Expressive Identity: Recuperating Dissent for Equality

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Introduction

Constitutional law has made a mess of the relationship between expression and equality. Much of the time, the two claims exist in sharp conflict, as in recent Supreme Court cases involving hate speech[1] and the effort by a gay and lesbian group to march in a St. Patrick's Day parade.[2] In those cases, equality claims collided head-on with defenses based on a First Amendment right to express anti-equality values. In other instances, such as debates about whether viewpoint diversity can serve as a justification for affirmative action,[3] or whether race-conscious redistricting can serve as a proxy for political interests under the Voting Rights Act,[4] the Court has waffled on whether associating race with viewpoint is empowering or insulting.

The ensuing confusion has been felt across all major fields of anti-discrimination law, from race to sexual orientation, gender to religion. In every instance, courts have failed to grasp that these cases present their own new species of equality claims, not simply a conflict between two old doctrinal categories. This new branch of equality law arises directly out of identity politics and its legal progeny. I call these decisions expressive identity case law, and in this Article, I call for the development of a theory of expressive identity.

Social movements founded on identity politics generate claims based on shared identity characteristics in order to gain access to public and private domains. In our political life, identity politics is interwoven with

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[1] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[2] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995); *infra* Part II.A.

[3] See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and cases discussed *infra* Part IV.A.

[4] See *Shaw v. Reno*, 509 U.S. 630 (1993) and cases discussed *infra* Part I.C.

dissent—is understood *as* dissent. Virtually all of the American civil rights movements since World War II have embodied the harmony between identity and dissent that exists in social practice, if not in law. By expressive identity, I mean those situations of particularly strong intersection, where an identity characteristic itself is understood to convey a message.

Although identity politics has become part of the landscape of our social reality, the law has not yet grasped its full import. Law fractures social reality into competing doctrinal boxes. Equality versus expression has become a staple of legal and political debate. Although one might sense that this dichotomizing is unfortunate, there has been no attempt to develop a theory of expressive identity that could be posed as an alternative method of analysis. As a result, courts have coped with all such examples of its manifestation (in affirmative action and gay rights cases, for example) as utterly disconnected episodes reflecting different doctrinal problems. Expressive identity remains unrecognized, an unacknowledged thread of the constitutional fabric. In fact, expressive identity cases comprise a new stage in the dynamic interaction between constitutional law and oppositional social movements.

The first such stage was a First Amendment-dominated modernism, based on an assumption of political messages with clear, unambiguous content needing simply the proper, anti-authoritarian doctrinal analysis. The free speech movement that emerged from pro-union and antiwar agitation during the period surrounding World War I epitomized this politics.[5] Authorial intention was always present, though sometimes murky, as the courts debated which speech satisfied the test for incitement.[6] Fully formed, self-knowing actors exercised—or tried to—an evolving body of rights.

Equality movements that comprise the body of identity politics formed the second stage of this interaction between dissent and equality doctrine. What has come to be called a politics of presence, or recognition, sought space for previously excluded minorities, finding that invocations of universal rights like free speech too often translated into exclusionary blind spots and a failure to see that not everyone benefits equally from humanistic principles.[7] Nonrecognition of subordinated identities within a discourse of freedom and democracy became understood as simply another form of oppression. Identity claims reached even into such strong bastions of nonidentity politics as labor law.[8]

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[5] *See* PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979).

[6] *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919).

[7] *See* MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW (1997).

[8] *See* Molly S. Mcusic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339 (1997).

Postmodernist politics rejected both the modernist themes of individual autonomy and universal values, as well as the belief that identity politics claims were necessarily liberatory. The postmodern critique of identity politics asked: if identity claims are to be legitimate, who among the group gets to formulate and voice the substance of such claims? Antiessentialist caveats to easy notions of a unitary conception, for example, of "woman," or a single narrative of women's life experiences, complicated theories of equality.[9] Postmodernism functioned in many respects as a dissent against certain features of identity politics, challenging identity orthodoxy and suggesting that overreliance on concepts like personhood causes as many problems as it solves. Often this strain of criticism took the form of further specification of unrecognized identities.

In constitutional law, the interrelationship between viewpoint and identity is uniquely central. This Article tackles the split self of equality theory: ideas versus identity, ideological versus status concerns. My focus is on the impact of viewpoint, or dissent, on law's analysis of identity claims.

Part I of this Article elaborates what I mean by expressive identity. I distinguish social identity from the variety of characteristics that different individuals might value as important to a sense of self. I align marked identities with systems of social stratification. I then analyze how multiple forces produce those identities. The experience of marginalization produces distinctive perspectives that are often confused with what First Amendment law understands as viewpoints (i.e., specific opinions on specific issues). I argue that these perspectives should instead be conceptualized as points of viewing, which are less specific and predictable than a set of beliefs that would unify a viewpoint-defined group (e.g., a political party), but are nonetheless coherent as to the positive value of certain social and cultural identities. In addition, the very act of differentiation constitutes the meanings of these identities; the systems for producing the salience of certain characteristics also produce their social meanings. I use the Voting Rights Act case law to illustrate the ramifications of these dynamics in the law's regulation of representative democracy along the lines of a politics of presence.

Part II focuses on the consequences of expressive identity for the First Amendment jurisprudence with which it is most closely linked. Specifically, I address its implications for the right to form associations that exclude persons marked by certain identities and, by so excluding, to express ideas or values thought to be contrary to the meanings of those identities. In this context, I outline a method for translating expressive identity theory into doctrine, and then use that proposed doctrinal analy-

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[9] *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

sis to reexamine the challenges brought by the lesbian and gay parade contingent and by gay Boy Scouts.

Part III uses the twenty-five-year history of gay student organization claims as a case study to examine in some detail how the law has gone astray. This body of law is seldom written about because its central holding (that public universities cannot selectively deny recognition or benefits to gay student groups without violating the First Amendment's prohibition on viewpoint discrimination) is so well settled. A closer reading, however, reveals that the same demand for a right to recognition evolved from a viewpoint claim into an equality claim based on gay and lesbian identity. The change in legal strategy came after some states added sexual orientation to the list of prohibited bases for discrimination. These cases provide a particularly dramatic example of the law's dynamics in operation, and the seamless transformation from an expression claim into an equality claim illustrates the fundamentally hybrid nature of expressive identity.

Part IV demonstrates that the problem is limited neither to the law of expressive association generally, nor to the example of sexual orientation specifically. I analyze how the same tension plagues equality concepts in three other contexts. In each instance, the law has failed to appreciate the ramifications of expressive identity issues and thus has created a series of double binds. Courts have relied on diversity of viewpoint as a rationale for race-based affirmative action in unconscious recognition of expressive identity, but are unable to marshal a coherent theory for defending it. In interpreting § 1985(3),[10] the Supreme Court has alternately submerged dissent into identity categories, and rejected equality claims by conditioning legitimate identity on the absence of intra-group dissent. Lastly, in Religion Clause jurisprudence, the decline of dissent and the ascendance of identity as the controlling theory of anti-establishmentarianism has weakened protections for religious liberty.

In conclusion, I argue for recognition of the linkages among these broad realms of equality law. The new, as yet unacknowledged, category of expressive identity cases offers an important opportunity to rethink one of the most important and enduring problems in constitutional law.

I. The Emergence of Expressive Identity

A. Social Practices

Expressive identity is a product of identity politics, an outgrowth of a series of equality claims. These claims are made, often by and through law, not on behalf of a voluntarist group that expresses an ideology, but

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[10] 42 U.S.C. § 1985(3) (1994) provides a right of action for claims alleging acts that deprive an individual of "the equal protection of the laws."

on behalf of a group defined by an identity which is itself expressive. A new equality discourse has shifted from understanding race and other characteristics as simply inborn fortuities to seeing them as socialized meanings of communities and groups. The law has played a central, fundamental role in shaping the new meanings of identity.

Identity cannot exist without representation. Speech and other expressive activity associated with identity is also a form of dissent. Individuals can often communicate certain kinds of identity, such as race, without conscious action. Other kinds of identity, such as religion, are typically invisible. But even individuals with visible identities can communicate consciously chosen messages of group pride and dissent from negative assumptions or stereotypes. Claims of equality based on identities of difference are intrinsically a kind of protest. Consider that in one of the First Amendment cases arising out of the African American civil rights movement, one of the placards carried by protesters stated simply, "I am proud to be a Negro."[11]

Identity claims in law arise not merely from a social context in which a particular group shares a certain history, culture, or status. Underlying that kind of identity is a shared viewpoint, not a set of opinions or a viewpoint specific to any particular topic or issue, but "view-point" in a more literal, basic sense: a shared point of view(ing), a shared position from which one's views emerge.

What distinguishes the viewpoint embedded in expressive identity is its inextricable linkage to the identity itself. It is not merely viewpoint alone, as in the shared expression of a group composed of members of the Republican Party. The underlying identity claim is not undermined by its association with a non-identity cluster of viewpoints, even arguably surprising ones such as gay Republicans. Both components of that category—gay and Republican—are expressive, but only the former aligns with a system of social stratification that inscribes it as identity in the sense that this piece contemplates. In the domain of law,, that minoritarian status paired with social disempowerment renders the group defensible against majoritarian rulemaking.[12] The ways in which an individual is raced or gendered carry over to the full range of social life. One's identity, therefore, is based not on an individual's self-perception of the salience of certain characteristics, but on the centrality of those characteristics to her standing and treatment in society.[13]

It is important to distinguish expressive identity from a simple interest group model. Nathan Glazer and Daniel Patrick Moynihan first described ethnic groups as also being interest groups. In *Beyond the Melting Pot*, they argued that ethnicity operated on two tracks: cultural and

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[11] Edwards v. South Carolina, 372 U.S. 229, 231 (1963).
[12] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[13] *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2360 (1997).

political.[14] Ethnic communities were in a continuing process of regeneration, regardless of intermarriage or cultural assimilation, because central political concerns endured. An individual was connected to a community not only by ties of blood, marriage, or personal history, but also "by ties of *interest*. The ethnic groups in New York are also *interest groups*."[15] Glazer and Moynihan sought to incorporate ethnicity into a model of interest-driven pluralism. In effect, they merged ethnicity, along with political and economic demands, into the interest group framework. If one imposes expression/equality doctrine onto this model, the concept of interest group appears to be driven primarily by expression or demand. Interest groups fall all along the continuum of stratification; they do not align with marginalized identity.

Kenneth Karst's work on communities as the loci for citizenship also drew on the idea of melding individual and group identities. He too saw community membership as grounded in a defining or shared characteristic, which may not be apparent on the surface: "To be a member of a community is to be joined with others for the achievement of a common good. There is something purposive about our communities even if we are born into them .... A community does not exist in nature; it is the joint artifact of a coalition of minds."[16] Karst drew more on communitarianism than on political pluralism. In Karst's view, equality and identity concepts dominate.

Critical race theory has elaborated substantially on the relationship between race, identity and community. I endorse the understanding that identity at the level of the individual and identity at the level of the community "are only analytically distinct. In our lived experience, ... they are continuous and reciprocal."[17] Ian Haney Lopez's work, for example, builds on the concept of race as a nonbiological social formation or fabrication, invented even if not chosen in any simple way. Haney Lopez sees the link between race and identity as running through communities, which he defines as social formations that mediate that linkage through their own instability: "the porous, diverse, and multiple nature of community affiliation itself."[18] Scholars writing on gender, religion and sexuality discrimination have also elaborated concepts of the dialogical processes by which identities are created and sustained.[19]

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[14] NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT (1963).

[15] *Id.* at 17.

[16] Kenneth L. Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME L. REV. 183, 183–84 (1980).

[17] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 67 (1986).

[18] Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 58 (1994). *See also* IAN F. HANEY LOPEZ, WHITE BY LAW (1996).

[19] *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION,

The phrase "identity politics" captures the moment of recognition of, and reaction against, a system of exclusion. Recognizing exclusion, one's place, and one's community's place in that discursive system (but outside the bounds of the purported universalism of liberal precepts, such as the First Amendment) is the experience from which identity and identity politics emerge. Simply put, "when a group recognizes its own exclusion, [that] tends to signify the formation of an identity that has political consequences."[20] The moment of affiliation, of realization of exclusion, is a (perhaps the) moment of identity formation. It is the moment when identity's social meaning becomes manifest to the individual in a matrix of community. It is part individual, part social; part viewpoint, part status. It generates expressive identity.

What is expressed in expressive identity, then, is not a conventional political viewpoint, but what Duncan Kennedy described as the social meaning of being raced as non-white: "a rough but adequate proxy for a connection to a subordinated community."[21] The point of view(ing) shared by a specific group is formed by that group's outsiderness, by an exclusion that is both particular, in that it is constructed along the axis of a specific characteristic, and deep. There is "an irreducible link of commonality in the experience of people of color: rich or poor, male or female, learned or ignorant, all people of color are to some degree 'outsiders' in a society that is intensely color-conscious and in which the hegemony of whites is overwhelming."[22]

Difference is a position that law conventionally links to status, but it is also a position or point of view that produces a viewpoint. The very differences that constitute the meaning of identity categories reflect the social hierarchy that equality claims disrupt.[23] This is the duality that the expression/equality dichotomy in law cannot accommodate. The outsider viewpoint becomes part of the very nature and social definition of the identity. To a significant extent, that point of view(ing) creates the identity.

AND AMERICAN LAW (1990); Balkin, *supra* note 13; Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 924–25 (1989); Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1542 (1995); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996).

[20] Stanley Aronowitz, *Discussion* (describing adherents of David Duke), *in* IDENTITY QUESTION 21, 25 (John Rajchman ed., 1995).

[21] DUNCAN KENNEDY, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, *in* SEXY DRESSING ETC. 41 (1993).

[22] *Id.* at 56, quoting in partial disagreement Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1784 (1989). Similarly, sexual identity signifies "the shared experience of having a sexual attachment to persons of the same sex and the oppression experienced because of that attachment." Yoshino, *supra* note 19, at 1755 n.3.

[23] *See* Jane S. Schachter, *Skepticism, Culture and the Gay Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 706 (1997) (book review).

The interrelationship can be so essential that when the belief structure associated with an identity is challenged, the identity itself can seem to be at risk. Some of the most vituperative debates in law and politics erupt when the assumed unity of identity group membership and political belief is ruptured, as in the case of disagreements among African Americans over the nomination[24] and the philosophy[25] of Supreme Court Justice Clarence Thomas.

It is because of the extent to which viewpoint is constitutive of outsider identity that disagreement among identity group members may seem like betrayal. Political differences become identity differences, and disputes are seen as "fundamental disavowals of *who we are*."[26] Another such example occurred when feminists argued fiercely among themselves over whether anti-pornography laws represented an "authentic" voice of women oppressed by sexualized commerce, or whether they were a mis-

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[24] The Southern Christian Leadership Conference endorsed Thomas's nomination. *See* Peter Applebome, *Dr. King's Rights Group Backs Court Nominee*, N.Y. TIMES, Sept. 27, 1991, at A2. The National Urban League took no position for or against. *See* James Rowley, *DeConcini Says Thomas' Presentation Will Make or Break Confirmation*, Associated Press wire, Aug. 1, 1991. The NAACP opposed it. *See id.* A *USA Today* poll found that three out of four African Americans supported the nomination. *See* Joseph Perkins, *Thomas and NAACP*, SAN DIEGO UNION-TRIB., Aug. 2, 1991, at B6. For an analysis of debates on the authenticity of African American experience as represented, or not, by Justice Thomas, see Cornel West, *Black Leadership and the Pitfalls of Racial Reasoning*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 390 (Toni Morrison ed., 1992).

[25] Justice Thomas has responded to his critics in a series of speeches condemning those who expect him, as an African American, to hold certain views. Writing early in his tenure on the Court, Justice Thomas defended his right to espouse opinions that differ from those of the majority of African Americans. "[S]traying from the tenets of this [pro-affirmative action] orthodoxy meant that you were a traitor to your race .... [W]here blacks were once intimidated from crossing racial boundaries, we now fear crossing *ideological* boundaries." Clarence Thomas, *The New Intolerance*, WALL STREET J., May 12, 1993, at A15).

He has continued to press the point. "I refuse to have my ideas assigned to me as though I was an intellectual slave because I am black," he said in a 1998 speech before the National Bar Association, an organization of black lawyers. Neil A. Lewis, *Justice Thomas Suggests Critics' Views Are Racist*, N.Y. TIMES, July 30, 1998, at A1. Many NBA members had protested the fact that Justice Thomas had been invited to speak. *See id.*

The NBA speech provoked heated reactions. Although identically titled, editorials in the *New York Times* and the *Washington Post* took opposite positions. *See Justice Thomas Speaks*, WASH. POST, July 31, 1998, at A24 ("On this matter ... one can only cheer him on.... Justice Thomas has no duty to parrot the orthodoxies of affirmative action simply because he is black."); *Justice Thomas Speaks*, N.Y. TIMES, July 31, 1998, at A22 (opining that Justice Thomas "should not expect to be embraced or supported by the black community because of his race. His instinct to turn antagonism toward his ideas into a racial matter is an odd impulse for a man who wants to be judged on his intellect and ideas alone."). To one columnist, the controversy over Justice Thomas's speech exemplified the expression/equality dichotomy: "When was it, and how, and why, that civil rights and free speech became mutually exclusive?" Jonathan Yardley, *For Heaven's Sake, Lawyers, Haven't You Ever Heard of Free Speech?*, WASH. POST, Aug. 3, 1998, at D2.

[26] Jodi Dean, *The Reflective Solidarity of a Democratic Feminism*, *in* FEMINISM AND THE NEW DEMOCRACY: RECITING THE POLITICAL 246 (Jodi Dean ed., 1997).

guided throwback to treating women as presumptively victims of sexuality.[27]

This phenomenon does more than make for vituperative intracommunity debates, however. It can be understood in one of two ways. Arguments over "who we are" could essentialize viewpoint by linking it to identity characteristics thought of as natural, such as race. This approach extends to the realm of ideas all of the dangers of an essentialist belief that black experience or women's experience is universal for persons within those identity groups. Alternatively, such arguments could denaturalize identity, by exposing one aspect of the contingency of categories often viewed as quasi- or literally biological. This second approach paves the way to an understanding of expressive identity.

As Alex Johnson wrote in another context, the voice of color is "variegated."[28] Clarence Thomas speaks in a "new dialect," but still within that voice, however contemptuous the tone, because he draws on his experiences as a person of color.[29] Whatever his views, Justice Thomas, too, is a product of profound outsiderness.

B. Performativity

I have argued that representation or expression of identity is necessary for that identity to have a social existence. This is true even for those identities that we think of as always, silently visible, like race. The imbrications of expression and identity do not stop there, however. Identities, once formed, require expression in order to exist, but they also require expression in order to be created.

Expression is the crucible in which identity is formed. Identity cannot exist subjectively without the constitutive impact of complex discursive systems, one of which is expression. Discourses shape individual experiences of self-identification, in part by a process of normalization that makes particular differences matter. Ideas shape identity, and culture creates the self, at least as much as the reverse. Identity is not a prediscursive, biological given.

Judith Butler's work introduced the concept of performativity to the body of scholarship addressing the process of gender construction. Butler's theory of the performativity of gender posits that gender attributes and acts "effectively constitute the identity they are said to express or reveal."[30] In that sense, we all "perform" gender, a performance that, like others, is not preordained by nature but is itself generated and sustained

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[27] Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

[28] Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2010 (1991).

[29] *Id.* at 2010, 2029.

[30] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 141 (1990).

by a matrix of cultural mechanisms, a matrix that allows the performance to be read and understood. Drawing on that analysis, feminist legal scholars have argued for reframing cultural notions of gender as constructive of the social and legal significance of biological sex categories,[31] and for the importance of importing a recognition of constructivism into the procedure by which narratives of woman-ness are assessed.[32]

To date, however, applications of Butler's theory of performativity have been limited to the parameters of equality law. The concept of expressive identity raises another set of questions about the operations of performativity by asking us to address the nature of the messages that are generated and communicated. An examination of those messages highlights the ideational function of identity, pushing it outside the confines of equality law as such and more fully into the realm of expression.

Butler's recent work explores the concept of speech acts, the process by which speech enacts and creates new social realities. A speech act is a verbal statement that itself alters material conditions or legal status, such as the statement "I pronounce you husband and wife."[33] She examines identity politics using the concept of interpellation, which posits that the act of recognition functions as an act of constitution, creating a moment not only in which the addressee is acknowledged in her cultural meaning self, but also in which she and her identity are simultaneously created.[34] In Butler's explication of the epistemology of hate speech, for example, she asks, "what does it mean for a word not only to name, but also in some sense to perform, and in particular, to perform what it names."[35]

Butler uses the military's "don't ask, don't tell" policy as a primary example.[36] Under the statute, service members can be expelled if they demonstrate a "propensity" toward homosexuality; one of the markers of this propensity, which can itself lead to expulsion, is the statement "I am gay."[37] The policy defines "I am gay" as proof of propensity, and propensity as equivalent to a "homosexual act."[38] Butler argues that the policy makes that statement, in effect, a speech act.

Investing "I am gay" with such power raises the question of what act it is thought to perform. Butler argues that the military policy normalizes a perception that coming out speech is a sexual solicitation, a threat, a

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[31] *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

[32] *See id.*; Higgins, *supra* note 19. *See also* Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995).

[33] BUTLER, *supra* note 30, at 107.

[34] *See* JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 2, 25 (1997).

[35] *Id.* at 43.

[36] *Id.* at 103–26.

[37] 10 U.S.C. § 654(b) (1994).

[38] For an analysis of the legal and lawyering process by which this occurred, see JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999).

kind of verbal assault. This overreading, in turn, prompts an understanding that exclusion of the speaker is a form of defense to solicitation. This reading explains why exclusion is logically unnecessary as to closeted lesbian and gay service members, who are permitted under the policy to serve in the military.

The notion that speech performs identity is richly significant for legal theory. Not only is identity constructed discursively, it also never escapes discourse. In particular, Butler's argument about gay speech in the military has broader usefulness for expressive identity analysis. It provides a context for analyzing why some, but not all, identity speech is treated as a speech act.

Butler focuses on the threat of sexual acts and of what is perceived as the challenge to the hearer's implicit heterosexuality. Expressive identity legal claims highlight a second misperceived message in coming out speech: a demand for agreement. Courts interpret descriptions of oneself as nonheterosexual as distinctly and primarily a political viewpoint.[39] Entities forbidden to exclude based on status thus acquire a defense through which they can exclude based on viewpoint. As with the military policy, however, "the performativity attributed to the homosexual utterance can only be established through the performativity of a state discourse that makes this very attribution."[40] In this discursive dynamic, "who we are" becomes not an assault but an argument, to which silence or tolerance becomes agreement.

That same dynamic can occur in other contexts as well, with the powerful kick of sexuality replaced by the implicit threat posed by other subaltern identities, such as those related to race or religion. The discursive authority to define some expressions of identity, but not others, as viewpoint dominant, as, in effect, speech acts, is a powerful deployment of the very structures of hierarchy that equality claims properly challenge. Each wing of this dynamic, both the expression of identity and the power to redefine it, is "a structure dependent upon its enunciation for its existence."[41]

Understanding these problems opens a path for a better conception of identity speech. If identity were understood to encompass viewpoint as point of view(ing), the overreading of identity speech would not occur. Equally important, the response of silence, or tolerance of the speaker, would be understood, at most, as a commitment to dialogue, of the sort that we expect after integration of "pure status" groups, and not as an imprimatur or endorsement.

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[39] *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. and Tel. Co., 595 P.2d 592 (Cal. 1979).

[40] BUTLER, *supra* note 34, at 122.

[41] *Id.* at 19.

In expressive identity case law, identity and performativity, dissent and equality, recombine in a new way. Expressive identity theory envisions expression and equality as a continuum, rather than a dichotomy. It embodies two components that can never be fully disaggregated. As a result, identity becomes less fixed, less easy to define, classify, or contain, a development that could reinvigorate equal protection jurisprudence. A theory of expressive identity differs from identity politics because this unruliness arises not solely from the concept of difference, but also from that of dissent. Expressive identity marks the juncture where equality claims can successfully incorporate point-of-view(ing) rationales. Theorizing expressive identity seeks to recuperate dissent for equality.

C. Presence

Tensions between identity and viewpoint have also arisen in the law of representational democracy. What political scientists have called the politics of presence[42] or the politics of recognition[43] incorporates an argument that the identity claims that emerge from social and political discourses, including the law, are centrally important to the legitimacy of the state. Because the citizen herself is formed in fundamental ways in and by the interaction of these forces, a refusal by the state to accept the legitimacy of an identity claim is itself oppressive.[44] On this understanding, the authority to assert and insist on recognition of a cultural identity is an individual right.[45]

The new politics of identity arose to rectify the absence of previously excluded minorities and women. Identity politics demonstrated that the articulating of interests depended on who did the articulation and that policy choices followed presence. The premise that "representatives must not only be representative but also be seen to be so"[46] underlies identity politics. One of the most powerful legal products of identity politics, the Voting Rights Act,[47] protects not merely a right of access to the ballot and a right to have one's votes fairly aggregated, but also a right to an "effective vote" and an "opportunity to participate."[48] That joinder of represen-

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[42] *See* ANNE PHILLIPS, THE POLITICS OF PRESENCE (1995).

[43] *See* Charles Taylor, *The Politics of Recognition, in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25 (Amy Gutmann ed., 1992).

[44] *See id.* at 64–65.

[45] *See* Jurgen Habermas, *Address: Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849 (1995).

[46] PHILLIPS, *supra* note 42, at 80.

[47] 42 U.S.C. §§ 1971–1974e (1994).

[48] *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (1993). Kenneth Karst argues that the Voting Rights Act is another example of the centrality of equality in the protection of a fundamentally expressive act, voting. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 52–65 (1975).

tation, perception, and participation describes a politics where identity and interests cannot be disaggregated.

As a result, a central issue in the interpretation of the Voting Rights Act has become the validity of representation premised on notions of racially aligned viewpoints. American democracy fosters the representation of competing political views in the legislative process in part through the election of representatives by geographically grouped voters. Soon after Congress amended the Act to encompass claims of vote dilution as well as denial of access to the ballot, the Supreme Court ruled that courts could force legislatures to create majority-minority single-member districts and impose single-member districting in lieu of winner-take-all systems, which favored white candidates and essentially precluded African Americans from holding office in many places.[49] To justify such a remedy, however, plaintiffs had to demonstrate not only that their minority group was numerous enough to justify having what amounted to its own district, but also that the group was "politically cohesive."[50] The empirical evidence of shared political views in African American districts was not difficult to come by.[51]

In a series of recent cases, however, the Court has sharply reversed direction. In *Shaw v. Reno* [hereinafter *Shaw I*],[52] the Court ruled that redistricting to create a majority-minority district constituted a prima facie equal protection claim when it produced torturously configured geographic boundaries. The Court held that a reapportionment plan driven so overwhelmingly by race consciousness reinforced the "impermissible racial stereotypes" that "members of the same racial group . . . think alike, share the same political interests and will prefer the same candidates at the polls."[53] Three years later, in *Bush v. Vera*,[54] the Court reiterated that such legislative decisions "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial."[55] And in *Shaw v. Hunt* [hereinafter *Shaw II*],[56] the Court explained that "the constitutional wrong occurs when race becomes the dominant and controlling consideration."[57] The Court also ruled that vote dilution harms are individual; so, the resulting disempowerment must be remedied by methods that specify the particular voters living where traditional districting has most favored the majority. Thus, the at-

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[49] *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

[50] *Id.* at 50–51.

[51] *See* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

[52] 509 U.S. 630 (1993).

[53] *Id.* at 647.

[54] 517 U.S. 952 (1996).

[55] *Id.* at 980.

[56] 517 U.S. 899 (1996).

[57] *Id.* at 905 (citing Miller v. Johnson, 515 U.S. 900, 911, 915–16 (quotation marks omitted)).

tempt by North Carolina to create a second majority-minority district was struck down in part because it was not carved out of that section of the state where the Department of Justice had identified the greatest extent of dilution. "To accept that the district may be placed anywhere implies that the claim . . . belongs to the minority as a group and not to its individual members."[58]

The debate over the social meaning of state actions that recognize and redistrict based on the "political cohesiveness" among African American voters has particularly engaged Justice O'Connor (who wrote the Court's opinions in both *Shaw I* and *Vera*) and Justice Souter as adversaries. In *Shaw I*, Justice Souter rejected the notion that boundaries drawn to produce a majority district for a minority created stigmatic harm or perpetuated belittling stereotypes, noting that a legislature need not refuse "recognition of actual commonality of interests and racially polarized bloc voting."[59] In *Vera*, he continued to press this point, arguing that a majority-minority district created "to allow previously submerged members of a racial minorities into the active political process" could not be read as conveying a message of anyone's inferiority or status.[60]

In *Vera*, Justice O'Connor reaffirmed the anti-stereotyping argument adopted in *Shaw I*, writing that policies "which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter."[61] Justice O'Connor thus invoked a rhetoric of assimilated, colorless, and fully autonomous individuals constituting the "political identity" of American-ness, of *the* American voter, very much like Justice Scalia's statement that "we are just one race . . . American."[62]

Justice Thomas was even more adamant, joining the debate with a vigorous concurrence in *Holder v. Hall*.[63] In that case, the Court ruled that the Voting Rights Act did not provide a remedy for a county's decision to adhere to a single-commissioner system rather than adopting a multi-member board of commissioners, even if the limitation to one commissioner insured white control of who was elected. Thomas, joined by Justice Scalia, systematically criticized the vote dilution theory for redistricting developed in prior cases, characterizing it as "a slightly less precise mechanism than the racial register for allocating representation

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[58] *Shaw II*, 517 U.S. at 917.

[59] 509 U.S. at 681 n.2 (Souter, J., dissenting).

[60] 517 U.S. at 1055 (Souter, J., dissenting).

[61] *Id.* at 985.

[62] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

[63] 512 U.S. 874 (1994). Justice Thomas's critique of current Voting Rights Act law in *Holder* conveys a remarkable sense of urgency: "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day." *Id.* at 944 (Thomas, J., concurring in the judgment).

on the basis of race."[64] He attacked as "pernicious . . . the one underlying assumption that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well."[65]

Justice Ginsburg weighed in on these questions in *Miller v. Johnson*,[66] in which the Court invalidated a Georgia majority-minority district on the ground that it violated the Equal Protection clause as a product of race-determined considerations. Justice Ginsburg's dissent included a pointed rejoinder to the stereotyping arguments made in previous cases by Justices O'Connor and Thomas: "[E]thnicity itself can tie people together . . . . For this reason, ethnicity is a significant force in political life . . . . The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation."[67]

Scholars have labeled the premise underlying these reinterpretations of the Voting Rights Act as "expressive harm"[68] or "non-instrumental harm."[69] They have described the evil of "expressive harm" as a prioritizing of race-driven lawmaking over the pluralism that otherwise governs democratic political processes,[70] a framing that the Court made explicit in *Miller v. Johnson*.[71] Both Justice O'Connor's plurality opinion and Justice Souter's dissent in *Vera* have accepted the "expressive harm" concept as an apt characterization of the Court's reasoning.[72]

In my view, the concept of expressive harm is a truncated reading of what the Court is trying to achieve. In addition to expressing the sense that race too heavily dominates legislative decision making, the Court is rejecting as harmful an official acceptance that racial identity reliably translates into political perspective. The Court now appears to be caught in the whipsaw between its own requirement in *Gingles* that minority voters demonstrate political cohesiveness and its apparent acceptance of the belief that it is harmful to use race to guide redistricting in a way that appears to assume, however correctly, a large core of shared political views among, for example, African Americans.

Context is everything. If state actions were to force individuals into ideological boxes in order for them to secure benefits, the interchange-

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[64] *Id.* at 908 (Thomas, J., concurring in the judgment).

[65] *Id.* at 903 (Thomas, J., concurring in the judgment).

[66] 515 U.S. 900 (1995).

[67] *Id.* at 944–45 (Ginsburg, J., dissenting).

[68] Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

[69] Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996).

[70] *See* Pildes & Niemi, *supra* note 68, at 506–09.

[71] 515 U.S. 900 (1995).

[72] 517 U.S. at 984; 517 U.S. at 1053–54 (Souter, J., dissenting).

able use of race and viewpoint as mutual proxies would be unacceptable. In the Voting Rights Act context, however, state actions necessarily group individuals along what are inevitably imperfect lines, seeking a rough approximation of shared interests. As Justice Souter noted, drawing district boundaries for voting purposes is different; it is necessarily about using proxies for shared concerns.

Beyond context, however, the Voting Rights Act debates illustrate how thorny the problem of conceptualizing identity so that it encompasses some notion of viewpoint, without sliding into reductionism, can be. One impediment to this conceptualization is the power of the legal cult of "abstract individualism that entrenches existing distributions of power even as it purports to make us more free."[73] More deeply, treating the recognition of shared viewpoints as always and only an insulting stereotype signals a failure to understand viewpoint as a social product, a product of the same process or discursive regime that generates identity. The result is another instance of using equality to disable the oppositional force behind identity claims. In this view, true equality not only must be color-blind, it must be content-blind.

Lani Guinier's work is built around the same core issue of how to resolve the tension between the social reality of a politically distinct African American community and the limitations of an essentialized definition of identity. Guinier defends the political cohesiveness of African American identity as forged in a very real history of exclusion and subordination. For her, it is not "merely" a discursive artifact nor a diversion from a more principled (in liberal terms) concept of voting as a thoroughly individualized act. But she also resists the results of superficial identity politics. She has criticized voting rights doctrine as mired in "the authenticity assumption," under which a "shorthand of counting elected black officials" is substituted for a deeper understanding of representation of African American (citizen) identity.[74] Guinier argues that representation of those interests that have been identified as African American is in no way guaranteed, and may even be subverted, by a focus on the race of the representative, especially where that representative is not selected directly by African American voters.[75]

Guinier criticizes a privileging of biologized racial identity as falling into the trap of using "the nominally cultural to obscure its substantively political meaning."[76] Her proposals for reform center on a system of proportional voting, a mechanism that would permit African American (or other minority group) voters to cluster votes in such a way as to maxi-

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[73] Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 313 (1997).

[74] LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 43–58 (1995).

[75] *See id.* at 119–56.

[76] *Id.* at 58.

mize the likelihood of influencing policy even where they are in a perpetual minority, in other words, a minority that cannot attract coalition support from members of the majority. Guinier argues that this approach would also encourage the growth of intracommunity diversity of interests and viewpoints.[77]

Guinier is also the scholar who has engaged most directly with Justice Thomas's argument in *Holder* that race should not be a political category. Guinier's response is that the extent to which individual identity is aligned with a perception of racial identity is highly variable, but nonetheless real.[78] Consistent with her earlier work, she attempts to build a theory in which the social meaning of race need not be reduced to a politics in which it is relevant only to issues of race per se. "[A] common set of interests . . . may or may not be racially based, and those who support them may or may not be racially similar. Race, *in this sense*, becomes a political, not a biological cue. It is chosen, not inherited."[79]

Guinier's work tracks the concept of expressive identity that I propose. She frames racial identity as nonessentialized and sees it as a politically coherent concept embodying and expressing a point of view(ing) that is sufficiently material so that voting on the basis of race functions as an intentional, outwardly directed expression of identity. The fact that the identity itself is expressive is one reason *why* race works as a political proxy.

The missing step is understanding viewpoint as a point of view(ing) rather than as a singular, specific platform or policy. Such an understanding would contribute to filling the gap identified by Guinier, when she comments that, "the Voting Rights Act is a statute without a theory."[80] A broader, point-of-view(ing) approach, consistent with the concept of expressive identity, could help strengthen the theory of representation upon which the Voting Rights Act is based, and could also provide a coherent thread for linking expressive identity conflicts as they arise across the range of identity politics issues, where a politics of presence must include voice as well as visibility.

II. Challenges to Equality Jurisprudence

A. Neutrality's Unanswered Question

In 1959, Herbert Wechsler published what continues to be the strongest criticism of *Brown v. Board of Education*.[81] Wechsler did not

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[77] *See id.* at 92–114.

[78] *See* Lani Guinier, *(E) Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994).

[79] *Id.* at 134 (emphasis added).

[80] *Id.* at 113.

[81] 347 U.S. 483 (1954).

regret the result, but he did criticize the Court for cobbling together a decision with inadequate evidentiary support for findings of harm to African American children and a conclusion attributing unequal lawmaking to the bad motivations of legislators.[82] Instead, Wechsler argued that the heart of the case lay in the contested scope of associational rights, specifically in the conflict between the rights of African American parents and children to end the system of racial segregation and the rights of whites to resist associations that they found repugnant: "Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"[83]

The Wechsler article generated a debate about equality per se as a neutral principle. So long as the context remained that of publicly owned facilities, the response to Wechsler seemed an easy combination of the strength and history of the textual command of the Fourteenth Amendment and the ability of segregationists to create for themselves private institutions that would sustain their freedom not to associate.[84] Once one crosses the bounds of state action, however, into the nether realm of privately owned public accommodations, the implications of Wechsler's question still linger. One place that they resurface is in the expressive identity case law.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,[85] the Supreme Court decision upholding the right of the private group sponsoring the Boston St. Patrick's Day Parade to exclude a gay group that wanted to march as part of the parade, also seems easy at first. The Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") asserted that the Massachusetts public accommodations law, which banned discrimination in public accommodations based on sexual orientation,[86] required that the parade organizers admit them to the parade and treat them equally. "Equal treatment," as defined by the GLIB membership, meant being allowed to carry a sign bearing the name of the group, just like all of the other contingents in the parade.

If one accepts, as the Court did, that the issue was whether parade organizers could be required "to include among the marchers a group imparting a message the organizers do not want to convey,"[87] then the First Amendment trumping of the equality claim is almost self-evident.

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[82] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[83] *Id.* at 34.

[84] *See, e.g.*, Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

[85] 515 U.S. 557 (1995).

[86] Mass. Gen. Laws. § 272, ch. 98 (1992).

[87] *Hurley*, 515 U.S. at 559.

The Court's result rests comfortably on the notion that an antidiscrimination law cannot be enforced when its inevitable and only impact will be to compromise the defendants' own right to speak.[88] As the Court framed it in *Hurley*, the application of the Massachusetts statute made the sponsors' speech itself a public accommodation.[89]

But the Court's formulation ignores the complexity of the problem. Beneath the Court's seemingly easy, unanimous decision lie many unexamined assumptions and unanswered questions. The Court made no attempt to escape the equality/expression dichotomy. On the Court's analysis, if GLIB's presence imparts any message, it loses. GLIB's message simply drowned their equality claim, transforming it from an assertion of civil rights into "a proposal to limit speech in the service of orthodox expression."[90]

Justice Souter closes *Hurley* with a coda, in which the character of the parade as primarily expressive is hardly significant. Drawing on the private club cases in which the Court had forced the admission of women by applying antidiscrimination laws,[91] Justice Souter wrote that no prior decision would force a private defendant, no matter how significant the economic, tangible benefits of association were, to admit those "whose manifest views were at odds" with positions taken by the club.[92]

The Court simply avoids the question of whether identity itself may be inseparable from "manifest views."[93] GLIB did not seek to carry a sign with an argument or slogan; its banner would have contained nothing but the name of the group. The Court was not wrong to read into the banner a message of the existence and celebration of gay identity, with its implicit claim of self-worth.[94] But that message is surely the irreducible minimum of any group's point of view(ing). To exclude that message is to exclude

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[88] Such a decision would be consistent with the plurality opinion in the case challenging the denial of recognition to a gay student group at Georgetown University, *see infra* Part III.C, distinguished by the fact that at Georgetown the tangible benefits at issue created a zone where the law could be enforced without infringing expression rights, whereas no such zone existed in the parade situation.

[89] *See* 515 U.S. at 573.

[90] *Id.* at 579.

[91] *See* New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[92] *Hurley*, 515 U.S. at 580–81.

[93] *Id.* at 581. Throughout the litigation in *Hurley*, courts sought to pin down whether GLIB was excluded because of who it was or what it said. The task proved impossible. The trial judge found that "[t]he defendant's final position was that GLIB would be excluded because of its values and its messages, i.e., its members' sexual orientation." Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston, 636 N.E.2d 1293, 1295 n.8 (Mass. 1994). During oral argument before the Supreme Court, counsel for the parade organizers framed the issue as follows: "The trial judge equated the sexual orientation with messages and values. In my book, if you combine a message and a value you've got a viewpoint, not a sexual orientation." 1995 WL 301703, at *16 (U.S. Oral Arg., Apr. 25, 1995). When asked whether GLIB's signs were "self-identifications" or a "message," he answered: "It's a message, it's an identification, it's a proclamation. . . ." *Id.* at *47.

[94] *See Hurley*, 515 U.S. at 570.

that identity, as it is the full identity claim that makes equality a meaningful concept.

Hurley presents in particularly stark form the issues that lie at the core of the expression/equality dichotomy and the conundrum presented by expressive identity cases. To treat GLIB's message as a piece of its equality claim, rather than as a fatal weakness in the logic of that claim, does not answer the question of whether this particular defendant had a strong point-of-view(ing) defense. However, such an approach would have forced the Court to engage with the real gravity of the conflict before it.

B. A Doctrinal Analysis

Any legal theory must be translatable into doctrine. There are three steps in a doctrinal analysis that would effectuate the expressive identity principle. First, one must ask whether the viewpoint attributed to the persons seeking inclusion is a product of the same processes of social construction as the identity characteristics to be protected, which must, then, be shielded by equality law as part of the identity. Second, one must ask whether inclusion can be forced upon the exclusive group without sacrificing that group's expressive rights, including its own identity rights, since that identity is in part constructed by the very act of exclusion. And third, one must assess whether compelled inclusion undermines the social good of preserving enclaves of expressively defined subcultures that, through their collective diversity, contribute to a more robust public discourse. In *Hurley*, the Court fell short at each turn.

1. Point of View(ing)

If, as I have posited, viewpoint can be understood more fruitfully in this context as a point of view(ing), one must take the next step of defining that concept more precisely. It cannot be merely tautological. Point of view(ing) must recognize something more than the existence of a group of persons who agree about a specific cluster of issues. One's status as landlord, tenant, or film producer may be important, even life defining, but it does not implicate the complex process of identity formation that race, gender, religion, and sexuality generate.

Affirmation of the self-worth or moral standing of persons who are in the group, along with opposition to denial of liberty or material goods that are based on group characteristics (or perceived characteristics) constitutes a point of view(ing) that cannot be separated from membership in the group per se. Whether the defendant group, upon which inclusion would be forced, can properly assert its own expression claim as a defense to inclusion is a separate issue. That issue should not be confused with the threshold question of whether the identity claim is treated as a

partisan argument or as an identity that, like all identities, contains the message that the individuals who claim it bring a distinctive and worthy point of view(ing). Although some courts[95] and scholars[96] have begun to make this connection, the point has never been clarified sufficiently to survive as a durable holding.

Failing to see the difference between these two inquiries was the Court's first mistake in *Hurley*. The Court read the presence of GLIB in the St. Patrick's Day parade as presence plus, rather than as presence complete. It is difficult to fault the Court too harshly, though, since current doctrine has muddied this step and made it more confusing than either of the other two. If the Court in *Hurley* stumbled by falsely disaggregating viewpoint from identity and then according too much power to what was mere point of view(ing), then it is also true that the earlier line of private club cases made the opposite mistake of erasing any distinct point of view(ing) whatsoever. In *Roberts v. United States Jaycees*, the Court ruled that enforcement of a Minnesota civil rights statute to force the Jaycees to admit women members did not violate their rights to associate for expressive purposes.[97] Justice Brennan's opinion in *Roberts* simply steam-rolled the defendant's claims that admission of women would affect the expressive culture of a previously male-only organization. Tying his reasoning to the fact that defendants could not prove a male/female difference in viewpoint defined in issue specific terms, such as support for nuclear weapons, Brennan dismissed the defendant's expressive association defense as mere stereotyping.[98]

The inability to distinguish between viewpoint and point of view(ing) has plagued the Court in other contexts as well. It is no wonder that the reasoning in the line of cases involving equal protection chal-

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[95] *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1017 (1985) (Brennan, J., dissenting from denial of cert.); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1343 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (holding that discrimination against a women's studies professor was tantamount to discrimination against women because "a diminished opinion of those who concentrate on those issues is evidence of a discriminatory attitude toward women"); discussion of Dale v. Boy Scouts of Am., 735 A.2d 1196 (N.J. 1999), *infra* at Part II.C; Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc), *infra* at Part III.C; cases on the diversity rationale in affirmative action, *infra* at Part IV.A.

[96] I used the term "identity speech" to describe this convergence in Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993). Two major articles have analyzed its ramifications in *Hurley*: William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997) and Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998). More generally, in an essay on the politics of presence, Kathryn Abrams posited three types of visibility based on identity: literal, political and programmatic. Her third category "arises from group members' efforts to connect their group-based identities with a particular political interest or program." Kathryn Abrams, *The Supreme Court, Visibility, and the "Politics of Presence,"* 50 VAND. L. REV. 411, 413–14 (1997).

[97] 468 U.S. 609 (1984).

[98] *See id.* at 628.

lenges to jury selection, for example, seems incoherent. In the early jury cases, the Court ruled that courts could not exclude either African Americans or women from jury pools, in part on the ground that the presence of each was necessary to achieve representation of a fair cross-section of the community.[99] In later cases, it ruled that peremptory strikes on those bases, at least by the state, were unconstitutional because they were, of necessity, born of a stereotyped view of what perspectives racial minorities or women were likely to have.[100] The Court was walking a fine line in reasoning, if not in result. On the one hand, it ruled that states could not presume either group so prone to identification with their own that they were incapable of impartiality.[101] On the other hand, however, the Court also relied for its inclusion rulings on the distinctive aspects of each group's typical life experiences, which it supposed could be relevant in many aspects of fact finding and thus essential to having the requisite cross-section of the full community.[102] The discrepancy in reasoning led Justice O'Connor to attempt to distinguish "the difference gender makes . . . as a matter of law" from "the difference gender makes . . . as a matter of fact."[103]

Treating an individual as no more than a mouthpiece for a particular opinion, or presuming the inability of that individual to assume a role, such as juror, that requires open-minded consideration of competing facts, *does* violate equality principles. However, recognizing that an individual is socially constituted and therefore contributes a point of view(ing) that is framed by undervalued identities is a method of achieving an equal result. The Court was correct to recognize that men could not be proxies for women, or whites for African Americans. Yet, the Court has been unable to distinguish such recognition of difference

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[99] *See* Taylor v. Louisiana, 419 U.S. 522 (1975) (prohibiting exclusion of women from state court juries); Ballard v. United States, 329 U.S. 187 (1946) (prohibiting exclusion of women from federal court juries where local law allowed them to serve); Strauder v. West Virginia, 100 U.S. 303 (1880) (holding racial exclusion from juries to be violative of the Fourteenth Amendment).

[100] *See* J.E.B. v. Alabama, 511 U.S. 127 (1994) (barring sex-based peremptory challenges by the state); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending *Batson* rule to civil cases); Batson v. Kentucky, 476 U.S. 79 (1986) (barring race-based peremptory challenges in criminal cases).

[101] *See J.E.B.*, 511 U.S. at 138–40 (sex); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (race); *Batson*, 476 U.S. at 86–87 (race).

[102] *See* Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970) (holding that an all-white jury does not satisfy constitutional requirement of a jury of his peers for an African American defendant); *Strauder*, 100 U.S. at 308 (same); *Ballard*, 329 U.S. at 193–94 ("The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both . . . .").

[103] *J.E.B.*, 511 U.S. at 149 (O'Connor, J., concurring). Justice Scalia was more caustic. "The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror's sex has some statistically significant predictive value as to how the juror will behave . . . . Personally, I am less inclined to demand statistics, and more inclined to credit the perceptions of experienced litigators who have had money on the line." *Id.* at 157–58 (Scalia, J., dissenting).

from bias. The Court has also become entangled in arguments over race-based districting under the Voting Rights Act and the viability of the diversity rationale for affirmative action.[104]

The political ramifications are significant. The confusion between viewpoint and point of view(ing) opens the door for courts to accept an identity-based equality claim only when it has been stripped of its oppositional meaning. This result eviscerates the value of inclusion. On this theory, inclusion is enforced when, and only when, a different point of view(ing) is absent.

Indeed, the presumption ought to cut the other way. If a point of view(ing) is particularly distinctive, it ought to constitute *more* support for an inclusionary goal. Whether a defendant would have an equally weighty interest in exclusion is a separate question, and the Court errs when conflating the two.

2. *The Defendant's Rights of Expression and Identity*

The Court's analysis is most nuanced on the issue of whether the defendant, in resisting an equality claim, has primarily expressive functions and thus should be granted an exemption from a claim for inclusion. Where the *Roberts* doctrine would force an examination of how integrally connected exclusion was to the particular expressive bond held by the defendant group,[105] the *Hurley* Court permitted an amorphous, post hoc claim of disagreement with what GLIB stood for to excuse the parade's organizers from the reach of public accommodations law.[106] As Kent Greenawalt has pointed out, even a purely expressive group should be subjected to equality claims if its exclusion is not linked to its expressive core, as would occur if, for example, an environmental advocacy group disallowed participation based on religion, race, or sex.[107]

Two bright lines can serve to frame this inquiry. In the employment context, the Court has carved out an exemption from antidiscrimination law for any activities of a religious organization.[108] In comparison, various members of the Court have suggested, although the Court has never definitively held, that commercial entities should be categorically excluded from an expressive association defense.[109] When one remembers that most civil rights statutes themselves exempt very small employers or

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[104] *See infra* at Part IV.A.

[105] *See supra* note 98 and accompanying text.

[106] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995). *See* Eskridge, *supra* note 96, at 2458–60; Hutchinson *supra* note 96.

[107] *See* Kent Greenawalt, *Freedom of Association and Religious Association, in* FREEDOM OF ASSOCIATION 117–18 (Amy Gutmann ed., 1998).

[108] *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[109] *See* Roberts v. United States Jaycees, 468 U.S. 609, 634–35 (1984) (O'Connor, J., concurring); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

landlords,[110] a rule barring business enterprises that are large enough to be covered by such statutes from claiming a First Amendment defense seems an appropriate resolution of the competing concerns.

The Court has been much more searching in its examination of secular nonprofit defendants to assess the scope of their expressive activities. Tension arises most acutely when such entities are involved in "the distribution of publicly available goods, services and other advantages."[111] Determination of whether expressive functions would be impaired by enforcement of antidiscrimination law must necessarily proceed on a case-by-case basis, with consideration of a number of discrete factors: explicit policy stands taken by the group, membership criteria associated with viewpoint, and the size and selectivity of purely social groups that eschew formal viewpoints.[112]

The primary concern at this step of the analysis is protecting the private group's right of self-definition, so long as that self-definition is genuine and not merely a pretext for exclusion. The self-worth point of view(ing) that an identity group would bring into the organization must clash with some discernible tenet of that organization. Absent an explicit anti-equality position adopted by the group, the inquiry at this stage in the analysis should be whether a reasonable member of the group understands herself to be endorsing particular exclusionary beliefs by her participation.

Organizers of a St. Patrick's Day parade in New York, for example, asserted that they meant for the parade to communicate a message of adherence to the tenets of the Roman Catholic faith.[113] A court should ask whether there is credible evidence that parade participants were led to understand that they were endorsing that set of views, on issues such as abortion, for example, as well as homosexuality. Justice O'Connor has stressed the importance of a perception of endorsement.[114] The absence of either articulated policy stances or a coherent philosophy would indicate that members and participants did not perceive themselves to be endorsing a particular cluster of beliefs.

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[110] *See* 42 U.S.C. § 2000e (b) (1994) (employment); 42 U.S.C. § 3603 (b) (1994) (housing).

[111] *Roberts*, 468 U.S. at 628.

[112] *See id.* at 620; New York State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546–47 (1987).

[113] *See* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 361–62, 367 (S.D.N.Y. 1993).

[114] *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348–49 (1987) (O'Connor, J., concurring).

3. Enhancing Cultural Diversity

Finally, one must ask if forcing greater inclusion would actually diminish genuine diversity. One objective behind the protection of expressive association rights is to preserve enclaves of orthodoxy. This is based on the theory that their collective presence will produce a more robust diversity culturewide.

In order for that objective to be served, orthodox organizations must clearly communicate the message that they contend will be abrogated if inclusion is compelled. An inquiry in this area would examine many of the same factors as the inquiry into group philosophy, but from the perspective of the public rather than the perspective of members. The social good produced by exempting private groups from generally applicable antidiscrimination statutes comes about only if the broader society understands the group to promote the particular message that it seeks to protect. Using a public perspective test also prevents the second test, of member adherence to a coherent philosophy, from becoming simply an opportunity for members to use a shared discriminatory perspective as a pretext for exclusion.

The *Hurley* Court focused on another aspect of the public perception question, which was whether the parade organizers had practical means for dissociating themselves from the gay pride message that would have been implicit in GLIB's presence in the parade. The Court concluded that they lacked such an opportunity, unlike shopping center owners who could post flyers disavowing positions taken by groups circulating petitions in a mall, or cable broadcasters, whom the public perceives as merely a conduit for programming rather than as a promoter of selective messages.[115] The Court's analysis of this point was correct. Unfortunately, however, it failed to engage the question of how much weight to give the absence of a method for dissociation where defendants have failed to establish as a predicate that their organization incorporated a coherent message of its own.

However muddy the reasoning, it may be that *Hurley* nonetheless produced the right result for its singular set of facts. Parades, however unselective or vague in their organizing principles, unquestionably exist primarily to serve expressive functions and are perceived as such, unlike most other group activities. A comparison illustrates the point. The Court has distinguished community service groups, when not associated with the tenets of a faith, from groups that take stands on publicly debated issues, holding that service work alone is not likely to be linked to significant expressive interests.[116] When one compares community serv-

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[115] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 575–78 (1995).

[116] *See Rotary Int'l*, 481 U.S. at 548.

ice to a parade, especially when the parade is the defendant organization's only activity, the very venue for the exclusion in *Hurley* renders forced inclusion extremely problematic.

Whatever one's opinion of the *Hurley* result, its superficial analysis begged as many questions as it answered. The heart of the conflict between GLIB and the parade organizers lay in the conflict over whether equality itself is a neutral principle. It is Wechsler's question in contemporary form. If we do accept the premise that equality can be neutral, then we must guard against rendering some identity claims susceptible to recharacterization as viewpoint when the only expression involved is the statement of the identity itself.

In sum, constitutional law will not escape the doctrinal incoherency that has been created in these cases unless there is a recognition of the subtle but important difference between viewpoint, as understood in traditional First Amendment terms, and point of view(ing). This distinction is much more than word play. It implicates our fundamental (and neutral) principles about what genuine equality encompasses.

A theory of expressive identity recognizes that any claim *for* equality must necessarily assert a claim *of* equality. One of the most dangerous aspects of accepting a First Amendment defense to an expressive identity claim is that it deploys the law in a fundamentally misleading way. Instead of promoting inclusion and genuine antiorthodoxy, the law invokes the rationale of protecting dissent while in fact truncating it.

C. Scout's Honor

The same expressive association issues are raised in starker form in a series of cases in which openly gay males have sought to gain or retain membership in the Boy Scouts. These cases lack some of the facts that rendered *Hurley* so atypical. In the scouting cases, there is an individual, not an organized group with its own shared core understandings, seeking inclusion. Furthermore, the Boy Scouts organization is far more mixed in its functions than the parade in *Hurley*. Scout troops typically engage in a wide range of activities, including social and recreational activities, community service, and educational projects.

The threshold question in the scouting cases—whether the Boy Scouts as an organization falls within the definition of public accommodation used in whichever antidiscrimination statute provides the cause of action for inclusion—has proved decisive in all but one case. Courts of last resort in three states have ruled that the Scouts do not fit the relevant definition.[117] Still, because the state statutes under which these claims

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[117] *See* Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385 (Kan. 1995); Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976). *See also* Quinnipiac Council,

have been brought vary in their definition of public accommodation, it is quite possible that scouting organizations will be considered public accommodations in some jurisdictions but not in others.

Beyond that statutory and definitional hurdle, the ramifications of the expressive identity concept kick in. Indeed, the decision that has come the closest to articulating this concept was the New Jersey Supreme Court's decision in *Dale v. Boy Scouts of America*.[118] In *Dale*, the court ruled that requiring admission of an openly gay scout did not violate the Boy Scouts' expressive association or speech rights because there are no shared beliefs about homosexuality that are part of the Boy Scout message.[119] Since "no single view on this subject functions as a unifying associational goal" of the Scouts,[120] the group's "ability to disseminate its message was not significantly affected by Dale's inclusion."[121]

The bulk of the opinion focused on the ascertainment of whether the Boy Scouts can claim that its expressive functions include a message of disapproval of homosexuality. The court addressed both the second and third steps of the analysis that I have proposed *supra* Part II.B. It canvassed the policy positions of the many organizations that sponsor Boy Scout troops, finding considerable variation among them as to treatment of homosexuals.[122] The existing members or component units of the Boy Scouts, therefore, seemingly lacked an understanding that their participation in scouting included adoption of a message of disapproval of homosexuality. As to the public perception of the Boy Scouts' message, the court relied on that organization's repeated assertion that it was all-inclusive and open to all boys.[123]

Yet, the opinion of the court ducked the most difficult aspect of an expressive identity claim. The court did not address head on whether Dale's open homosexuality expressed a message. Instead, the court found that Dale had stated his own support for the precepts of scouting and that, unlike the gay and lesbian group in *Hurley*, "Dale does not come to Boy Scout meetings 'carrying a banner.' Dale has never used his leadership position or membership to promote homosexuality."[124] The court implied, but did not state, that any message of moral equivalence communicated by Dale's openness was subsumed in his "pure status" claim.

Boy Scouts of Am. v. Commission on Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987) (refusal to hire woman as scoutmaster was a discriminatory accommodation practice).

[118] 734 A.2d 1195 (N.J. 1999), *cert. granted*, 68 U.S.L.W. 3292 (U.S. Jan. 14, 2000) (No. 99-699).

[119] *See id.* at 1223.

[120] *Id.* at 1225.

[121] *Id.* at 1223.

[122] *See id.* at 1224–25.

[123] *See id.* at 1226–28.

[124] *Id.* at 1229.

Justice Handler, writing in concurrence, took up that leg of the analysis. Noting that the decisive question in the expressive association line of cases was the "line between status-based and speech-based exclusion,"[125] Justice Handler said that status cannot be used as "shorthand measures" of a person's unexpressed views in general, and that homosexual status in particular could not be the basis for an inference about an individual's morality or lack thereof.[126] To allow otherwise, he wrote, would be to draw on stereotypes in the attempt to create a legitimate speech basis for exclusion. That very argument, in his view, amounts instead to evidence of an impermissible status basis.

The gap in Justice Handler's opinion lies in its avoidance of acknowledging the message of self-worth inherent in self-identification. Although he describes self-identifying speech as inextricably linked to status, he indicates that such speech communicates literally nothing more than a label. Common sense tells us that this speech is also a statement of self-worth, of an identity of which one will not be ashamed. Erasure of this element of self-identifying speech should not be necessary to rebut an expressive association defense. Justice Handler seems to allow only two options for interpretation of coming out speech: either it is merely a label, or it is an ascribed set of viewpoints on specific issues, based on stereotypes about what homosexuals as a class believe. This perpetuates Justice Brennan's too easy statement in *Roberts* that one could not separate the assertion that including women would alter the Jaycees' message from an assertion of archaic stereotypes about women.[127] Although both judges are surely correct that some arguments do amount to nothing more than stereotypes, it is also true that self-identifying speech is not as deracinated as the traditional expressive association doctrine would seem to require.

Without some acknowledgment that self-identification is more than a label, one cannot satisfactorily answer the most obvious hypothetical in this area of law: could the Ku Klux Klan, for example, be required to admit an African American? There is no disagreement that the answer is no.

Under Justice Handler's approach, however, while it is clear that the NAACP could not be forced to admit a Klansman, since membership in the Klan undoubtedly signals a viewpoint in direct opposition to a core principle of the NAACP, it is not so clear that the reverse is also true. If one holds to the view that African American is nothing more than a label, the answer becomes problematic. Although the Klan is devotedly racist, one must read nonwhite status as more of an unspoken expression than a

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[125] *Id.* at 1237 (Handler, J., concurring).
[126] *Id.* at 1242 (Handler, J., concurring).
[127] *See supra* note 98 and accompanying text.

neutral category. If non-white status truly means nothing, it cannot contradict an organization's tenets.

Similarly, for the Boy Scouts, there must be a meaning for outness that is more than a mere label but less than a repository of social stereotypes or particular political opinions. A meaning that is conceived in expressive identity terms would not overload gay identity with so much imputed viewpoint that a First Amendment defense would easily defeat the equality claim.[128] On the other hand, if the Scouts or any other organization were to adopt the denigration of homosexuality as a core purpose, akin to white supremacist or anti-Semitic philosophies, they would have an expressive association defense against being forced to admit any openly gay person, without having to show that the gay person intended to "bring a banner" to meetings.

III. Sexual Orientation and the First Amendment as a Case Study

As the preceding discussion illustrates, coming out speech provides a particularly fertile context for examining expressive identity. When one considers the largest single body of coming out speech cases—claims for recognition by gay student organizations—one can see in particularly stark terms how that one demand could be, and has been, litigated as both an expression and an equality claim. Without a concept of expressive identity, however, this claim has been turned back against itself to create a First Amendment defense for private actors.

A. The Gay Student Cases: A Genealogy

Twenty-five years ago, lesbian and gay student organizations began to file lawsuits challenging official university decisions denying them recognition and, therefore, access to the benefits available to recognized groups. The history of these cases provides a microcosm of the expressive identity concept. In the fact patterns behind the cases, we see the emergence of expressive identity as a powerful force in social relations. The law, however, remains locked in an expression/equality dichotomy.

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[128] This was precisely the mistake made by Justice Kennard, concurring in Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998). The California Supreme Court ruled that the Boy Scouts did not fall within the statutory definition of "business establishment," the term used by the state civil rights statute. Thus, the court did not reach the question of whether the Scouts had a First Amendment defense to the law's application. Writing in concurrence, however, Justice Kennard argued that the Scouts could not constitutionally be compelled to allow an openly gay man to serve as a scoutmaster even if the definition of public accommodation had been satisfied. She framed the problem as, "Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?" *Id.* at 257 (Kennard, J., concurring). In this analogy, gay is made equivalent to Klansman and anti-Semite, both of which are viewpoint-defined, not identity categories.

In the typical case, an organization forms on campus, led by lesbian and gay students but open to and including others. This group typically has multiple purposes: advocating for gay rights, providing a safe harbor for gay students, and engaging the university community in dialogue on gay issues. At some relatively early point, usually when the group first seeks recognition or begins actively sponsoring events, university officials deny it official support of the kind routinely provided to other student organizations. The denial is explicit, often in writing, and bases the decision on one or both of the following factors: the existence of the group would encourage the commission of crimes (usually citing a sodomy law), and/or formal recognition or the conferring of benefits would create the impression that the university approved of, or condoned, the tenets of the group.

The student organization cases arose in three generational stages. In the first, which began in the early 1970s, gay student groups sued public universities for recognition as official student groups. They relied on the First Amendment, claiming that the universities were denying their freedom of expressive association by refusing to charter them despite their having satisfied all of the neutral criteria for legitimate student organizations. The courts universally found for the plaintiff students, ruling that universities could not deny them recognition based on their groups' public adoption of, and implicit endorsement of, homosexuality. One court of appeals, for example, framed the "underlying question" as whether "group activity promoting values so far beyond the pale of the wider community's values is also beyond the boundaries of the First Amendment."[129] This cluster of cases is emblematic of a broad range of early gay rights cases that invoked First Amendment and procedural due process—but not equality—grounds.

The second stage of cases developed after jurisdictions began to add sexual orientation to the scope of local civil rights statutes. Student groups at private colleges acquired the capacity to sue for recognition based on claims under those statutes. The civil rights statute-based claims were used to challenge exclusionary practices by a broad range of public accommodations, not just educational institutions. By necessity, however, in order to fit within the parameters of the civil rights laws, these suits had to be premised on equality claims. Indeed, given the inapplicability of the First Amendment to private actors, the plaintiffs in cases based on a civil rights statute had to disavow any viewpoint claim. Substantively, these cases made the same challenge as the first generation of student cases, but they were framed as the doctrinal opposite. In the most important of the university cases, lesbian and gay students at Georgetown University Law Center filed suit, and the University de-

[129] Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 658 (1st Cir. 1974).

fended on grounds of its First Amendment rights, including its free exercise rights as a Roman Catholic institution.[130]

The third stage illustrates the reflux from the first two. In the wake of successful student organization cases, several states passed statutes prohibiting recognition, or funding, of pro-homosexual views. These statutes uncannily combined viewpoint and identity in their definition of what was prohibited and targeted public funding as the mechanism of denial. In reaction, plaintiffs have returned to First Amendment claims, but these claims and the resulting decisions are more narrowly framed as being defined by identity. This stage of litigation illustrates the contest played out more broadly against a range of statutory restrictions on the "promotion" of homosexuality.

B. Viewpoint Defines the Class

Throughout the student organization line of cases, the initial dynamic between each claim and its asserted defense remained constant. The viewpoint claim led in essence to a viewpoint defense, contending that official recognition amounted to an imprimatur, a kind of compulsory endorsement. The equality claim produced an identity-specific defense, a protest that *this* group would commit crimes.

What did change, however, was that the identity concept began to shape the viewpoint discourse and vice versa. Although all of the first generation cases were decided on viewpoint grounds alone, that line of reasoning obviated the importance played by identity in creating the basic conflict. It also obscured the increasing importance of who the speakers were in how courts analyzed their viewpoint claims. The exclusivity and repetition of the First Amendment approach solidified the concept that self-identifying speech was viewpoint speech. Indeed, viewpoint defined the class.

Underlying the first generation cases is a tension between the surface claim of viewpoint and what one senses everyone knows is the *real* issue: whether a public institution must treat homosexuals just like everyone else. It is central to a pure First Amendment claim that the issue be viewpoint, the content of the ideas and not the identity of the speaker. What is being suppressed are ideas that anyone could express. In the first three of the student cases to reach courts of appeals, it appears that the groups were composed of both gay and straight students, although gay students predominated. This fact would seem to bolster the pure First Amendment viewpoint approach, but the language of the appellate court decisions is ambivalent.

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[130] *See* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc).

The two earliest opinions described the plaintiff groups in viewpoint terms, but the third shifted to a description of who the plaintiffs were. In the first case, *Gay Students Organization of the University of New Hampshire v. Bonner*, the First Circuit referred to a group that "stands for sexual values . . . far beyond the pale"[131] and described them as "a cause-oriented group" with "a basic message."[132] The Fourth Circuit in *Gay Alliance of Students v. Matthews*,[133] explicitly noted that both gay and straight students belonged to the group as "individuals who believe in the right of self-determination with regard to sexual orientation"[134] and described the group as "at most, a 'pro-homosexual' political organization."[135]

The third case, *Gay Lib v. University of Missouri*,[136] produced not only a court of appeals decision but also a dissent from the Supreme Court's denial of certiorari. The district court, which had upheld the University's action, characterized the issue as "the legal right of homosexuals to form a student organization."[137] The Eighth Circuit reversed, asserting that the University could not "ascribe evil connotations to a group because they are homosexuals" and noting that "not all members of the group are homosexuals."[138]

Most dramatically, the dissent from the denial of certiorari signed by Justices Rehnquist and Blackmun framed the question from the University's position as analogous to "whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined."[139] The identity completely subsumes the viewpoint in this framing; indeed, the identity totally causes, explains and renders ridiculous the viewpoint.

Similarly, analysis of the argument made by the defendants in each of the first generation cases that the expression in question posed an imminent danger of lawless action was fundamentally shaped by who the speakers were. The University of New Hampshire argued in *Bonner* that allowing a gay student dance could lead to conduct that would violate the sodomy law then extant in that state. The First Circuit was unpersuaded, citing the requirement established in *Tinker v. Des Moines Independent*

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[131] 509 F.2d at 658.
[132] *Id.* at 659–61.
[133] 544 F.2d 162 (4th Cir. 1976).
[134] *Id.* at 163.
[135] *Id.* at 164.
[136] 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom.* Ratchford v. Gay Lib, 434 U.S. 1080 (1978).
[137] Gay Lib v. Univ. of Mo., 416 F. Supp. 1350, 1353 (W.D. Mo. 1976).
[138] *Gay Lib*, 558 F.2d at 856 (citations omitted).
[139] *Ratchford*, 434 U.S. at 1084.

Community School District[140] that even high school students could not have their political speech infringed based on "'undifferentiated fear or apprehension' of illegal conduct."[141] In *Matthews*, Virginia Commonwealth University had argued that recognition of the gay group would "increase the opportunity for homosexual contacts" and "would tend to encourage some students to join the organization who otherwise might not join."[142]

In *Gay Lib*, the arguments about the danger of criminal conduct shifted, profoundly, to a claim that this group was *uniquely* likely to violate the law. The University Board of Curators justified the refusal to recognize the group on a series of "findings of fact," one of which was that "[h]omosexuality is a compulsive type of behavior."[143] The district court held for the University, ruling that the latter's action was justified despite the infringement on expression "where the result predictably is to bring on the commission of crimes."[144] The Eighth Circuit reversed, finding that the district court had blurred the line between "mere advocacy and advocacy directed to inciting or producing imminent lawless action."[145]

Again, the "people with measles" analogy of Justices Rehnquist and Blackmun provides a dramatic metaphoric contrast, even to "mere" advocacy directed to incitement. Under these circumstances, the two Justices said after offering the analogy, "the very act of assemblage"[146] threatens the state's legitimate interests. In that view, nothing such people could do would stop the crime from being committed or the disease from being spread. They could not help but violate the law, so the institution that is prevented from restricting them is also rendered helpless to prevent crime. "The very act of assemblage" becomes tantamount to a crime—a stunning concept, and one completely derivative of who the group is.

Lastly, neutrality was not merely unappealing for the defendants in these cases, but was also considered to be impossible. The defendants claimed that neutrality, as manifest in recognition and benefits, could not be seen as anything other than endorsement. Only when compelled by a court would recognition by the university not constitute approval.

On this point, both positions articulated in these opinions appear to agree. Writing in concurrence in *Matthews*, Judge Markey noted that the assertion that recognition of the group did not constitute approval was a "fiction,"[147] but a fiction required by the constraints of the First Amendment's privileging of expression. From the opposite perspective, Judge

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[140] 393 U.S. 503 (1969).

[141] *Bonner*, 509 F.2d at 662.

[142] Gay Alliance of Students v. Matthews, 544 F.2d 162, 164 (4th Cir. 1976).

[143] *Gay Lib*, 558 F.2d at 852.

[144] *Gay Lib*, 416 F. Supp. at 1370.

[145] *Gay Lib*, 558 F.2d at 856.

[146] Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting from denial of cert.).

[147] 544 F.2d at 168 (Markey, J., concurring).

Regan, dissenting in *Gay Lib*, asserted that "unlike recognition of political associations, whether of the right, center or left, an organization dedicated to the furtherance and advancement of homosexuality would, in any realistic sense, certainly so to impressionistic students, imply approval not only of the organization per se but of homosexuality."[148]

Thus, who the speakers are, what their speech will lead to, and the uniquely powerful contaminating effect of their self-identification, framed the First Amendment analysis throughout this set of cases. Courts characterized "pro-homosexual" arguments, even if made by mixed straight and gay groups, as pervasively, and ultimately only, "homosexual ideas." Indeed, the courts framed the issue in a way quite unlike the analysis of racial equality arguments. Racial equality arguments have not been characterized as African American or Latino ideas, or gender equality arguments as women's ideas. Even as these decisions reaffirmed First Amendment supremacy, they also taught that the ideas themselves could not be disaggregated from homosexuality. Indeed, *because* these cases reaffirmed First Amendment supremacy, they also taught that the identity itself is inflected with viewpoint.

As this point was increasingly locked into the case law through the gay student organization cases, the focus of efforts to enact antigay legislation shifted to laws prohibiting government agencies or grantees from promoting homosexuality.[149] Unlike the earlier student group cases, these newer laws codified a denial of some benefit to groups explicitly defined by their advocacy. Successful challenges to such laws reiterated that "promotion" of homosexuality is protected speech, apart from advocating repeal of anti-sodomy or similar laws.[150]

Success in the "no promo homo" litigation also had a cost for equality advocates, however. It sealed the argument that by extension courts should treat homosexuality itself *as* viewpoint. As with any viewpoint claim, it established both a claim and a defense against government enforcement of that claim.

What is unique about the First Amendment case law in both sets of cases is that it swallowed the equality claim in toto. The right of expressive association was created almost entirely in the context of cases brought by organizations seeking racial justice, and that body of law clearly framed the underlying protected activity as expression of a viewpoint. When laws mandating racial equality conflicted with antiequality viewpoints raised as a defense by private actors, courts did not charac-

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[148] 558 F.2d at 859 (Regan, J., dissenting).

[149] *See* Hunter, *supra* note 96.

[150] An Alabama statute stricken as "blatant viewpoint discrimination," Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997), forbade the use of public funds for any group that "fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws." *Id.* at 1545. It was not saved by its exemption for expression "limited solely to the political advocacy of a change in [those] laws." *Id.*

terize the conflict as a clash between two viewpoints, but, rather, as a conflict between a policy of equal treatment of a group of persons and a viewpoint.[151]

C. Georgetown and the Head-on Collision

If the gay student cases put expression and equality claims on a collision course by cementing together homosexuality and viewpoint, then Georgetown University provided the point of impact when gay student groups at the University's main campus and at its law school sought university recognition.[152] At Georgetown, the recognition process was sequential. Initially, a group was recognized by the student government, a status that the gay groups achieved without hindrance. However, in order to qualify for certain benefits, such as use of campus mailboxes, a group had to receive "official recognition" from the University administration. Official recognition was denied to the gay student groups.

The students sued based on the D.C. Human Rights Act, a local civil rights law that prohibited discrimination by educational institutions on the basis of sexual orientation.[153] The University asserted that the statute could not be applied to it without violating its rights under the Free Exercise Clause and its right to expression. The stage was thus set for a sharp conflict between the equality claim and the expression defense.

Sitting en banc, the District of Columbia Court of Appeals sought to protect the rights of both parties. The court ruled that the University's denial of recognition, insofar as it involved only an intangible endorsement, did not violate the statute. Stated another way, if the students were to be taken at their word that they did not seek an imprimatur, then losing this intangible endorsement was not a true loss, and therefore, not discrimination. As to all tangible benefits, however, including those associated with official recognition, the court rendered judgment for the students. As to what the court essentially classed as real benefits, it ruled that the District's compelling interest in eradicating discriminatory treatment based on sexual orientation outweighed the burden on Georgetown's First Amendment rights from providing those benefits to the students.

The most divisive debate on the court centered on whether the University's denial of recognition had been based on sexual orientation, the prohibited basis for such an act, or on the message that the groups sought to communicate. The court ruled that the civil rights statute could not compel speech or endorsement from a private university, but could compel such a university to act neutrally by requiring evenhandedness. Ulti-

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[151] *See supra* notes 81–84 and accompanying text.

[152] *See* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc).

[153] D.C. Code § 1-2520 (1987).

mately, the court concluded that the prescribed neutrality could be compelled as to a class of persons, but not as to ideas.

Again, this debate centered on whether neutrality amounted to endorsement. The majority held that the University, in accordance with its Roman Catholic beliefs, could not be made to "condone, endorse, approve or be neutral about homosexual orientation, homosexual lifestyle or homosexual acts."[154] Three judges of the seven-member panel disagreed.

Two judges argued that the meaning of neutrality had to be determined according to an objective standard, or else private sector actors could declare that any equal treatment, for example, in hiring, conveyed a meaning of "moral equality" for the group in question.[155] Moreover, they argued that neutrality, or tolerance, was not the same as a compelled endorsement, such as a mandatory recitation of the pledge of allegiance or an affirmation of belief in God, and thus non-discrimination did not raise issues of freedom of religion or expression.[156] They were joined on this last point by a third judge, who analogized enforcement of the Human Rights Act's ban on sexual orientation discrimination to enforcement of its ban on discrimination based on political affiliation. The former did not imply endorsement of "any particular doctrine of sexual ethics" any more than the latter signified endorsement of a particular political party.[157]

As to the conferral of tangible benefits that recognition would entail, the majority ruled that University neutrality did not constitute endorsement. Equality in terms of tangible benefits was an anti-discrimination principle that the Human Rights Act could mandate without burdening Georgetown's Free Exercise rights to an unconstitutional degree. In doing so, the majority reached the question of whether the differential treatment arose from an opposition to certain ideas or discrimination against a class of persons. Three perspectives emerged that, although not articulated as such, staked out a framework for expressive identity doctrine.

Judges Belson and Nebeker, in dissent, argued that Georgetown had a free expression defense as well as a free exercise defense. They argued that Georgetown appeared to have treated the gay students differently because of their advocacy of "a particular message, viz. the morality of a homosexual life-style which was analogous to the promotion of political views."[158] No law prohibited discrimination on that basis, nor could one.

Although they did not characterize it as such, Judges Belson and Nebeker used reasoning identical to the arguments upon which the gay

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[154] *Id.* at 15.
[155] *Id.* at 52 (Ferren, J., concurring in part and dissenting in part).
[156] *Id.* at 53 (Ferren, J., concurring in part and dissenting in part).
[157] *Id.* at 45 (Newman, J., concurring).
[158] *Id.* at 70–71 (Belson, J., concurring in part and dissenting in part).

student groups in the first generation of decisions had *won* their cases.[159] If the student groups did not communicate a positive message about homosexuality, they had no reason to exist.

For Judges Belson and Nebeker, that was the end of the argument. The First Amendment defense trumped the equality claim with no trouble, and it would for any private actor, whether religiously affiliated or not.[160] However, they did not address the question of when, or whether, any equality claim exists without an element of advocacy.

The second position to emerge from the *Georgetown* court denied that a viewpoint could be attributed to the gay student groups absent evidence to that effect. Judge Mack, writing for the court, found that class-based animus led the University to deny recognition based on the promotion or advocacy of ideas when the group's statement of purpose said nothing to support that notion. She noted that in one case, the University assumed that if a gay student group were to form, it would necessarily involve such advocacy, even though the group had not in fact formed. In addition, the court found further evidence of animus based on sexual orientation in the University's assumption that the gay groups were necessarily—"'by definition'"—associated with "'a full range of issues'" raised by the gay rights movement in general.[161] Taken to its extreme, the majority's ruling is unpersuasive. In fact, it was perfectly reasonable for the University to impute a viewpoint as to the moral legitimacy of homosexuality to the groups even absent a specific statement to that effect.

The third analysis came from Judges Ferren and Terry in dissent. They argued that the distinction between advocacy and identity, or status, was false. In their view, discrimination against ideas inevitably discriminates against persons because "ideas—and advocacy—are an essential part of the person."[162] They construed the Human Rights Act to mean that even if the Act does not forbid discrimination against "homosexual ideas, it unquestionably does forbid discrimination against homosexuals because of their ideas."[163]

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[159] *See supra* Part III.A–B.

[160] "Georgetown's free speech defense is not dependent on its status as a Catholic institution." *Georgetown*, 536 A.2d at 69 (Belson, J., concurring in part and dissenting in part).

[161] *Id.* at 29–30. The University President testified that group activity "merely promoting the legal rights of gay people" would not pose a conflict with Catholic teachings, but the University asserted that the groups' message went beyond legal rights to legitimacy. *Id.* at 18.

[162] *Id.* at 57 (Ferren, J., concurring in part and dissenting in part).

[163] *Id.* (Ferren, J., concurring in part and dissenting in part). Judges Ferren and Terry also imply, although they do not explicate, the argument that homosexuality is, in some epistemological sense, an idea. "[A]n asserted right to discriminate against someone's advocacy of homosexuality is clearly a claimed right to discriminate against the person on the basis of one's sexual 'preference' and thus 'sexual orientation.'" *Id.* at 56 (Ferren, J., concurring in part and dissenting in part). At one level, this statement is merely a sleight-of-hand statutory interpretation, playing off a semantic progression from "advocacy" to "preference" to "orientation." That may well be all the meaning that was intended. It also

So phrased, this is a somewhat garbled argument. It seems quite possible to separate the ideas from the person. For example, there is no formal body of ideas to which all homosexuals subscribe. One must assume that what the judges meant by "homosexual ideas" is roughly what Judges Belson and Nebeker defined as the student groups' message, "the morality of a homosexual life-style." This is the concept of expressive identity in a nutshell—the proposition that equality in all senses, including moral equality, is an idea that merges completely with status, regardless of the differing views of group members.

Thus, Judges Ferren and Terry sharpened the point of dispute, posing the expressive identity dilemma in bold relief: if equality is an idea and it has merged with identity, then which trumps—the defense against compelled viewpoint endorsement or the equality command? For these dissenters, the equality principle won, in part because there appeared no way to honor it without infringing to some extent on the defendant's First Amendment rights. Yet that resolution merely begs the question of why one principle is chosen over the other, since the logic could as easily be reversed.

Even in this exceptionally thoughtful conversation among the judges, none of the opinions escapes the trap of the expression/equality dichotomy. The court's confusion grew directly from how the parties and conventional doctrine had framed the case. In fact, gay plaintiffs have argued that discrimination against them is based on viewpoint (the first wave of student organization cases); based on antigroup bias and *not* on viewpoint (cases like *Georgetown)*; and based on both (the challenges to the "don't ask, don't tell" military policy).[164] Private defendants have argued that differential, adverse treatment of gay people is because of a clash of viewpoint, not bias. The military, state universities, and other public sector defendants have argued that this discrimination is based on anything *but* viewpoint. Both sides have been driven into these internally conflicting positions by doctrinal incoherence and the absence of a concept of expressive identity.

IV. Double Binds Throughout Equality Jurisprudence

We turn now to three examples of how the expressive identity problem lurks in other areas of equality law. In each, the courts' inability to transcend the expression/equality dichotomy has led to inconsistent and distorted doctrine. In each, the failure to deploy an expressive identity framework continues to weaken the full force of both equality and antiorthodoxy claims.

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reads, however, as an assertion that being gay is a form of argument.

[164] *See generally* HALLEY, *supra* note 38.

A. "More Speech": Diversity and Affirmative Action

The closest that the Supreme Court has come to the concept of expressive identity is in the body of race discrimination case law explicating a diversity rationale for affirmative action. In the contexts of higher education programs[165] and licensure of broadcasters,[166] the Court has held that enhancement of diversity can sustain affirmative action efforts that seek to ensure a greater presence of African Americans than otherwise would occur. Because the Court has reversed itself on whether such justification need meet only an intermediate level of scrutiny[167] by ruling subsequently that it must survive strict scrutiny,[168] there has been considerable commentary[169] and lower court uncertainty[170] on whether the diversity rationale can, in fact, survive this heightened review standard.

However the Court ultimately decides that question, our concern is with the function in equality law of this particular diversity test. Obviously, diversity carries the weight of something more than the self-evident claim that inclusion of more African Americans in predominantly white institutions would lead to greater racial variety. What has come to be called the diversity rationale grew from Justice Powell's opinion in *Regents of the University of California v. Bakke.*[171] Justice Powell found that a university could use race as one of several "plus" factors in admitting students in order to promote "wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."[172]

The diversity rationale is the frankest acknowledgment in equality law of the viability of race as a proxy for "ideas and mores." It stands the equality/expression dichotomy on its head. Not only is viewpoint not a

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[165] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[166] *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[167] *See id.*

[168] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[169] Post-*Adarand*, scholars have rehearsed what the arguments will be for and against the proposition that the diversity rationale can satisfy a strict scrutiny test when that question reaches the Supreme Court, as it inevitably will. For the argument that it can satisfy strict scrutiny, see Akhil Reed Amar & Neal Kuman Katyal, Bakke's *Fate*, 43 UCLA L. REV. 1745 (1996) (subject to limitations); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test,* 33 HARV. C.R.-C.L. L. REV. 381 (1998); and Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 ANN. SURV. AM. L. 515 (1995). For the argument that it should fail, see Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759 (1995); and Eugene Volokh, *Diversity, Race as Proxy and Religion as Proxy*, 43 UCLA L. REV. 2059 (1996).

[170] *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487 (D.C. Cir. 1998) (diversity rationale does not meet strict scrutiny test); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (same). *Cf.* Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (racial balancing not shown necessary for expression of diverse viewpoints).

[171] 438 U.S. 265 (1978).

[172] *Id.* at 313.

defense to an equality claim here, but under the diversity rationale, viewpoint becomes an argument *for* equality.

The origins of the diversity rationale lay squarely in expression doctrine. Justice Powell derived the principle that diversity among students serves educational goals "of paramount importance"[173] from the cases concerning academic freedom, "a special concern of the First Amendment."[174] Such cases addressed challenges to the presence of persons defined (for purposes of those disputes) by viewpoint, typically Communists or other leftists whose ideologies comprised the dominant paradigm for dissent at the time that many landmark First Amendment cases were being decided.[175]

Although Justice Powell is not commonly described as a multiculturalist, the diversity rationale that he crafted in *Bakke* was anchored in academic freedom. In effect, Powell sheltered a race-conscious diversity program under the umbrella of the First Amendment. While Powell spoke of "that robust exchange of ideas which discovers truth out of a multitude of tongues,"[176] neatly stitching the two concepts together, the dissent, which more strongly defended the University's policy, focused exclusively on the equality rationale for affirmative action.[177] The seamless transition in Powell's opinion from viewpoint diversity to racial diversity appears self-evident. Furthermore, the nexus between race and viewpoint was commented on by neither the concurrence nor the dissent.

The Court extended the diversity rationale for affirmative action in *Metro Broadcasting, Inc. v. FCC*.[178] The Court upheld an FCC policy of considering minority ownership as a positive factor in a competition for new licenses, allowing assignment of a license to a minority owner in lieu of revocation. Championing the importance of fostering a "robust exchange of ideas," much as it did in the university context, the Court validated the governmental interest in "diversity of views and information on the airwaves."[179]

Despite its apparent temporary suspension in these cases, the equality/expression dichotomy complicates the racial diversity rationale. Conceptually, the diversity rationale, at least when applied outside of the context of student admissions or faculty hiring at public educational in-

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[173] *Id.*

[174] *Id.* at 312.

[175] Justice Powell relied on two cases. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), concerned a contempt citation for refusal to answer questions about political activities. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1957), the Court ruled that states could not prohibit employment as a public school teacher based on membership in a "subversive" organization.

[176] *Bakke*, 438 U.S. at 312 (quoting *Keyishian*, 385 U.S. at 603).

[177] *Bakke*, 438 U.S. at 324–27 (Brennan, J., concurring in judgment and dissenting in part).

[178] 497 U.S. 547 (1990).

[179] *Id.* at 568.

stitutions,[180] directly contradicts a fundamental premise of constitutional law: that government may not force private entities to accept or tolerate viewpoints with which they disagree, and expression itself cannot be made into a public accommodation for purposes of civil rights laws.

There are strong analogies to the line of gay civil rights cases implicit in the race-based affirmative action cases. Expression is surely as much of a core function for broadcasters as it is for a parade. Granted, the facts are distinguishable. *Metro Broadcasting* concerned the regulation of a uniquely scarce resource for expression,[181] and assumed a degree of regulation that could not be tolerated for a parade. Moreover, the FCC rules did not have the direct and immediate impact on the message that was at issue in the St. Patrick's Day parade cases. But the philosophy underlying the diversity rationale brushes up against the same expression/equality line from the opposite direction.

Although not framed as such, the tension of the equality/expression dichotomy has been a source of attack against the diversity rationale. In this context, the assertion has been that First Amendment values should give way to the equality value, here of color-blindness. Neal Devins argues that "[t]he notion that First Amendment concerns . . . outweigh core equal protection concerns is dumbfounding," and, in a perfect flip of the message of the hate speech cases, concludes that "antidiscrimination concerns trump the first amendment diversity value."[182]

Jim Chen also argues that the doctrinal transplant would kill the diversity rationale, but he does so by equating diversity with content-based regulation of speech.[183] For Chen, diversity is mainly an ideological viewpoint, "an agenda advocating the immediate and comprehensive transfer of wealth and political power to historically downtrodden groups."[184] Thus, affirmative action represents the "short step" from "the funding of favored persons . . . to the direct funding of favored ideas."[185]

Chen's definition of diversity—the redistributive impulse—could also serve as a description of the "agenda" of the framers of the Fourteenth Amendment. Racial equality is itself an idea. Chen's argument illustrates that affirmative action can be styled as a position and not solely as a mechanism. If affirmative action hiring or admissions is im-

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[180] Justice O'Connor has hinted that "promoting racial diversity among the faculty" would qualify in her view as at least an important governmental interest. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 n.* (1986). Justice Stevens would go further and accept a role model rationale for favoring African American teachers in deciding layoffs. *Id.* at 313–16.

[181] *See Metro Broadcasting*, 497 U.S. 547; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[182] Neal E. Devins, Metro Broadcasting, Inc. v. FCC: *Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 147–48 (1990).

[183] *See* Chen, *supra* note 169, at 1839.

[184] *Id.* at 1898.

[185] *Id.* at 1899.

posed, it can be seen as skewing a public forum or intruding on a private entity's own expressive self-definition. Chen's position may appear extreme, but it is the logical extension of the same analysis that argues that recognizing gay student groups violates a university's public forum by compelling it to accept what it opposes. On this view, any enforcement of equality through forced association or acceptance violates First Amendment freedoms. Ultimately, we arrive at Wechsler redux.

The weakest point in the diversity rationale, however, is not its violation of the expression/equality dichotomy, but an earlier step in the logic of the dichotomy. Centrally, the diversity rationale is weakest in its failure to articulate precisely that for which race is a proxy. The language used in the cases—"ideas and mores," "robust exchange of ideas," "diversity of views"—tethers the concept to dissent. Although no controversy arose as to this linkage in the beginning, the debate now includes questions about the legitimacy of the nexus between racial identity and viewpoint.

Critics of the diversity rationale have repeatedly hammered the perverse stereotype of conformity of thought, and the concomitant implication of lack of thoughtfulness,[186] that seems necessary to the fullest use of racial diversity as a proxy for viewpoint diversity. I will call that position the counterproductive stereotype argument, the assertion that equating racial diversity with viewpoint diversity reifies the same kind of thinking that underlies racism. The error in this argument stems from its reliance solely on the traditional First Amendment model of viewpoint as ideology, rather than recognizing the point-of-view(ing) perspective that emerged from identity politics.

Justice O'Connor's dissent in *Metro Broadcasting* is the most powerful expression of the counterproductive stereotype critique. Justice O'Connor distinguished the FCC policy at issue there, which sought to ensure the presence of some minority licensees, from the "whole person" diversity approach in *Bakke*, which she supported, and which permitted a university to consider race as one of several "plus" factors in its admissions policy. For her, the flexible, non-categorical approach endorsed by the Court in *Bakke* mitigated the effects of associating race with viewpoint, since it left the admissions officer free to exercise discretion about how best to achieve overall diversity among students and necessitated consideration of each applicant as a whole person, not simply as a racial marker in the university's freshman class statistics. Those points are appealing. But rather than limit affirmative action to institutions that engage in whole person evaluations, I would argue that even in a tighter space for application, race proxy diversity passes muster.

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[186] Chen describes the stereotype as "diversity's heart of darkness," *id.* at 1883, and complains that "[t]he much vaunted voice of color is a monotone," *id.* at 1901.

Justice O'Connor's critique in *Metro Broadcasting* had three parts. First, she argued that racial criteria "directly equate race with belief" by presuming that some applicants, solely by virtue of race or ethnicity, are likely to provide a "distinct perspective."[187] Second, she argued that the affirmative action policy was overinclusive because some minority applicants would, in fact, evidence disinterest or disagreement with the "distinct perspectives" being sought.[188] Third, she argued that the policy was also underinclusive because it failed to consider those individuals who shared the distinct perspective but were not members of a minority race or ethnicity.[189]

Her opinion seemed to nail the diversity rationale with what is, in reality, the expression/equality dichotomy. If viewpoint diversity is really the goal, she said, then assess it directly and award licenses on that basis.[190] If it is not, then it is merely a cover-up for simple, constitutionally repugnant racial preferences. Absent a remedial justification, she argued, such a preference could not be permitted.

Here, as in other instances of the dichotomy, the problem lies in failing to accept point of view(ing) as a component of expressive identity and expressive identity as a component of equality. There is no insulting stereotype that is reinforced in recognizing race (or sex) as a marker for outsiderness if whites (or men) predominate in the institution for whatever reason, whether discriminatory or demographic. If whites (or men) do not predominate, then the expressive aspects of identity become insignificant as a mechanism of equality.

The diversity rationale *does* reflect a diversity of perspective, but not of narrow ideological viewpoint. Recall Alex Johnson's point that the voice of color has multiple, and sometimes conflicting, dialects.[191] Expressive diversity is not simply a cover-up for rampant "reverse racism." A compelling antidiversity value, such as uniformity of perspective in a small expressive association, would properly defeat equality diversity. The irrelevance of expressive diversity in a certain context, such as the awarding of trades or service contracts,[192] could likewise defeat such a claim. In general, however, expressive diversity ought to be part of what equality law means.

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[187] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 618 (1990) (O'Connor, J., dissenting).

[188] *Id.* at 621.

[189] *See id.*

[190] *See id.* at 622–23.

[191] *See* Johnson, *supra* note 28, at 2010.

[192] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). This is not to exclude other rationales for affirmative action in those circumstances.

B. Using Dissent to Limit Equality: § 1985(3)

In interpreting a portion of the Civil Rights Act of 1871,[193] the Court has been faced with the question of whether groups of persons with an affiliation based on shared viewpoint could constitute a class protected by the equality statute. Implicitly, the Court has also addressed the question of how the law should analyze situations in which the group under attack is one that shares both ascriptive qualities that would trigger heightened scrutiny and a common ideological viewpoint. It has answered the first negatively, reading into the statute a requirement for class-based animus that it has equated with ascriptive identity. Not surprisingly, given the doctrinal incoherencies endemic to expressive identity cases, it has answered the second both yes and no, albeit without any recognition of the contradiction.

Section 1985(3), known as the Ku Klux Klan Act, provides a right of action against "two or more persons . . . [who] conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[194] However, this provision had been eviscerated of much of its force by judicial limitation of its applicability to state actions,[195] until the Court, in *Griffin v. Breckenridge*, withdrew this earlier interpretation of the statutory text.[196] Finding that the underlying landscape governing federal authority to reach private discriminatory acts had shifted, the *Griffin* Court ruled that there was a cause of action under § 1985(3) against purely private actors.[197] Simultaneously, the Court sought a limiting principle to prevent the creation of a new open-ended "general federal tort" against assault and battery. The Court found the limiting boundary in the statute's reference to equality: "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[198]

The Court's obvious, though unspoken, reference is to the body of law by then extant denominating suspect classes. Its use of *suspect class* as an implicit synonym for "class-based" may not be a correct textual interpretation or historical reading, but it logically draws upon the *Carolene Products* paradigm of a "discrete and insular minority."[199] The foot-

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[193] The Civil Rights Act of 1871, Pub. L. No. 106-73, 16 Stat. 433 (1871).

[194] 42 U.S.C. § 1985(3) (1994).

[195] *See* Collins v. Hardyman, 341 U.S. 651 (1951) (construing the Ku Klux Klan Act as only reaching conspiracies under color of state law).

[196] 403 U.S. 88 (1971).

[197] *See id.* at 88–89.

[198] *Id.* at 102 (emphasis in original).

[199] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

note that launched a thousand heightened scrutiny arguments is grounded in a notion of animus-driven distortions of pluralist majoritarian law-making.[200]

However, the Court, in *Griffin,* ignored the ramifications of the facts before it. The Court described the case as involving an attack by a group of whites against several African Americans whom the whites mistakenly believed to be civil rights workers, and their white associates.[201] This recitation of the facts emphasized the race of the victims, while minimizing the significance of the viewpoint that was attributed to them. An alternative presentation of the facts could have described the attack as one on a group of persons thought to be racial equality radicals. Justice Stevens later described the facts in *Griffin* in that way: "a Mississippi highway attack on a white man suspected of being a civil rights worker and the two black men who were passengers in his car."[202]

My point is not to disregard the highly differential impact of Klan-like terror on African Americans, but to note the obvious fact that this attack targeted more than racial identity per se. As was usually true of the Klan, the defendants' actions in *Griffin* were directed most harshly against blacks who asserted their rights as moral equals. Viewpoint, however, was erased in the Court's analysis of the plaintiffs' allegations.[203]

This erasure of viewpoint allowed the Court's logical slippages to work, starting with *Griffin.* There, the Court began with a statutory text prohibiting conspiracies to deprive "any person or class of persons of the equal protection of the laws." It moved from the statutory language of "class of persons" to "class-based . . . animus"[204] to "bias"[205] against "a protected class"[206] or "a qualifying class."[207] When "class-based animus" became "bias," synonymous with bigotry, and "class of persons" became "protected" or "qualifying class," the concept was reified into ascriptive identity boxes, a framework that was not present at the outset. It seems far more likely that what Congress intended, at the very least, was a shield against violence targeted selectively to suppress expressive (or

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[200] *See id.* That footnote also includes animus against viewpoint-centered groups among its examples of process failures that justify judicial intervention.

[201] Griffin v. Breckenridge, 403 U.S. 85, 88 (1971).

[202] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 316 (1993) (Stevens, J., dissenting).

[203] The omissions may have been more than an unconscious assumption that racial identity would "naturally" be the sole explanation. The *Griffin* court was careful not to overrule the result in *Collins.* "Whether or not *Collins v. Hardyman* was correctly decided on its own facts is a question with which we need not here be concerned." *Griffin,* 403 U.S. at 95. Had the Court acknowledged the significance of the viewpoint component of the targeting of plaintiffs for attack, it would have been forced to reconsider the facts of *Collins,* which concerned disruption of a political party's event.

[204] *Griffin,* 403 U.S. at 102.

[205] *Id.* at n.9.

[206] *Bray,* 506 U.S. at 322 (Stevens, J., dissenting); *id.* at 350 (O'Connor, J., dissenting).

[207] *Id.* at 269.

other) activities, based on the identity of the speaker (or actor). A concept of expressive identity would have allowed the Court to expand its interpretation of equality to accommodate situations where ascriptive identity groups were either absent or where their presence was necessary but not sufficient to explain the defendant's intent.

United Brotherhood of Carpenters and Joiners v. Scott[208] squarely presented the question of whether a viewpoint-defined group could satisfy the criteria for class-based animus established in *Griffin*. There, union members went onto a job site and attacked nonunion workers who had been hired during a strike. The Court, rejecting a vigorous dissent from four of its members who argued that Congress "viewed the Ku Klux Klan as pre-eminently a political organization, whose violence was thought to be premised most often on the political viewpoints of its victims,"[209] declined to rule on whether political groups, as such, were protected under the statute. Characterizing *Griffin* as involving "animus against Negroes and those who supported them,"[210] the Court blanched at the prospect of allowing § 1985(3) to reach every instance of heckling, disruption, or other unlawful action by one political party or group against another. The Court found a narrower means of excluding the case before it from the statute, holding that bias based on economic view, status, or activities absolutely did not qualify. Moreover, although the Court technically left open the question of bias against political viewpoint groups, it also held that private conspiracies to deprive persons of their First Amendment rights were not reachable. The Court held that, when a right is protected only against state interference (as is true of the First Amendment), the state must be involved in the conspiracy to deny equal enjoyment of that right in order for a § 1985(3)claim to accrue. It distinguished *Griffin* as implicating the right to travel, a right protected against private interference and, by implication, reaffirmed the result in *Collins*.[211]

In effect, the Court ruled that there could be no action against private parties who sought to interfere with the right of dissent, even if only African Americans, for example, were the victims. The *Carpenters* Court's prioritization of the protection of physical mobility over the protection of dissent mirrored the *Griffin* Court's privileging of race or race-like bias as the only relevant motive. A terror campaign to drive the civil rights movement out of the South had thus generated a body of case law about the right of persons of color to travel.[212] If a Klan member were to have shot a civil rights worker who was giving a speech demanding inte-

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[208] 463 U.S. 825 (1983).

[209] *Id.* at 850 (Blackmun, J., dissenting).

[210] *Id.* at 835.

[211] *See id.* at 826.

[212] For African Americans, section 2 of the Thirteenth Amendment also creates a right of action against private actors. *See* Griffin v. Breckenridge, 403 U.S. 85, 105 (1971).

grated lunch counters, there would have been no cause of action under the anti-Klan statute.

The desire to allow for such a cause of action led courts to stretch to fit ideology into ascriptive identity paradigms. In *Carpenters*, to support its finding that the assault on nonunion workers did qualify under § 1985(3), the Fifth Circuit had ruled that an actionable conspiracy could be motivated by either racial or political "bias."[213] The court then went on to rule that ideological disagreement was synonymous with bias, so that such disagreement could fit into the "class-based animus" required by *Griffin*. But, opposition obviously is not the same as bias. Thus, the Supreme Court's ruling that nonunion workers as a group do not constitute a "protected class" appears sensible.

In *Bray v. Alexandria Women's Health Clinic*,[214] the Court ruled that § 1985(3) did not apply to women seeking abortions. Plaintiffs had sought protection under that statute from interference by antiabortion protesters at the clinics that they were trying to enter. The Court ruled that, even if women were a protected class under the class-based animus standard (like African Americans), the particular plaintiffs did not qualify simply by being women. Rather, the Court held that the protesters' motivation was an antiabortion viewpoint, not antiwoman bias. The Court refused to consider the point of view(ing) implicated in women's position(s) on abortion, and thus artificially separated viewpoint from identity. The difference among women as to viewpoint was used to deny the identity-equality claim.

In both *Carpenters* and *Bray*, Justices Blackmun and O'Connor dissented on grounds that would lay the foundation for an expressive identity analysis. In *Carpenters*, Justice Blackmun's dissent (joined by Justices O'Connor, Marshall, and Brennan) identified the function of § 1985(3) as protecting classes of people, "whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities," from private acts "aimed at interfering with [their] equal exercise of their civil rights . . . . While certain class traits, such as race . . . *per se* meet this requirement, other traits also may implicate the functional concerns in particular situations."[215] Justice Blackmun's analysis simply equated "beliefs or associations" with "certain class traits such as race," without articulating a doctrinal or jurisprudential path to justify it—though at least he arrived at the right result.[216] Justice O'Connor, joined again by Justice Blackmun, renewed the argument in *Bray*, adding that women met the criteria used for the implicit analog to class-based

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[213] *See* Scott v. Moore, 640 F.2d 708 (5th Cir. 1981), *aff'd en banc*, 680 F.2d 979 (5th Cir. 1982).

[214] 506 U.S. 263 (1993).

[215] United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 853 (1983) (Blackmun, J., dissenting).

[216] *Id.*

animus, which would trigger heightened scrutiny under the equal protection clause.[217] The point, though well taken, does nothing to deconstruct the ascriptive identity framework.

The § 1985(3) cases illustrate the pitfalls of privileging either identity or viewpoint instead of recognizing them as interdependent. In *Griffin*, the Court submerged viewpoint into race, leaving race as the primary marker, even for whites whose race (*qua* race) had never put them in danger of Klan attack. In the same move, the Court subsumed a certain viewpoint into the notion of race without acknowledging that the former was ever there in the first place. In *Bray*, the Court reversed direction and submerged gender into viewpoint, with the result that, since viewpoint had trumped identity, a statute which protected only identity and not viewpoint provided no relief.

On the *Bray* Court's view, seeking abortion de-signified the plaintiffs as women. Their pro-choice viewpoint (quite possibly the only viewpoint that these women shared) ideologized their status category and thus robbed it of its naturalized definition. Their attackers (including women) sought to preserve that status by reinscribing motherhood as an inherent part of the definition of "woman." Plaintiffs' counsel in *Bray* emphasized that their clients were in the position of seeking to enter the clinic because of their capacity to become pregnant, a biological characteristic.[218] But, in that regard, the Court was correct that the blockaders' motive was not so simple nor so biologically determined. The targeted group was not merely women, nor was it all women. What *was* critical was that they were *women* defying their "natural destiny" as women, an act that threatened to re-signify the very category "woman" to include rejection of motherhood. The power of that threat was that other women could agree, could *choose* to reconstruct gender in that way. Here, to paraphrase Justice Brandeis, men feared women and burnt witches.[219]

In *Bray*, the clinic blockaders were fighting to insulate the naturalized identity of women from the pro-choice viewpoint—to keep viewpoint out—as well as fighting to prevent the social reconstruction of gender. *Bray* is the flip side of the gay rights cases discussed *supra* Part III, where viewpoint was seen as so intrinsic to the group's definition that it swallowed identity and the equality claim with it.

Such incoherence is unnecessary. An understanding of expressive identity leads to a reading of § 1985(3) that prevents results so divorced from social practices. It also provides a limiting principle to forestall the

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[217] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 349–50 (O'Connor, J., dissenting).

[218] Respondent's Brief at *27, Bray v. Alexandria Women's Health Clinic, 1991 WL 534030 (U.S. 1991) (No. 90-985).

[219] *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury alone cannot justify suppression of free speech and assembly. Men feared witches and burnt women.").

invocation of § 1985(3) every time there is heckling or picket-line fighting. The heart of the statute was to provide redress for situations where concerted private acts acquired such repressive power that they had the virtual effect of official repression.[220] The intent that the statute requires is intent "[to] depriv[e] . . . persons of the equal protection of the laws."[221] Most acts of violence do not even approach the threshold of such deprivation. Terrorizing civil rights workers does; so does physically preventing women from carrying out their decision to terminate a pregnancy. Assaulting nonunion workers is a more difficult case, one that would, properly, rise or fall given the specific facts of the situation. Disrupting a political meeting or forcing the end of a rally does not, in my view, come close. The answer should not depend on which identity label, if any, the group under attack carries. Nor should the fact that an affiliation is viewpoint-based *dis*qualify a targeted group for protection.

The legal issues are different in § 1985(3) than in situations where the First Amendment creates a defense to an equality claim. Here, the problem arises at the very threshold of the equal protection analysis, as fatal to plaintiffs' case in chief, rather than as an affirmative defense. The problem is whether a group can even state a claim if it is united by some blend of identity and viewpoint that threatens the dominant understanding of that identity (for example, a white who transgresses color lines or a woman who seeks an abortion), rather than being united by pure status. Although the specific question is different than the question in the expressive association cases, the same dynamic of pitting viewpoint against identity has ensued, harming the values of both inclusion and anti-orthodoxy.

C. Downshifting from Dissent to Equality: The Religion Clauses

Of all of the identities whose existences are contingent upon expression, religion is the most favored under the law. The Religion Clauses are grounded historically in multiple identity groups, each organized around a belief system as well as a series of ritualized practices. Any history of the American tradition of protecting dissent must have religion as a central focus.

Indeed, the Religion Clauses themselves represent the most explicit recognition in the constitutional text of the imbrication of dissent and identity, because the prohibition against establishment and the mandate of free exercise so closely track concepts of dissent and identity, respec-

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[220] This is evident from an *in pari materia* reading of the remainder of § 1985(3), known as the "hindrance clause," which prohibits acts by two or more persons "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." 42 U.S.C. § 1985(3) (1994).

[221] *Id.*

tively. I read them as the acknowledgment of the social practices in the eighteenth-century American colonies that illustrated the practical and political artificiality of prioritization.

Yet, their meaning has shifted in the last fifteen years, reflecting a diminution in the power of the Establishment Clause and an increasing role for the Free Exercise Clause. One dimension of that shift is a subtle but powerful emergence of concepts of equality and identity that increasingly dominate the jurisprudence of establishment as well as free exercise.

Establishment Clause doctrine once appeared to erect an almost impenetrable barrier against the incursion of religion into the meaningful operations of civic life. Religious doctrine was excluded in particular from publicly supported educational institutions.[222] In addition, the Court had effectively prohibited linkages between religious symbolism and public tax-supported venues.[223]

The Court applied the three criteria outlined in *Lemon v. Kurtzman* to determine whether the Establishment wall had been breached by the mixtures of sectarian and civic functions: a purpose to advance religion; the effect of advancing religion; or excessive entanglement of secular and religious operations, even if resulting from the attempt to avoid entanglement.[224] This standard, particularly its third prong, created a much more stringent test for state actions that encroached upon the arena of religion than the one for state actions challenged under the Free Exercise Clause.[225]

In sum, the Establishment Clause functioned as a super-right, virtually ensuring the absence of state-sanctioned religious orthodoxy and the consequent protection of dissent. It was drafted as a negative liberty, but was elevated by the hydraulics of interpretation to the role of a positive right. Of course, implicit in the concept of religious dissent was the understanding that such dissent would be voiced by diverse groups identified by their faith. The role of the Free Exercise Clause was to shield such professions of faith, by word and by act, from state action that would force an adherent to confront a choice between observance of religious duty and compliance with public law. Although the mandate for equal treatment of differing faith groups underlay the clause, the predominant case law focused on the impact of particular state actions, rather than whether such actions were intended to single out a given faith for disfavor.

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[222] *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[223] *See* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Stone v. Graham, 449 U.S. 39 (1980).

[224] This is the so-called *Lemon* test. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[225] *See* Bowen v. Kendrick, 487 U.S. 589, 627 n.1 (1988) (Blackmun, J., dissenting).

In the decade from roughly the mid-1980s to the mid-1990s, the dominant theme of interpretation under each clause changed. It is beyond the scope of this Article to examine this development comprehensively. However, one aspect of the paradigm shift in interpretation of the Religion Clauses has been the ascendance and increasing dominance of concepts of identity.

Under the old regime of Establishment Clause jurisprudence, there was a mandate to exclude religion as a subject matter from certain venues. That mandate functioned as a mechanism to guarantee no state endorsement of religion in general or of a particular faith. Today, the exclusion of religion as a subject matter has ended and the focus of interpretation has shifted to an assessment of differential treatment between individual faith groups. The animating principle of the current inquiry is very much one of equality among identity-based groups. One can trace this evolution in three key decisions.

Lynch v. Donnelly[226] was the last major Establishment Clause decision of the Burger Court. It involved a challenge to a city-owned Christmas display, placed in a central shopping district, on private land, which consisted of reindeers and Santa Claus's house, a Christmas tree, a toy clown, elephant and teddy bear, a "SEASONS GREETINGS" banner, and a creche with figures of Jesus, Mary, and Joseph together with angels, shepherds, and kings.[227] The Court's decision focused on whether the city's action "establishe[d] a religion or religious faith or tend[ed] to do so"[228] and called concerns that it did "farfetched indeed."[229] Applying the *Lemon* test[230] somewhat gingerly,[231] the Court found that evidence of an intent to advocate a particular religious message was insufficient in light of the full context of the display[232] and that "whatever [beneficial effect] there [was] to one faith or religion or to all religions, [was] indirect, remote, and incidental."[233]

Justice O'Connor's concurring opinion in *Lynch* signaled the first major shift from a focus on suppression of dissent to one on equality of voices. O'Connor's most significant intervention came in her rereading of the effects prong of the *Lemon* test. She wrote that the standard did not require invalidation of a governmental action "merely because it in fact causes, even as a primary effect, advancement or inhibition of relig-

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[226] 465 U.S. 668 (1984).

[227] *See id.* at 671.

[228] *Id.* at 678.

[229] *Id.* at 686.

[230] *See* discussion *supra* note 221 and accompanying text.

[231] *See id.* at 678–79. The Justice Department had urged in an amicus brief that the *Lemon* test be abandoned. Brief for the United States as Amicus Curiae Supporting Reversal, Lynch v. Donnelly, No. 82-1256 (U.S. June 30, 1983) (LEXIS, US Supreme Court Briefs).

[232] *See* 465 U.S. at 680.

[233] *Id.* at 683.

ion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[234]

Under O'Connor's interpretation, *endorsement* meant the favoring of a particular idea, which in the context of organized religion, easily slid into the notion of favoring a particular group of persons. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[235] O'Connor made the transition explicit by describing the question of whether government activity communicated endorsement of religion as "like the question whether racial or sex-based classifications communicate an invidious message."[236]

O'Connor's endorsement/equality principle migrated from her solo concurrence in *Lynch* to the rationale of the Court in *County of Allegheny v. ACLU*.[237] The Court's rhetoric is novel and revelatory. The word "diversity" appeared three times in the first two paragraphs of the section of the opinion that gave the rationale for the decision.[238] Prior to *Allegheny County*, the term "diversity" had never appeared in any Supreme Court decisions interpreting the Religion Clauses. For good measure, the Court capped off the analysis with the phrase "religious liberty and equality" in the same section.[239]

Justice Blackmun, who wrote *Allegheny County* but had dissented in *Lynch*, sought to harmonize the O'Connor concurrence in *Lynch* with prior Establishment Clause case law by building a bridge between the concepts of suppression and equality. Blackmun linked the usage of "endorsement" in a series of prior cases in which it signified material support[240] to the usage of "preference" or "favoritism" among religions.[241] At the end, however, his statement of the "essential principle" could just as easily have been cited as the definition of a classification under the Equal Protection Clause: "making adherence to a religion relevant in any way to a person's standing in the political community."[242]

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[234] *Id.* at 691–92.

[235] *Id.* at 688.

[236] *Id.* at 694. O'Connor concurred in *Lynch* because she found that no such message was communicated by the inclusion of the creche in the display.

[237] 492 U.S. 573 (1989) [hereinafter *Allegheny County*].

[238] *Id.* at 589–90.

[239] *Id.* at 590.

[240] *Id.* at 592–93 (discussing the endorsement of prayer activities in public schools in *Wallace v. Jaffree*, 472 U.S. 38 (1985); a tax exemption for religious periodicals in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); and the funding of a creationism curriculum in *Edwards v. Aguillard*, 482 U.S. 578 (1987)).

[241] *Allegheny County*, 492 U.S. at 593 (citing O'Connor's concurring opinion in *Jaffree* and Blackmun's concurring opinion in *Texas Monthly*, as well as the Court's opinion in *Edwards*).

[242] *Id.* at 593–94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J.,

Justice Kennedy upped the ante by arguing in partial dissent[243] that exclusion of religion was not neutrality but a preference for nonreligion. Finding that the risk of establishment from the display of religious symbols solely during a holiday period was minimal, Kennedy argued that the majority had enshrined a rule of interpretation that itself violated the Establishment Clause by *dis*favoring religion. The conformism of antireligion was the new danger. Under the majority's approach, he argued, "what is orthodox . . . means what is secular."[244]

Justice Kennedy's opinion in *Allegheny County* was not framed in equality terms per se, but in the assertion of a new form of establishmentarianism that reflected a new antireligious orthodoxy. It was in the last of this trio of cases that Justice Kennedy's position was subtly but significantly reframed into an equality and expressive identity position, by which he succeeded in convincing a majority of the Court to adopt an equal treatment interpretation of the Establishment Clause.

Rosenberger v. University of Virginia[245] involved the student activities fund at a public university, which had refused to reimburse expenses of an otherwise eligible student group because it published a Christian newspaper. The unique aspect of this case, with respect to Establishment Clause precedent, was the fact that reimbursement would mean a state-funded program would be providing tangible, financial benefit to a group organized for the purpose of disseminating a particular religious perspective. In *Allegheny County*, Blackmun had limited the Court's adoption of O'Connor's endorsement/equality principle to situations involving governmental use of religious symbols, implicitly excluding state-provided material support.[246]

In *Rosenberger*, the Court ruled that the Christian publication had to be treated as a viewpoint group, not as a religious group, and that, as such, it was entitled to treatment on an equal basis with other viewpoint groups. Indeed, for the University to have excluded it would have violated the First Amendment's free speech clause. Rejecting the dissent's characterization of the result as amounting to a public subsidy for "the preaching of the word,"[247] Justice Kennedy, writing for the Court, char-

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concurring)).

[243] Kennedy concurred in the judgment that the menorah display was constitutional, but dissented from the ruling that the creche display was not.

[244] *Allegheny County*, 492 U.S. at 678.

[245] 515 U.S. 819 (1995).

[246] *See Allegheny County*, 492 U.S. at 595 (noting that O'Connor's concurrence in *Lynch* "provides a sound analytical framework for evaluating governmental use of religious symbols"); *id.* at 597 ("[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context.").

[247] *Rosenberger*, 515 U.S. at 868 (Souter, J., dissenting).

acterized religious beliefs as "a specific premise, a perspective, a standpoint."[248]

What is notable about *Rosenberger* is its fusion of religious belief and equality language. The Court accepts religion as (another) expressive identity, as another player in what Justice O'Connor called "the expressive marketplace,"[249] but not a threatening player whose danger would warrant precluding state support through symbolic or even financial means. *Rosenberger* marked the shift in the meaning of neutrality in Establishment Clause jurisprudence from the preservation of state functions as a religion-free zone to the requirement of evenhandedness among and between religions and nonreligions.

Thus, in the context of religion, the failure to recognize the interplay between identity and dissent has operated to diminish the power of the older, pure dissent model. The newer evenhandedness model implicitly relocates Establishment Clause cases by placing them in an identity politics paradigm. In many respects, this seems appropriate. The identity glove fits. But the constitutional beginning point is different. Unlike the § 1985(3) cases, where the equality claim is sacrificed by its reconception as an ideological dispute, here the stringent command to establish no religion has become an admonition to treat all equally.

Conclusion

Claims based on identity politics have had a profound impact on American law. Their centrality to equality law is obvious. What is less self-evident is the important role that identity-based claims serve in governing the interplay between equality and expression.

A myriad of social forces (including the law itself) produces our conceptions of what constitutes a distinctive identity. Individuals who share the characteristics of a status that is socially devalued also share the point of view(ing) implicated in that social location. An equality claim framed by that kind of minoritized identity communicates, by its very articulation, a message of dissent from the social devaluation of the identity. Such a challenge is an expressive identity claim.

In a range of fields, equality jurisprudence has foundered because of an inability to adjudicate expressive identity claims without forcing them into one of two mutually exclusive doctrinal categories: expression or equality. As a result, the values of both antiorthodoxy and inclusion have been weakened.

When an expressive identity claim is overimbued with traditional First Amendment notions of viewpoint, as has happened in many sexual orientation cases, the act of exclusion becomes reconfigured as an inno-

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[248] *Id.* at 831.
[249] *Id.* at 847 (O'Connor, J., concurring).

cent neutrality. In other instances, the expressive aspects of an identity-based claim can threaten to declassify it from being an equality claim at all, as the debates regarding the Voting Rights Act and § 1985(3) illustrate. Alternatively, and seemingly inconsistently, courts may seek to remedy inequality by deploying arguments based on the value of diversity of expression, as the development of the diversity rationale for affirmative action illustrates. Viewed together, these results are incoherent.

The law must more accurately reflect the social reality underlying all of these claims, incorporate the fullest meaning of equality into doctrine, and guard against the selective disqualification of certain identities from equality protection simply because their claims most powerfully communicate dissent from social hierarchies. The best way to achieve these ends is for the law to develop a theory of expressive identity as part of its equality jurisprudence. We should not have to sacrifice the power of dissent in order to retain a claim for equality. This Article seeks to initiate that project.