U.S. at 499 (holding that an "amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota").

287. *Wygant*, 476 U.S. at 276-77 (stating there must be "sufficient evidence to justify the conclusion that there has been prior discrimination"); *see* Metro Broad., Inc. v. FCC, 497 U.S. 547, 613-14 (1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S. 200.

288. Particularized findings of past discrimination can also be viewed as satisfying the Court's need to state unequivocally that in some circumstances racial minorities continue to face particularized discrimination in the present so as to justify and legitimate drastic and specific race-based remedies. *See* Days, *supra* note 212, at 457-58; Sullivan, *supra* note 183, at 91-92. In that sense, proven past discrimination simply serves as a proxy for and evidence of present discrimination, as well as a means of verifying the existence of present effects of past discriminatory actions. *See Croson*, 488 U.S. at 490-92. Affirmative action programs are the means to the end of discrimination that would otherwise continue to exist due to the recalcitrance of those who have engaged previously in discrimination. *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 448-49 (1986). Requiring proof of specific discrimination when such programs are directed at discrimination that is inherently difficult or impossible to prove would be incongruous.

289. It is also in this respect that voting rights cases involving redistricting to improve the electoral strength of minorities are different in a significant character from the religious segregation question recently decided in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). Even though redistricting in

A more detailed exposition of this aspect of religion jurisprudence can be found in the Court's endorsement jurisprudence.

### 3. Religious Inclusion and Exclusion: Legislative Accommodations and Endorsement Jurisprudence

While religion jurisprudence has proven useful in analyzing race jurisprudence, race jurisprudence can also be helpful in analyzing religion jurisprudence. In particular, the integration purpose of affirmative action suggests that government actions seeking to overcome differences and exclusion of religious outsider groups may be constitutionally permissible as well.

Endorsement jurisprudence evinces the constitutional importance of inclusion and tests the permissibility of government programs and actions in this regard. The permissibility of such government programs hinges on the fact that even though such programs provide special benefits only to select religious groups, they do not send a message of exclusion to those who are not benefited.[290] The constitutional importance of the value of inclusion is revealed in Justice O'Connor's opinion in *Lynch v. Donnelly*.[291] There, the Court found a nativity scene in a city's Christmas display not to be a violation of the Establishment Clause because "[c]elebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."[292]

Yet, the fact that Christmas has significance at all is because of its history as a purely religious holiday. It is only by virtue of its widespread observance that it became part of popular culture and thereby gained an additional cultural significance independent of its religious character. Its acceptance into popular culture by even those who are not Christian correspondingly reduces the message of exclusion that official observance of that religious holiday may cause,[293] a message that O'Connor has characterized as endorsement of a particular

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many instances takes race into account and aggregates members of a particular racial group in particular voting districts, such redistricting is remedial in nature and conducted with the ultimate goal of integration and increased participation of racial minorities in our society. In contrast, the creation of political boundaries in *Kiryas Joel* was conducted not with that purpose, but rather with the opposite and specific purpose of permitting the Satmars to segregate and isolate themselves from the larger society.

290. Arguably, such government actions or programs sometimes do not actually provide the favored religious group with concrete financial benefits, *see, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984), unlike affirmative action programs that set aside public resources for the benefit of minority groups. But just as governmental endorsement of the superiority of one race provides an impermissible status benefit, with attendant beneficial economic consequences, to the favored racial group regardless of the expenditure of public funds, the same is true of symbolic governmental support for one religion. *See id.* at 701 (Brennan, J., dissenting).

291. 465 U.S. at 687-94 (O'Connor, J., concurring).

292. *Id.* at 691 (O'Connor, J., concurring).

293. Of course, whether in fact official observance of Christmas is sufficiently nonexclusionary in character to be constitutionally permissible is subject to disagreement.

religion.[294] Endorsement is impermissible because it "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."[295] Conversely, a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[296]

But O'Connor's observation also suggests that government action intended to send a message of inclusion is permissible under the Establishment Clause if it is not attended by a message of exclusion to others. As a form of religious accommodation by government to a majority of its citizens, official observance of Christmas as a public holiday acknowledges the significance of that religious holiday to Christians and validates the importance and belonging of such individuals to the community. In a society such as ours that is largely secular, such action can send an important message of inclusion to the religiously devout who may feel alienated by the secular nature of government.

The Court's holding in *Allegheny County v. Greater Pittsburgh ACLU*[297] is consistent with this perspective. There, Justice O'Connor found the display on public property during Chanukkah season of a Jewish menorah, even though clearly a religious symbol, to be a permissible form of government action because it promoted inclusion of a minority religion.

> By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.[298]

Endorsement jurisprudence thus reveals the Supreme Court's concerns with the sense of belonging of religious minority or religious outsiders and the message that government actions send.[299]

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294. Thus, "whether a government activity communicates endorsement of religion . . is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring).

295. *Id.* at 688 (O'Connor, J., concurring).

296. Lee v. Weisman, 505 U.S. 577, 598 (1992). Thus, strict separation of religion and government, such as requiring government only to acknowledge the secular "would border on latent hostility toward religion . . . to the exclusion and so to the detriment of the religious." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). A "wall of separation" approach is unnecessarily restrictive of permissible governmental actions, *see id.*, because it would send a message of disapproval of the religious, *see Lynch*, 465 U.S. at 692 (O'Connor, J., concurring), in contrast to the irreligious.

297. 492 U.S. 573.

298. *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).

299. Interestingly, Justice O'Connor's endorsement jurisprudence specifically analyzes the message government support of religion provides to nonmembers of the favored group in coming to a determination whether such government support is permissible, *see id.* at 632-37 (O'Connor, J., concurring in part and concurring in the judgment), while such

Of course, the extent to which government may go in seeking to include particular religious groups is strictly limited by the potentially accompanying exclusionary message to nonadherents. In *Allegheny County*, the official crèche display sent an exclusionary message to non-Christians and thus was impermissible even though it posed "'no realistic risk' of 'represent[ing] an effort to proselytize.'"[300]

Such exclusionary concerns lie at the heart of the endorsement inquiry. At one end of the spectrum, government action can be substantively neutral with respect to religion because it promotes interests that are shared by religionists and irreligionists alike. Exhibitions of religiously inspired paintings in a federally funded art exhibition,[301] or funding of educational institutions that teach and study religions as an academic endeavor fall within such permissible government involvement. However, as soon as one moves away from that end of the spectrum, the permissibility of governmental action becomes much less clear.[302]

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considerations are deemed irrelevant in the race context, *see* Metro Broad., Inc. v. FCC, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

300. *Allegheny County*, 492 U.S. at 602 (alteration in original) (quoting *id.* at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part)). *But see* Epstein, *supra* note 84, at 2160-64 (arguing that official reference to religion as a means of acknowledging religious beliefs of citizens because of traditional practices is inappropriate).

Of course, an endorsement problem cannot be solved by simply providing equivalent government support for other religious groups—after all, the Establishment Clause protects adherents of irreligion as well. *See* Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985); *see also* Frederick Mark Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 723-26.

301. *See Lynch*, 465 U.S. at 683.

302. *See id.* at 668 (upholding the constitutionality of displaying a nativity scene in a city park); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (holding that unecumenical prayer by Christian minister before each state legislative session did not violate the Establishment Clause). While *Marsh* was analyzed as a long-standing historical practice, without regard to its endorsement implications, the same concerns apply.

A more current instance involves the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb to bb-4 (1994) (held unconstitutional by City of Boerne v. Flores, 117 S. Ct. 2157 (1997)). In *Boerne*, the Supreme Court found the RFRA to be an unconstitutional exercise of Congress's powers under § 5 of the Fourteenth Amendment and an impermissible attempt to change the Supreme Court's interpretation of the Free Exercise Clause in *Smith*. Accordingly, Congress could not require states under that power to accommodate religious free exercise. However, *Boerne* did not pass on the ability of governments to accommodate religious free exercise voluntarily.

But even when applied only to federal government action, the RFRA, as a "superlegislative accommodation," might still present constitutional problems. Because the RFRA appears to elevate religious burdens over all other interests, it could be seen to send a message of endorsement of religion in general. An additional significant problem may be that the RFRA does not take into account the substantial burdens that government actions in compliance with the RFRA might impose on others. *See Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring). In contrast, more specific programs accommodating religion, such as aid to handicapped children in religious schools, *see* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14 (1993) (holding that the

Legislative accommodations, for instance, fall into that gray area. Government programs, such as the released-time program in *Zorach v. Clauson*,[303] the conscientious-objector provision to the draft,[304] and the religious discrimination exemption of Title VII,[305] all attempt to include as equals the followers of the benefited faith. Because government has found certain religious differences from government-sanctioned norms to be sufficiently important in those instances to justify an exemption from the norms, accommodations recognize the legitimacy of such differences and thus the legitimacy of that individual's conception of the self. The effect is one of inclusion.

The opposite was true for the legislative "accommodation" at issue in *Board of Education of Kiryas Joel Village School District v. Grumet*.[306] There, the "accommodation" in fact sought to segregate a religious community from the larger society rather than facilitate its inclusion. In that respect, the "accommodation" was antithetical to what is intended to be achieved by religious accommodations, inclusion as an equal, and was accordingly constitutionally impermissible.[307]

Consideration of race jurisprudence suggests also that an additional relevant consideration in the endorsement inquiry is the existence of past discrimination against the particular religious group.[308] Religious displays of faiths which have clearly been the subject of past and present discrimination by a particular community would be less likely to raise endorsement problems than religious displays of sects that cannot point to such a background. Displays of persecuted religions could thus be seen as a form of "remedial" measure for religious outsiders, and as a means of emphasizing their inclusion. Again, the Court's holding in *Allegheny County* is consistent with this view. The display of the Jewish menorah did not present establishment concerns because it was representative of a religion that has been the subject of significant discrimination in the past. In contrast, the display of a crèche, representative of the Christian majority religion that cannot point to such a history in this country, did raise establishment problems.[309]

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Establishment Clause does not prohibit a school district from providing a sign language interpreter for a deaf student attending a parochial school), or federal funding for core edueational subjccts in religious schools, *see* Agostini v. Felton, 117 S. Ct. 1997 (1997), appears not to cross that line.

303. 343 U.S. 306 (1952).

304. *See* United States v. Seeger, 380 U.S. 163 (1965); The Selective Draft Law Cases, 245 U.S. 366 (1918).

305. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

306. 512 U.S. 687 (1994).

307. Of course, that kind of restriction docs not appear to exist in the context of constitutionally mandated accommodations. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). To the extent that the religious interest there is much stronger than those involved in legislative accommodations, and to the extent the government does not willingly use its power to exclude some from the larger community, that distinction may be justified.

308. Of course, irreligionists would qualify as well.

309. Just as in the race context, this inquiry does not provide a ready solution for discrimination in the government's decision of which specific religious faith to select for *permitted* governmental acknowledgmcnt or special governmental benefits. *See Kiryas*

But regardless of how legal doctrines regarding religion are expressed, such as by prohibiting the exclusion of religious outsiders, the permissibility of government actions is, in the end, always judged by its effect on the individual and his or her conception of the self.

## CONCLUSION

Individualism and individual liberty are values that our Constitution holds dear. But a diversity of individual interests also means that people will separate and aggregate into smaller groups supportive of their interests, goals, and identity. And it is such aggregation and differentiation that can give rise to prejudice and racial bigotry.

Public actions toward racial and religious minorities can be regulated to a large extent—true racial and religious tolerance cannot. In the long run, the only effective bulwark against such discrimination is the changing of public attitudes and discourse over the legitimacy of, and protection afforded to, cultural minority group members.

Even though education, social integration, and supportive measures by government can speed up the changing of such attitudes and beliefs, elimination of prejudice and bigotry cannot occur without acceptance of cultural minorities as equals, and even then, not until cultural minorities are permitted to participate fully in the larger society on their own terms.[310] Yet, that can only be achieved if integral aspects of their self-identity, cultural heritage, and sense of belonging are not denigrated. Denial of difference, such as a color-blind jurisprudence, demeans only members of the minority group because it is the minority's distinguishing characteristics that are viewed as nonconforming. A minority group's desire to preserve its racial and ethnic identity should not be any more radical, alienating, or threatening to the majority than a group's desire to preserve its unique religious beliefs.

In that respect, it is the willingness to accept that which is ridiculous or distasteful to one as essential or holy to another, not just with respect to religious beliefs but also with regard to racial and ethnic practices and aspects, that we ought to strive for. In the end, it is tolerance and the strength of our shared values and ideals, such as those embodied in the Constitution, that holds us together as one nation—not the suppression of dissent and differences.[311]

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*Joel*, 512 U.S. 687 (expressing concern about discrimination in conferral of government benefit). Nevertheless, considering past and present discrimination can significantly advance the inquiry.

310. *See* GORDON, *supra* note 6, at 235 ("Studies have pointed to the role of intimate equal-status contact between members of majority and minority groups in reducing prejudiee.").

311. *See generally* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993) (stating that the core values of our nation are respect for the laws, liberty, equality, and republicanism); Karst, *supra* note 33, at 363.

The task that I have sought to accomplish here is not to provide ready-made solutions to problems that our nation has struggled with for a long time. Rather, it is to bring a different analytical perspective to race and religion issues, which emphasizes the importance and roIe of individual identity and dignity considerations in these problems. Recognizing the similarities of race and religion and extending the protections afforded in the religion context to the race context can be an important step toward the elusive goal of equality.