

## RECENT DEVELOPMENTS

PENALTY ENHANCEMENT FOR BIAS-BASED CRIMES: *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

In 1992, in *R.A.V. v. St. Paul*<sup>1</sup> the Supreme Court cast doubt on the constitutionality of "hate crimes" statutes, laws that punish speech and conduct deemed to display bias on the basis of specified characteristics, such as race, color, ethnicity, religion, national origin, sex, disability, or sexual orientation.<sup>2</sup> The *R.A.V.* Court struck down a St. Paul, Minnesota, municipal ordinance<sup>3</sup> that selectively proscribed fighting words used to express discriminatory animus because it held that even proscribable classes of speech like fighting words cannot be regulated on the basis of content. Although the St. Paul ordinance focused on expression rather than non-speech conduct, the difficulty of distinguishing between speech and conduct prompted many observers to construe *R.A.V.* as invalidating most hate-crimes legislation.<sup>4</sup>

In the ensuing controversy over *R.A.V.*'s meaning, state supreme courts divided over the constitutionality of penalty-enhancing, hate-crimes statutes.<sup>5</sup> Last Term, in *Wisconsin v. Mitchell*,<sup>6</sup> the Supreme Court resolved this conflict by unanimously upholding a statute that increases sentences if the perpetrator "intentionally selects" the victim or targeted property "because of

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1. 112 S. Ct. 2538 (1992).

2. At least forty-six states and the District of Columbia have criminal laws designed to deter bias-motivated "hate crimes." Twenty-four states have general penalty-enhancement statutes that increase penalties for any crime in covered code sections if its commission was motivated by bias toward the victim. See ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, ADL LAW REPORT: HATE-CRIMES STATUTES: A 1991 STATUS REPORT, 21-23 (1991).

3. ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990). Although the ordinance's language banned any "plac[ement] on public or private property [of] a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," Minnesota's Supreme Court read the ordinance as prohibiting "fighting words." See *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev'd sub nom.* *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

4. See, e.g., Ruth Marcus, *Supreme Court Overturns Law Barring Hate Crimes: Free Speech Ruling Seen as Far-Reaching*, WASH. POST, June 23, 1992, at A1.

5. Compare *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992) (overturning bias-motivated aggravated assault conviction), *rev'd* 113 S. Ct. 2954 (1993) and *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992) (overturning convictions for bias-motivated menacing and assault) with *State v. Plowman*, 838 P.2d 558 (Or. 1992) (upholding bias-motivated assault conviction). Lower courts in two other states upheld bias-crime legislation. See *Dobbins v. State*, 605 So.2d 922 (Fla. Dist. Ct. App. 1992); *People v. Micco*, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992).

6. 113 S. Ct. 2194 (1993).

the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property.”<sup>7</sup> By denying First Amendment protection to the discriminatory selection of a violent crime victim, the Court correctly decided *Mitchell*; however, by failing to address the applicability of penalty enhancement to proscribable speech offenses (such as fighting words) that are motivated by discriminatory animus, the Court created a loophole through which legislatures can attempt to circumvent *R.A.V.* and impose burdens on disfavored speakers.

Graphically illustrating the murkiness of the boundaries between speech and conduct, *Mitchell* involved an act of racial violence verbally incited by the defendant. On October 7, 1989, Mitchell, a young black man, had been discussing with a group of other young black males the racially-charged movie *Mississippi Burning*, which depicts a white racist savagely beating a little black boy whom he encountered praying. As anger among the group rose, Mitchell spied a 14-year old white boy, Gregory Riddick, walking on the other side of the street. Mitchell asked the group if they felt “hyped up to move on some white people,” pointed to Riddick, and said, “you all want to f—k somebody up? There goes a white boy; go get him.”<sup>8</sup> Counting to three, he pointed the group in Riddick’s direction. As many as ten members of the group crossed the street, beat Riddick into a coma, and stole his sneakers.<sup>9</sup> Although Mitchell did not actually beat the victim, he, as the instigator and ringleader of the attack, was convicted of aggravated battery, an offense that normally carries a maximum sentence of two years imprisonment.<sup>10</sup> Because the jury found that Mitchell had selected his victim on the basis of race, however, Wisconsin’s hate-crimes statute increased his maximum sentence to seven years. Mitchell received a four year prison sentence.<sup>11</sup>

Writing for the Wisconsin Supreme Court, Chief Justice Heffernan held the Wisconsin penalty-enhancement statute unconstitutional.<sup>12</sup> The hate-crimes law, Chief Justice Heffernan wrote,

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7. WIS. STAT. § 939.645(1)(b) (1991) (the “hate-crimes law”).

8. *Mitchell*, 113 S. Ct. at 2196-97.

9. *Id.*

10. Bernard James, *Hate Crimes: Can the state authorize extra punishment for criminal acts that purposely target certain groups*, PREVIEW OF U.S. SUPREME COURT CASES, Apr. 16, 1993, at 347.

11. *Mitchell*, 113 S. Ct. at 2197.

12. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992).

“violate[d] the First Amendment directly by punishing what the legislature has deemed to be offensive thought, and violated the First Amendment indirectly by chilling free speech.”<sup>13</sup>

Chief Justice Heffernan argued that the hate-crimes law directly violated the First Amendment by creating a “thought crime” that punished not the crime but the bigoted thoughts that motivated the actor to commit the crime. This argument required numerous fine distinctions among related concepts. The Chief Justice distinguished motive, the underlying reason for committing the crime, from intent, the actor’s desire to commit the harm. Although legislatures may, and historically have, punished intent, punishing a motive constituted an unconstitutional “thought-crime.”<sup>14</sup> The Chief Justice also distinguished antidiscrimination laws from hate-crimes laws, both of which ban discriminatory selection of victims. He explained that bans on “objective acts of discrimination,” upheld against First Amendment challenge in the context of federal antidiscrimination laws, differ from hate-crimes law, which he considered to punish the “subjective mental process” by which a defendant selects the victim.<sup>15</sup> Additionally, he contrasted the civil nature of workplace antidiscrimination law, which he claimed “redressed (not punished)” discrimination, with the criminal, retributory nature of the hate-crimes law.<sup>16</sup>

The statute, argued Chief Justice Heffernan, also indirectly and unconstitutionally chilled speech because a speaker’s knowledge and fear that speech could be used as evidence to prove violations of the hate-crimes law would unconstitutionally deter speech.<sup>17</sup> This differed from constitutional workplace antidiscrimination laws because “[a] statute criminalizing the bigoted selection of a victim will chill free speech to a much greater extent than a statute imposing civil penalties” for employment discrimination.<sup>18</sup>

The Supreme Court reversed in a unanimous opinion by Chief Justice Rehnquist.<sup>19</sup> The Court rejected Chief Justice Heffernan’s

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13. *Id.* at 811. Chief Justice Heffernan derived much of this reasoning from Susan Gelman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?*, 39 U.C.L.A. L. REV. 333, 364 (1991).

14. *Mitchell*, 485 N.W.2d at 813.

15. *Id.* at 817.

16. *Id.* at 817 n.21.

17. *Id.* at 816-17.

18. *Id.* at 817.

19. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

distinctions as false or irrelevant. Chief Justice Rehnquist found the hate-crimes law's chilling effect negligible because "[t]he sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases."<sup>20</sup> The Court also found the motive-intent dichotomy irrelevant, denying any distinction between statutory penalty enhancement and informal sentencing increases based on motive.<sup>21</sup> Motive, noted the Court, has long been a factor in sentencing, including death penalty determinations, "surely the most severe [penalty] 'enhancement' of all."<sup>22</sup> The Court also emphasized the spurious nature of Heffernan's distinction between "objective acts of discrimination" and "subjective mental processes," noting that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws . . ."<sup>23</sup> Finally, the Court ignored Chief Justice Heffernan's plainly incorrect assertion that the antidiscrimination laws are distinguishable because they "redress, not punish" discrimination. In support of the Wisconsin law, the Court accepted as "adequate" Wisconsin's argument that penalty enhancement reflected the State's desire to redress the greater individual and societal harms allegedly produced by bias-inspired conduct, including retaliatory crimes, distinct emotional harms, and community unrest, and did not reflect a desire to punish offenders for their "beliefs or biases."<sup>24</sup>

*Mitchell* wisely upheld the constitutionality of penalty enhancement for bias-motivated violence, but by not clearly addressing the applicability of penalty enhancement to speech offenses (such as fighting words), the Court created a dangerous loophole to circumvent *R.A.V.*'s rule protecting speakers against content-discriminatory prohibitions on expression. *Mitchell* correctly denied First Amendment protection to bias-motivated violence.<sup>25</sup>

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20. *Id.* at 2201.

21. *Id.* at 2200.

22. *Id.*, citing *Barclay v. Florida*, 463 U.S. 939 (1983) (upholding, in a death penalty case, consideration of fact that defendant's motivation for committing murder was to start a race war) and *Dawson v. Delaware*, 112 S. Ct. 1093 (1991) (overturning the death penalty imposed after considering defendant's racist beliefs, which were unrelated to his crime, but noting in *dictum* that bias would be admissible if related to the crime).

23. *Id.*

24. *Id.* at 2201.

25. Nevertheless, penalty-enhancements for bias-crimes are of doubtful merit in promoting the public welfare. They may increase penalties so heavily that punishment becomes disproportionate to the crime. Moreover, they send a negative message to the majority of violent crime victims whose attacks were based on motives other than bias, by implying that their injury is of lesser concern than those targeted for "politically incorrect" reasons. These problems, however, are matters of public policy, not of free speech.

Erecting a First Amendment bar to examining a defendant's motive would undermine the foundations of the criminal law, which carefully assesses the mental state of the lawbreaker to ensure that punishment fairly reflects his culpability. Moreover, providing violent criminals First Amendment protection, even indirectly, trivializes free speech by sheltering physical coercion under the very umbrella designed to shield dissenters from the coercion of censorship.

That hate-crimes statutes are generally constitutional should not be understood as shielding such statutes from constitutional challenge when they are applied to speech. Penalty enhancement for bias-motivated speech offenses chills protected speech far more heavily than penalty enhancement for bias-motivated violence and provides a far greater opportunity for abuse by government officials seeking to send a message of intimidation to dissidents. Commission of bias-motivated acts of violence commonly doubles or triples jail terms.<sup>26</sup> By contrast, penalty enhancement for speech-crimes frequently produces sentences that are huge multiples of the ordinary maximum sentence. For example, the lead defendant in *State v. Wyant*,<sup>27</sup> convicted of bias-motivated menacing after making threatening racial remarks within earshot of a black couple, was given an 18-month prison sentence, an increase of 1700 percent over the 30-day maximum sentence for non-bias menacing. Such a large penalty enhancement is grossly disproportionate to any conceivable added harm arising from his discriminatory motive and seems, instead, to use his motive as a pretext for punishing disfavored attitudes.

The censorial intent lurking behind some penalty-enhancement statutes is illustrated by the fact that seven of them provide for a single maximum sentence, regardless of the severity of the underlying crime, which could range from trivial verbal abuse to serious violence.<sup>28</sup> Even advocates of hate-speech laws concede

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Only in extreme cases is penalty-enhancement for bias-motivated violence constitutionally suspect, and even then, the Equal Protection Clause and the ban on cruel and unusual punishment seem better suited to addressing such cases than the First Amendment.

26. Mitchell, for example, received a four year sentence, twice the maximum allowed for a non-bias-motivated crime.

27. 597 N.E.2d 450 (Ohio 1992).

28. See, e.g., CONN. GEN. STAT. ANN. § 53(a)-181(b) (West 1985); IDAHO CODE § 18-7902 (1987); MASS. GEN. LAWS ANN. § 39 (West 1992); MICH. COMP. LAWS ANN. § 750.147(b)(2) (West 1991); MO. ANN. STAT. § 574.090(2), 574.093(2) (Vernon Supp. 1992), N.D. CENT. CODE § 12.1-14-04 (1985); WASH. REV. CODE ANN. § 9A.36.080(3) (West Supp. 1992).

that such statutes "might be unconstitutional [because the] penalty is so disproportionate to any legitimate harm that the state could claim to be remedying" that a court could only conclude that "the differential impact on communication of certain messages . . . would . . . be the entire point of the statute."<sup>29</sup>

By failing to address the constitutionality of penalty-enhancement for speech-crimes, the Court created a loophole that allows legislatures to try to circumvent *R.A.V.* and impose burdens on disfavored speakers. Chief Justice Rehnquist tried to distinguish *R.A.V.* from *Mitchell* by noting that "the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . [whereas] the statute in [*Mitchell*] is aimed at conduct unprotected by the First Amendment."<sup>30</sup> Yet, the fighting words regulated in *R.A.V.* were also, in a sense, unprotected by the First Amendment, since they are a proscribable class of speech. Rehnquist's indication that the conduct in *R.A.V.* was protected by the First Amendment likely reflects prior cases that held *all* speech, including proscribable classes of speech such as fighting words, obscenity, and defamation, to be protected by the First Amendment from certain methods of regulation.<sup>31</sup>

Chief Justice Rehnquist provided a simple test to distinguish between speech and conduct. He distinguished speech from "violence or other types of potentially-expressive activities that produce special harms distinct from their communicative impact," holding that such violence is "entitled to no constitutional protection."<sup>32</sup> *R.A.V.* differs from *Mitchell*, therefore, because "the targeted harm [in *R.A.V.*] flows directly from its communicative impact"<sup>33</sup> while in *Mitchell* the bias-motivated violence is the

29. Eric J. Grannis, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias-Crimes*, 93 COLUM. L. REV. 178, 228 (1992) (commenting on ethnic intimidation statutes with uniform maximum sentences regardless of the seriousness of the underlying offense).

30. *Mitchell*, 113 S. Ct. at 2201.

31. *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992). As Justice Scalia noted for the majority in *R.A.V.*, proscribable classes of speech are not "entirely invisible to the Constitution, so that they may be made vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 2543. See also *Fort Wayne Books v. Indiana*, 484 U.S. 46 (1989) (pre-trial seizure of bookstore under state racketeering statute on basis of prior obscenity offenses is unconstitutional prior restraint even though seizure on basis on non-speech-related offenses would be permissible); *Near v. Minnesota*, 283 U.S. 697 (1931) (nuisance abatement statute unconstitutional prior restraint as applied to defamatory newspapers).

32. *R.A.V.*, 113 S. Ct. at 2543 (citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that sex-discriminatory admission policy of a generally unselective club was not protected by First Amendment freedom of association)).

33. Dorothy Roberts, *What's the Harm in Hate Speech and Bias Attacks*, 133 N.J.L.J. 1607.

targeted harm. Rehnquist rejected the notion that violence can be classified as expressive conduct within the scope of *R.A.V.* merely because it expresses the discriminatory philosophy of the attacker:

[O]ur cases reject the “view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.<sup>34</sup>

Thus, while proscribable categories of speech such as obscenity and fighting words remain subject to *R.A.V.*'s rule against content-based restrictions, regulation of nonspeech conduct is governed solely by *Mitchell*, allowing the government to single out bias-motivated violence for selective punishment.<sup>35</sup>

The Court's distinction between speech and unprotected conduct fails when applied to a large portion of crimes: bias-inspired crimes that mix elements of speech and non-expressive conduct. These “mixed crimes” such as property defacement and trespassing produce some “harms distinct from their communicative impact,” but cause most of their harms directly through their communicative impact. For example, painting a swastika on a synagogue harms worshippers chiefly through its communicative impact, but it also inflicts the property damage typical of all kinds of defacement.<sup>36</sup> Thus, *Mitchell* does not make clear whether penalties may be enhanced for mixed crimes.

Penalty-enhancement for purely speech-based offenses, such as obscenity and fighting words, probably remains invalid even after *Mitchell* under *R.A.V.*'s rule against content discrimination, since penalty-enhancement for a speaker's discriminatory selection of his target regulates the content of his speech nearly as precisely as a statute that expressly punishes the speaker for the biased content of his speech. A simple example illustrates the striking similarity between the *R.A.V.* ordinance and *Mitchell*'s penalty en-

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34. *Mitchell*, 113 S. Ct. at 2199 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)) (citations omitted).

35. That speech-crimes, even violent threats, are generally governed by *R.A.V.*, rather than *Mitchell*, was noted recently by a state appeals court. *In re M.S.*, No. A055072, 1993 Cal. App. LEXIS 839 (Aug. 17, 1993) (analyzing a state law under *R.A.V.*, because it selectively increased penalties for violent threats, which the Court recognized as speech within the meaning of *R.A.V.*).

36. Wisconsin's hate-crimes law applies to many crimes, ranging from pure speech to “mixed crimes,” such as public lewd or indecent drawings (Wis. STAT. § 944.23 (1991-1992)), disorderly conduct (§ 947.01), sedition (§ 946.03), flag desecration (§ 946.05), and harassment (§ 947.013).

hancers in the context of speech. "St. Paul's statute could have been drafted in content-neutral terms," it has been argued, simply by adding the words "in a person whom one has selected" to the statute, so that instead of prohibiting fighting words that arouse "anger, alarm or resentment on the basis of race, color, religion, creed, or gender," the statute would prohibit fighting words that arouse "anger, alarm or resentment *in a person whom one has selected* on the basis of race, color, religion, creed, or gender."<sup>37</sup> Under this pinched view of *R.A.V.*'s scope, the statute in *R.A.V.* would have been constitutional if it had, like the *Mitchell* statute, "focus[ed] on the victim rather than on the expressive content of the defendant's conduct."<sup>38</sup>

This hypothetical redrafting of the St. Paul statute is virtually indistinguishable from the facially discriminatory ordinance invalidated by *R.A.V.* The redrafted statute would prohibit the same expressions of discriminatory animus as are prohibited by the *R.A.V.* ordinance,<sup>39</sup> because any utterance of fighting words expressing bias also would reflect discriminatory selection.<sup>40</sup> It is "troubling that the constitutionality of statutes applied to identical conduct should turn on arguably subtle differences in their drafting."<sup>41</sup> To uphold penalty enhancement for speech crimes despite *R.A.V.*'s prohibition on content-based regulation would reduce First Amendment jurisprudence to meaningless formalism. Thus, it seems doubtful that *Mitchell* grants blanket approval to penalty-enhancement for speech-related offenses.

Nevertheless, proponents of hate-crimes laws have already cited *Mitchell* for the peculiar proposition that a discriminatory motive for committing a speech-related crime converts the offense into conduct that may be regulated in a content-discriminatory manner. Proponents treat *Mitchell*'s willingness to uphold a penalty-enhancement for bias-motivated selection of the victim as creating a gaping loophole in *R.A.V.* that approves virtually all hate-crimes laws, including some that sharply resemble the ordinance overturned in *R.A.V.* A New Jersey prosecutor, for example, argued that New Jersey's desecration laws, which include

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37. Grannis, *supra* note 29, at 215 n.252 (emphasis added).

38. *Id.* at 214.

39. Theoretically, the statute would also cover cases in which the message is not discriminatory although the selection of the target is. In reality, however, such a situation is unlikely to be subject to penalty enhancement unless, despite the absence of biased language, the context made manifest the speaker's underlying discriminatory philosophy.

40. Grannis, *supra* note 29, at 214.

41. *Id.* at 215.

language identical to the *R.A.V.* statute, “regulate conduct, not speech,” because they also require a “purpose to intimidate” rather than a “simple prohibition on displaying a swastika.”<sup>42</sup> The Washington Supreme Court recently confused speech and conduct by upholding a “malicious harassment” statute,<sup>43</sup> ruling that the penalty enhancement imposed on the defendants for their harassing speech punished “not bigoted speech . . . but rather the act of victim selection.”<sup>44</sup> The Washington Supreme Court overlooked the fact that the “act” of victim selection was not conduct punishable for its own sake, but merely a mental element of a speech-crime.

The American Civil Liberties Union (“ACLU”) conceded in its amicus brief supporting the penalty enhancement in *Mitchell* that hate-crimes laws are “easily susceptible to prosecutorial abuse,” and asserted that the Supreme Court must “ensure that hate-crimes statutes do not become, as their critics predict and even their supporters fear, a vehicle for the suppression of unpopular ideas.”<sup>45</sup> The Supreme Court, however, did not heed the ACLU’s warning. By miscategorizing bias-motivated speech as conduct, state courts and legislatures have already begun using *Mitchell* to circumvent *R.A.V.* and impose burdens on disfavored speech. Such penalty enhancement for expressive conduct could have a huge chilling effect on discussion of disfavored topics.

The past decade has witnessed the proliferation of campus speech codes, under which students have been punished for “discriminatory harassment” for expressing commonplace political views on subjects like affirmative action, feminism, and homosexuality.<sup>46</sup> While federal courts have overturned every speech code challenged at public universities,<sup>47</sup> campus administrators’ zeal

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42. Russ Bleemer, *Mitchell Decision Likely to Boost N.J. Bias Laws*, 134 N.J.L.J. 602 (1993) (quoting Monmouth County assistant prosecutor Honecker).

43. *State v. Talley*, No. 58492-31993, 1993 Wash. LEXIS 227 at \*11 (Wash., Sept. 9, 1993) (upholding statute banning “words or conduct that places another person in reasonable fear of harm to his person or property . . . because of, or in a way that is reasonably related to, associated with, or directed toward, that person’s race, color, religion”).

44. *Id.* at \*26.

45. Amicus Brief of the ACLU at 20, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

46. *See, e.g., Doe v. Michigan*, 721 F. Supp. 852, 859-861 (E.D. Mich. 1989) (discussing sexual harassment conviction of evangelical Christian student who publicly disapproved of homosexuality and likelihood that graduate student would be disciplined for discussing gender-based differences in his psychology class).

47. *See id.*; *UWM Post, Inc. v. Board of Regents of the Univ. of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991). Both speech codes were based on the hostile environment test that undergirds workplace harassment laws.

to censor has scarcely diminished. The perception that the Court has retreated from *R.A.V.*'s prohibition on content-based discrimination in *Mitchell* will embolden supporters of political correctness to renew their push for censorship on campus and in other public fora, narrowing academic freedom, chilling political discourse, and menacing free intellectual inquiry. By leaving *R.A.V.*'s reach uncertain, and potentially opening a Pandora's box of new speech restrictions, *Mitchell* has done a grave disservice to the free expression that is the cornerstone of a tolerant society.

Hans F. Bader

ANIMAL SACRIFICE AND EQUAL PROTECTION FREE EXERCISE: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993).

[I]ndeed if any People congregated upon account of religion, should be desirous to sacrifice a Calf, I deny that That ought to be prohibited by a Law. *Melibaeus*, whose Calf it is, may lawfully kill his Calf at home and burn any part of it that he thinks fit. . . . And thus what may be spent on a Feast, may be spent on a Sacrifice. But if . . . the Commonwealth required all slaughter of Beasts should be forborne . . . the Magistrate, in such a case, may forbid all his Subjects to kill any Calves for any use whatsoever . . . . [I]n this case the law is not made about a religious, but a political matter . . . .<sup>1</sup>

In the aftermath of *Employment Division v. Smith*,<sup>2</sup> countless scholars, practitioners, and interest groups decried the Supreme Court's holding that neutral and generally applicable laws incidentally restricting religion need not be justified by a compelling state interest.<sup>3</sup> Critics fervently awaited the next time the Court

1. JOHN LOCKE, A LETTER CONCERNING TOLERATION 42 (James H. Tully ed., 1983) (1689).

2. 494 U.S. 872 (1990).

3. See, e.g., John Delaney, *Police Power, Absolutism, and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). See also *Miller v. South Bend*, 904 F.2d 1081, 1102-03 (7th Cir. 1990) (describing as "moribund" post-*Smith* Free Exercise); *State v. Flesher*, No. 89-P-2084 (Ohio Ct. App. June 1, 1990) (describing post-*Smith* free exercise protection as a mere "puff of smoke"). But see William P. Marshall, *In Defense of Smith, and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

would consider a free exercise claim, hoping that the Court would clarify the *Smith* rule or, preferably, abandon it.<sup>4</sup> Last Term, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>5</sup> the Court addressed such a claim, considering an archetypal instance of a non-neutral, non-generally applicable regulation: a Florida city's ordinances directed at stopping animal sacrifice by practitioners of the Santeria religion. Rather than modifying or abandoning *Smith*, the Court utilized the *Smith* test to strike down the laws as violative of free exercise.

This holding, on its facts, was absolutely correct, as was the Court's continued reliance on *Smith*. It reflects, implicitly at least, a shift in free exercise doctrine from the vagaries of its substantive due process origins to a new-found reliance on equal protection as the proper source of incorporation. This reorientation of free exercise as applied to the states should be made explicit because equal protection provides a sounder and more textually supported genesis for free exercise incorporation.

Petitioner Ernesto Pichardo is a Santeria<sup>6</sup> priest residing in Hialeah, Florida, who sought to bring the religion out into the open and to establish the Church of the Lukumi Babalu Aye as a visible and safe haven for the practice of Santeria.<sup>7</sup> In response to Pichardo's public announcement of his intent to open a Santeria church practicing animal sacrifice, the City Council of Hialeah passed a series of ordinances outlawing animal "sacrifice" performed "in a public or private ritual or ceremony," while allowing hunting and fishing for sport, ordinary slaughter for food, experimentation for medical science, euthanasia of unhealthy, unwanted, or commercially-valueless animals, and even use of live rabbits to train greyhounds.<sup>8</sup>

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4. Nineteen interest groups filed five amici briefs in the Supreme Court in *Lukumi Babalu Aye* urging the substantial limitation or complete repudiation of *Smith*.

5. 113 S. Ct. 2217 (1993).

6. Santeria is a Caribbean syncretic blend of African Yoruba practices and Roman Catholic iconography. Fundamental to the practice of Santeria is the sacrifice of animals to personal Orisha spirits. After the majority of Santeria sacrifices, the animals are cooked and eaten. *See id.* at 2222.

7. Santeria has a long history of secret practice. It was extensively persecuted in Cuba, where it originated. It came to the United States with Cuban exiles, who, due to ongoing intolerance, practice primarily in secret. *See id.* at 2222-23.

8. *See id.* at 2229, 2232. *See also* FLA. STAT. ch. 828 (1987) (prohibiting "unnecessar[y]" killing of animals); Hialeah, Fla., Ordinance 87-40 (June 9, 1987) (incorporating Florida's animal cruelty laws); Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987) (prohibiting "ritual" slaughter); Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987) (prohibiting "sacrifice [of] any animal"); Hialeah, Fla., Ordinance 87-72 (Sept. 22, 1987) (prohibiting slaughter in areas not zoned for slaughterhouses, except for killing of "small numbers of hogs and/

Following passage of these ordinances, petitioners challenged their constitutionality in the United States District Court for the Southern District of Florida. The district court found for the City of Hialeah on all counts. Although the court found that "the ordinances [were] not religiously neutral but were intended to stop the practice of animal sacrifice,"<sup>9</sup> it held that "[s]trict religious neutrality is not required by the First Amendment."<sup>10</sup> The court therefore applied two threshold analyses: whether the law regulated conduct rather than belief, and whether it had a secular purpose and effect.<sup>11</sup> Answering both tests in the affirmative, the court balanced the government interests against the free exercise claim and upheld the ordinances.

The court found four compelling interests: (1) the health risks from improper disposal of carcasses and eating uninspected meat; (2) the psychological damage to children caused by exposure to animal sacrifice; (3) the cruelty to animals caused by "filthy, overcrowded" storage, "fear and stress in the animal," and the inhumane method of killing; and (4) the need for restricting slaughter to areas zoned for slaughterhouse use.<sup>12</sup> The court rejected less restrictive means of achieving these compelling interests in light of the enforcement problems raised by Santeria's secrecy<sup>13</sup> and denied Pichardo and his church a religious exception to the statute because "[t]he exception would, in effect, swallow the rule."<sup>14</sup>

The Eleventh Circuit Court of Appeals affirmed in a one-paragraph, unpublished, *per curiam* opinion.<sup>15</sup> The court disavowed the district court's second compelling reason, children's welfare, and held simply that the ordinances were consistent with the Constitution.<sup>16</sup> In the interim between the district and the appellate decisions, the Supreme Court decided *Smith*. The court of

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or cattle"). The city council also adopted two resolutions expressing disapproval for religious "practices which are inconsistent with public morals, peace, or safety" and opposing "ritual sacrifices," which from that time forward the city council intended to prosecute fully. See Hialeah, Fla., Resolution 87-66 (June 9, 1987); Hialeah, Fla., Resolution 87-90 (Aug. 11, 1987).

9. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1476 (S.D. Fla. 1989).

10. *Id.* at 1484.

11. *See id.* at 1483.

12. *See id.* at 1485-86.

13. *See id.* at 1486-87 & nn.57-59.

14. *Id.* at 1487.

15. *See Lukumi Babalu Aye*, 113 S. Ct. at 2225. The judgement order was reported at 936 F.2d 586 (11th Cir. 1991).

16. *See Lukumi Babalu Aye*, 113 S. Ct. at 2225.

appeals declined to apply *Smith* directly, noting that the district court had “employed an arguably stricter standard” than that mandated by *Smith*.<sup>17</sup>

The Supreme Court reversed unanimously. Writing for the majority,<sup>18</sup> Justice Kennedy applied *Smith*’s two-pronged test and found the ordinances unconstitutional. Justice Kennedy first considered *Smith*’s neutrality prong, noting that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”<sup>19</sup> To determine the object of the ordinances, he looked first to the text and its emphasis on the words “sacrifice” and “ritual,” an emphasis he found “consistent with . . . facial discrimination, but . . . not conclusive.”<sup>20</sup>

Justice Kennedy then turned to the effects of the laws, seeking “meticulously . . . to eliminate . . . religious gerrymanders.”<sup>21</sup> He noted that the ordinances “target[ed] Santeria sacrifice,”<sup>22</sup> while “exclud[ing] almost all [other] killings of animals . . . [and even] exempting Kosher slaughter.”<sup>23</sup> Examining each of the ordinances,<sup>24</sup> Justice Kennedy determined that their net effect was a

17. *Id.* (quoting App. to Pet. for Cert. at A2 n.1).

18. The majority consisted of different Justices for different parts allied in checkerboard fashion. Parts I, III, and IV—consisting of the facts and the procedural history, the determination of compelling interests, and a general admonition for religious tolerance—were joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia, Souter, and Thomas. Part II-B—the discussion of general applicability—was joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia, and Thomas. Parts II-A-1 and II-A-3—the consideration of neutrality and the conclusion that the object of the ordinances is suppression of religion—were joined by Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas. Part II-A-2—the discussion of extrinsic evidence—was joined only by Justice Stevens and so was not the Opinion of the Court.

19. *Lukumi Babalu Aye*, 113 S. Ct. at 2227 (citing *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990)).

20. *Id.*

21. *Id.* at 2227 (quoting *Waltz v. Tax Comm’n*, 396 U.S. 664, 696 (1970) (Harlan, J., concurring)). This inquiry was colored significantly by the resolutions condemning religious practices contrary to “public morals.” *See supra* note 8.

22. *Id.*

23. *Id.*

24. Ordinances 87-71 and 87-52 were found individually to prohibit Santeria sacrifice while allowing almost all other forms of animal killing. *See id.*, at 2228-29. Ordinance 87-40, incorporating the Florida animal cruelty statute, hinged on the interpretation of “unnecessar[y] . . . kill[ing].” Since this represented “a system of ‘individualized governmental assessment of the reasons for the relevant conduct,’ . . . the government ‘may not refuse to extend that system to cases of ‘religious hardship’ without a compelling reason.’” *Id.* at 2229 (quoting *Smith*, 494 U.S. at 884). Finally, Ordinance 87-72, zoning for slaughterhouses, was not found to be overbroad. Rather, the Court declined to decide whether this ordinance could survive scrutiny alone, and instead treated “the four substantive ordinances . . . as a group for neutrality purposes.” *Id.* at 2230.

“gerrymander” that prohibited Santeria sacrifices but allowed nearly every other form of animal killing.<sup>25</sup>

Justice Kennedy found more proof of “the ordinances’ improper targeting of Santeria sacrifice” in the fact that they “proscribe more religious conduct than is necessary to achieve their stated ends.”<sup>26</sup> He argued that the public health concerns could be addressed by regulating the “disposal of organic garbage,”<sup>27</sup> and the animal cruelty concerns by regulating the conditions and method of slaughter.<sup>28</sup> The sum of all of these considerations was that the ordinances were not neutral because their object was “the suppression of religion.”<sup>29</sup>

Justice Kennedy next turned to the second prong of *Smith*: general applicability. He used much of the analysis put forth in discussing neutrality to illustrate that the challenged ordinances were grossly underinclusive because they “pursue[d] the city’s governmental interests only against conduct motivated by religious belief.”<sup>30</sup> Therefore, they were not generally applicable, but were targeted at Santeria.<sup>31</sup>

Because the ordinances were neither neutral nor generally applicable, they were subjected to strict scrutiny as to whether they furthered compelling interests in the most narrow manner possible.<sup>32</sup> As already demonstrated, the four ordinances together were both underinclusive (as to regulating similar secular conduct) and overbroad (as to what religious conduct was regulated). Their underinclusivity belied any claim of compelling interest, and their overbreadth eliminated any narrow tailoring.<sup>33</sup> Therefore, they could not withstand strict scrutiny.

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25. *See id.* at 2229, 2232.

26. *Id.* at 2229.

27. *Id.* at 2229-30. Justice Kennedy then flipped the district court’s unenforceability argument on its head: “It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not.” *Id.* at 2230.

28. *Id.* at 2230. The other two interests cited by the district court, children’s welfare and zoning, were dismissed by the Court. The former was not considered because the appellate court had not relied upon it, and the latter was rejected as simply a tautological restatement of the asserted interest itself. *See id.* at 2229 n.2.

29. *Id.* at 2231.

30. *Id.* at 2233.

31. *See id.*

32. *See id.*

33. *See id.* at 2234.

Finally,<sup>34</sup> Justice Kennedy, joined only by Justice Stevens, wrote that the neutrality inquiry is closely related to equal protection analysis, and, as in equal protection cases, the Court must examine both “direct and circumstantial evidence” to determine the city council’s object.<sup>35</sup> Justice Kennedy, therefore, reviewed the legislative history and contemporaneous statements of the city council. The “significant” and explicit hostility to Santeria expressed by the council members<sup>36</sup> further solidified Justice Kennedy’s conclusion that the ordinances were not neutral but rather were targeted at Santeria.<sup>37</sup>

Writing in concurrence, Justice Scalia<sup>38</sup> observed that the distinction between “neutrality” and “general applicability” is vague, and the two “substantially overlap.”<sup>39</sup> Despite his “somewhat different[ ]” drawing of the line between the two tests, Justice Scalia joined the majority opinion.<sup>40</sup> The only part of Justice Kennedy’s opinion that Justice Scalia did not join was Part II-A-2, the use of legislative history.<sup>41</sup>

34. “Finally” is something of a misnomer. This section actually falls as Part II-A-2, the only part of Justice Kennedy’s opinion not joined by at least four other Justices. In the interest of clarity, his conclusions are discussed here rather than in the order in which they actually occur in his opinion.

35. *See id.* at 2230 (opinion of Kennedy, J.).

36. For example, one councilmember asked, “[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?” Another stated that Santeria was “in violation of everything this country stands for.” A third argued, “I don’t believe that the Bible allows [Santeria animal sacrifice].” *See id.* at 2231.

37. *See id.*

38. *Id.* at 2239 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia was joined by Chief Justice Rehnquist.

39. *Id.* The requirements of the former are violated primarily by laws that “impose disabilities on the basis of religion,” while the strictures of the latter are offended by “laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.” *Id.* This description is tantalizingly close to the pre-*Smith* standard applying strict scrutiny to laws that, though facially neutral, in practice have discriminatory effects on religion. Whether his commentary on general applicability reflects a susceptibility of Justice Scalia to modification of his *Smith* standard remains to be seen.

40. *Id.*

41. Justice Scalia instead continued his familiar theme of “plain meaning” statutory interpretation. *See, e.g.,* *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J. dissenting). He constructed two strawman hypotheticals: an inept and evil legislature passing (despite its best efforts) nondiscriminatory laws and a pure and noble legislature unintentionally passing discriminatory laws. He then dismissed them both, asserting that the former laws would be valid but the latter laws would not. *See Lukumi Babalu Aye*, 113 S. Ct. at 2240 (Scalia, J. concurring in part and concurring in the judgment). Unfortunately, Justice Scalia ignored the harder question: whether legislative history is helpful when discriminatory effect of the law is on the margin, that is, should the fact that laws were passed with the express purpose of squashing a disfavored religion tip the balance when it is close? It seems plausible at least that in such an instance the laws should not merit as great a presumption of constitutionality as they might otherwise.

Justice Souter wrote a separate concurrence<sup>42</sup> to express his disagreement with the *Smith* rule and to urge its rejection. He argued that the “noncontroversial principle” that holds non-neutral, non-generally applicable laws subject to justification by compelling reasons easily disposed of *Lukumi Babalu Aye*.<sup>43</sup> Thus, *Smith*’s more problematic holding that neutral, generally applicable laws need not be justified by compelling reasons was not implicated by the case before the Court.<sup>44</sup> Justice Souter attacked this rule for not respecting “substantive neutrality,” the principle that “government [must] . . . accommodate religious differences by exempting religious practices from formally neutral laws.”<sup>45</sup>

Justice Souter then tried to blaze a trail for the future repeal of *Smith*. First, he argued that everything in *Lukumi Babalu Aye* beyond the “non-controversial principle” was mere dictum.<sup>46</sup> Second, he pointed to serious faults in *Smith*’s treatment of precedent.<sup>47</sup> Finally, Justice Souter asserted that *Smith* can and should be reexamined without offending *stare decisis*. He pointed out that the *Smith* rule was never argued or briefed, that it was unnecessary to decide the factual controversy in *Smith*, and that significant tension still remains in the law because *Smith* did not overrule its adverse precedent.<sup>48</sup> Since the text of the First Amendment neither requires nor seems to support the *Smith* rule,<sup>49</sup> Justice Souter advocated its abandonment.<sup>50</sup>

Justice Blackmun, concurring in the judgment,<sup>51</sup> also advocated the rejection of *Smith*. He faulted *Smith* for treating the “Free Exercise Clause as no more than an antidiscrimination principle.”<sup>52</sup> Justice Blackmun argued that any under- or overinclusive law that restricts religion must be subjected to strict scru-

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42. *Lukumi Babalu Aye*, 113 S. Ct. 2217, 2240 (Souter, J., concurring in part and concurring in the judgment).

43. *See id.* at 2243.

44. *See id.* at 2240.

45. *Id.* at 2241-42.

46. *See id.* at 2242.

47. *See id.* at 2245-46.

48. *See id.* at 2243-47.

49. As support for this proposition, Justice Souter cited, *inter alia*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

50. *See Lukumi Babalu Aye*, 113 S. Ct. at 2248-50.

51. *See id.* at 2250 (Blackmun, J., concurring in the judgment). Justice Blackmun was joined by Justice O’Connor.

52. *Id.*

tiny,<sup>53</sup> and any non-neutral or non-generally applicable law does not even merit strict scrutiny; rather it is, *ipso facto*, invalid.<sup>54</sup>

The Court's final result was absolutely correct, and the decision's unanimity sharply underscores the strength of its substantive conclusion. The ordinances, which were directly aimed at stopping Santeria, were violative of free exercise. Their fundamental flaw parallels that described by Locke in 1689: "[W]hat may be spent on a Feast, may be spent on a Sacrifice."<sup>55</sup> The conduct prohibited was prohibited in religious contexts only; the activity itself was legal *except* for the religious belief.

A simple hypothetical illustrates the ordinances' problems. Imagine two neighbors, Romulus and Remus. One day, Remus goes into his backyard and, for no reason whatsoever, grabs his pet chicken and slits its throat. He drops the carcass, turns around, and goes inside. Simultaneously, Romulus is in his backyard with his chicken. Like Remus, he grabs the bird and, with the identical motion, cuts its throat. Romulus, however, believes that his god cares about his dead poultry. Although their actions were identical, Romulus violated the Hialeah ordinances<sup>56</sup> while Remus did not.<sup>57</sup> The only difference is their motivations. Because the Hialeah ordinances differentiated among identical actions solely on the basis of religious belief, they did not regulate conduct; rather, they prohibited belief.

The interests asserted in defense of the ordinances were mere charades. Animal rights, enforced only against religious practitioners, are merely a pretense for suppressing religion. Outside a religious context, slitting the neck of an animal is not cruel or illegal in Hialeah.<sup>58</sup> If animal rights activists want to prevent such

53. *See id.* at 2250-51.

54. *See id.* at 2251.

55. LOCKE, *supra* note 1, at 42.

56. Because Romulus's religious beliefs imparted meaning to the killing, they transformed his action into a "ritual" or "ceremony." As such, the slaying was a forbidden "sacrifice." Furthermore, because Romulus killed his chicken because of belief in a deity, it was by definition not "necessary." *See Lukumi Babalu Aye*, 113 S. Ct. at 2223.

57. Because Remus engaged in no "ritual" or "ceremony," his killing was not a "sacrifice." Because he did not kill the chicken for food, it was not a "slaughter." The only possible obstacle Remus could face is Ordinance 87-40, which adopts the Florida animal cruelty law forbidding "unnecessarily" . . . kill[ing]. *See id.* Yet any such problem is illusory, because the law exempts killing "unwanted" animals and animals "of no commercial value." *See id.* at 2232.

58. *See id.* at 2230. Justice Kennedy noted that "the 'simultaneous and instantaneous severance of the carotid arteries with a sharp instrument'—the method used in Kosher slaughter—is approved as humane." *Id.* (citing 7 U.S.C. § 1902(b); FLA. STAT. § 828.23(7)(b) (1991)). If the method of Santeria slaughter, pushing the knife through the side of the animal's neck behind the throat and in front of the vertebrae is less relia-

killings, they should fight to change generally applicable legal standards rather than standards enforced only against religious minorities. Until the state is willing to regulate Remus, animal rights groups have no claim against Romulus alone. The interests in public safety are also facades. Both Romulus and Remus must now dispose of their dead chickens. If improper disposal is the problem, the state can regulate disposal rather than banning sacrifice altogether.

Not only was the Court's substantive conclusion correct; so was its reliance upon *Smith*, a rule that embodies the second half of Locke's analysis: "the Commonwealth . . . may forbid *all* [its] Subjects to kill any Calves . . . [because then] the law is not made about a religious, but a political matter."<sup>59</sup> More importantly, *Smith* also reflects a reorientation in free exercise doctrine from substantive due process to equal protection as the proper source of incorporation.<sup>60</sup>

The *Smith* rule much more accurately follows the letter and spirit of the Constitution than did the prior, broader interpretation. Superficially, much of the argument against *Smith* relies on the First Amendment's seemingly absolute ban on any law prohibiting the free exercise of religion.<sup>61</sup> But this absolutist tendency comes from the Amendment's first five words: "Congress shall make *no* law . . ." <sup>62</sup> Hialeah is not Congress; nor, for that matter, is the state of Oregon. For free exercise to bind the states, it must first be applied to the states, and all subsequent interpretation must occur through that lens of incorporation.<sup>63</sup>

ble (as the district court found, *Lukumi Babalu Aye*, 723 F. Supp. 1467, 1472 (S.D. Fla. 1989)) then it can be regulated directly. None of the Hialeah ordinances purport to regulate methods of humane slaughter; rather, they seek to prohibit "sacrifice" altogether.

59. LOCKE, *supra* note 1, at 42 (emphasis added).

60. This Recent Development will not consider in depth the *a priori* validity of the *Smith* rule. The arguments in support of the rule are familiar: the potential for anarchy or chaos from infinite religious exceptions; the administrative difficulties of deciding upon and managing those exceptions; and the fundamental unfairness of allowing some to use personal beliefs to relieve themselves of general obligations placed on the rest of the populace. See *Employment Division v. Smith*, 494 U.S. 872, 878-80 (1990); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879). Nor does this Recent Development deny the devastating attacks on *Smith*'s use of precedent levied by Justice Souter (*Lukumi Babalu Aye*, 113 S. Ct. at 2240-2246 (Souter, J., concurring in part and concurring in the judgment)), Justice O'Connor (*Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment)), and virtually every scholar to consider the matter (see *supra* note 3).

61. See, e.g., *Lukumi Babalu Aye*, 113 S. Ct. at 2248 (Souter, J., concurring in part and concurring in the judgment).

62. "Congress shall make no law respecting the establishment of religion, nor prohibiting the Free Exercise thereof . . ." U.S. CONST. amend. I (emphasis added).

63. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1136-37 n.23 (1991) ("Like people with spectacles who often forget they are wearing them, most

Current application of the Free Exercise Clause to the states and their political subdivisions depends upon *Cantwell v. Connecticut*,<sup>64</sup> which held that the substantive aspects of the Due Process Clause of the Fourteenth Amendment incorporated the First Amendment protection of free exercise. Only through substantive due process can the Free Exercise Clause affect the states. Yet substantive due process itself is a doctrine under siege;<sup>65</sup> it remains a discredited remnant of the *Lochner*<sup>66</sup> era, a symbol of illegitimate judicial activism.<sup>67</sup>

If the validity of free exercise incorporation hinges on the soundness of substantive due process, then free exercise incorporation is in a precarious position indeed.<sup>68</sup> Perhaps alternative vehicles for incorporation exist. The Fourteenth Amendment provides two possibilities: the Privileges or Immunities Clause and the Equal Protection Clause. The former, however, is not viable. Aside from the nullifying effect of the *Slaughter-House Cases*<sup>69</sup> on the clause, direct application of the Privileges or Immunities Clause leads to the following tautological paradox: (i) the Privileges or Immunities Clause forbids states from abridging the privileges or immunities of United States citizens; (ii) prior to the Fourteenth Amendment, Congress could not prohibit free

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lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”).

64. 310 U.S. 296 (1940).

65. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* 18-19 (1980) (“[S]ubstantive due process” is a contradiction in terms—sort of like ‘green pastel redness.’ . . . The line of decisions has been subjected to widespread scholarly condemnation, which suggest that sometime within the next thirty years we may be rid of it.”).

66. *Lochner v. New York*, 198 U.S. 45 (1905), began a series of cases using substantive due process to enforce laissez faire principles on the states and to invalidate economic regulation. This broad use of judicial power has since been repudiated, at least in the sphere of economic regulation. See, e.g., *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941); *United States v. Darby*, 312 U.S. 100 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

67. One area of jurisprudence where substantive due process remains alive is that of the right to “privacy,” an implied right within the “penumbras” of the “emanations” of Amendments I, III, IV, V, and IX. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see also *Roe v. Wade*, 410 U.S. 113 (1973). More recent trends, however, seem to be limiting the reach of substantive due process even as it applies to privacy. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); but see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (declining to continue limiting privacy and to overrule *Roe*).

68. Obviously, a detailed inquiry into the viability of substantive due process is beyond the scope of this piece. As that position has been advanced on many other fronts, this Recent Development builds from the initial proposition that substantive due process (i) is fundamentally illegitimate, and (ii) is a doctrine from which the current Court is retreating quickly. Therefore, it looks to other sources for incorporation of the Free Exercise Clause.

69. 83 U.S. 36 (1872).

exercise, but the states could; so (iii) if free exercise is a privilege or immunity of a United States citizen, then the states cannot abridge it. But free exercise was only a privilege *vis a vis* Congress. *Vis a vis* the states, free exercise was not a privilege. Therefore, unless the clause incorporates the federal privilege because it is interpreted as incorporating the federal privileges (obviously circular), the prohibition is nugatory.

Equal protection, on the other hand, is quite promising.<sup>70</sup> A law prohibiting conduct by some while allowing identical conduct by others can hardly be called equal; nor can a law expressly targeting a particular religious group for persecution. "Equal protection of the laws" envisions laws applying to everybody—generally applicable—and targeting nobody—neutral. Suddenly *Smith* reemerges. The rule in *Smith*, decried by Justice Blackmun as "no more than an antidiscrimination principle,"<sup>71</sup> is just that—a rule of antidiscrimination embodying the principle of equal protection.

To the extent that substantive due process is an illegitimate doctrine (and that is another debate), so then is free exercise incorporation via due process. Equal protection, however, provides the solution. It necessitates some protection of free exercise (unlike due process), and suggests the very rule in *Smith*. The substantive result of *Lukumi Babalu Aye*, when framed in terms of equal protection, was obviously correct. Hialeah prohibited *some* from engaging in what *all others* could do, solely on the basis of religious belief. Equal protection also explains the use of *Smith* in *Lukumi Babalu Aye*. The Equal Protection Clause illustrates (i) descriptively, what the Court was doing in *Smith*,<sup>72</sup> and (ii) normatively, why the Court was doing it.

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70. The interrelation between the Religion Clauses and Equal Protection has been noted before, most often focusing on the Establishment rather than the Free Exercise Clause. See, e.g., Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 325 (1986) ("[T]he establishment clause is best understood as providing for the *equal protection of the free exercise of religion*").

71. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2250 (1993) (Blackmun, J., concurring in the judgment).

72. This paradigm also explains why the shift to the Equal Protection Clause was not explicit. The previous fifty years of free exercise doctrine was predicated upon substantive due process incorporation. Assuming that the Court sought to change that, it had to do so in a way that did not directly confront adverse precedent and *stare decisis*. So, it blurred the caselaw—in the sophisticated manner so often decried—and recast it in the form of equal protection free exercise. See *supra* note 60.

On November 16, 1993, President Clinton signed into law the Religious Freedom Restoration Act of 1993.<sup>73</sup> This Act purports to overrule *Smith* and to prohibit generally applicable burdens on religious behavior except when justified by compelling interest enforced in the least restrictive manner.<sup>74</sup> The Supreme Court will no doubt soon consider its application. The fate of the Act, of *Smith*, and of "equal protection free exercise" all remain to be seen.

*R. Ted Cruz*

FEDERAL PREEMPTION OF STATE HEALTH AND SAFETY REGULATIONS:  
*CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993).

With the growth of federal regulation, questions concerning preemption of state and local law arise more frequently. If Congress fails to state clearly a statute's preemptive scope, courts must determine it, based either on the plain meaning of the statute or on a more purposive approach that seeks instruction from the purposes for which Congress enacted the statute. A plain meaning interpretation respects separation of powers by refusing to render a judicial interpretation of Congress's purpose. Although this approach can provide certainty and predictability in the application of statutes, it may unnecessarily restrict state sovereignty by broadly construing the preemptive effect of federal legislation. A purposive reading, on the other hand, tends to reduce preemptive scope because it encourages courts to read federal and state provisions in a complementary fashion. This bolsters federalism by following Justice Frankfurter's advice that "any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority . . . ."<sup>1</sup>

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73. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (relevant sections to be codified at 42 U.S.C. § 2000bb).

74. *See id.* §§ 2-3. The Act further purports to secure the rights protected in the First Amendment, *see id.* § 2, and to apply to "all Federal and State law." *Id.* at § 6. It makes no mention of incorporation.

1. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting). *See also* *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (stating "the basic assumption that Congress did not intend to displace state law"); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (reinforcing the idea that a court should not "conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an unambiguous congressional mandate to that effect").

Last Term in *CSX Transportation, Inc. v. Easterwood*,<sup>2</sup> the Supreme Court faced this choice between the plain meaning and purposive approaches to preemption in determining to what degree preemption may be implied from a general scheme of federal regulation. By finding preemption through an ambiguous federal regulation in one section of the opinion, the Court chose to rely on the plain meaning approach, thus respecting separation of powers. But by avoiding the purposive approach, the Court harmed federalism by showing less sensitivity to the purpose for which the underlying regulation was promulgated. *Easterwood*, therefore, may mark a shift from prior case law that more greatly respects states' traditional police powers because it will frequently extend the preemptive effect of federal legislation beyond that needed to fulfill the purpose of the underlying federal statute.

Thomas Easterwood was killed on February 24, 1988, when the truck he drove and a train owned by CSX Transportation ("CSX") collided at a grade crossing in Cartersville, Georgia.<sup>3</sup> His widow filed a diversity suit alleging CSX's breach of its state common-law duty to operate a train at an appropriate speed.<sup>4</sup> Although the train's speed did not exceed the federal speed limit of sixty miles per hour, she argued that the train's speed at the crossing was nevertheless negligent under the more restrictive standards of Georgia negligence law.<sup>5</sup> Easterwood also alleged a breach of CSX's state statutory duty to maintain a proper warning signal at the crossing.<sup>6</sup>

CSX moved for summary judgment on the ground that the state claims were preempted by regulations promulgated under the Federal Railroad Safety Act of 1970 ("FRSA").<sup>7</sup> The FRSA provides that "laws, rules, regulations, orders, and standards [on railroad safety] shall be nationally uniform to the extent practicable."<sup>8</sup> States, however, may "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary of Transportation has adopted a

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2. 113 S. Ct. 1732 (1993).

3. *Id.* at 1736.

4. *Id.*

5. *Id.* at 1742.

6. See GA. CODE ANN. § 32-6-190 (1991) (providing that railroads have a duty to maintain grade crossings "in such condition as to permit the safe and convenient passage of public traffic").

7. Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-447 (1988 and Supp. II).

8. 45 U.S.C. § 434 (1988).

[requirement] covering the subject matter of such [s]tate requirement.”<sup>9</sup> Even after the Secretary adopts a regulation, a “[s]tate may adopt or continue in force an additional or more stringent [requirement] relating to railroad safety” when “necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law.”<sup>10</sup>

The district court dismissed the complaint,<sup>11</sup> finding that regulations promulgated under the FRSA occupied the field of regulation and preempted the subjects of Mrs. Easterwood’s claim. The court based its finding on two regulations: One established maximum speeds of both freight and passenger trains for different classes of track;<sup>12</sup> the other addressed the adequacy of track warning devices.<sup>13</sup> The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part, holding that although the FRSA preempted the excessive speed claim, it did not preempt the claim concerning the maintenance of a proper warning device.<sup>14</sup>

The Supreme Court affirmed the decision of the Court of Appeals.<sup>15</sup> Writing for a unanimous Court, Justice White held that federal law did not preempt state law on the question of allegedly improper warning signs.<sup>16</sup> Writing for a majority of the Court, he also held that federal law did preempt state law concerning train speed.<sup>17</sup>

Justice White began his analysis by invoking the plain meaning approach. Courts must, he argued, “focus on the plain wording of the [preemption] clause which necessarily contains the best evidence of Congress’ pre-emptive intent.”<sup>18</sup> The text of the FRSA’s preemption clause requires that to preempt state law, federal

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9. *Id.*

10. *Id.*

11. *CSX Transp., Inc. v. Easterwood*, 742 F. Supp. 676, 678 (N.D. Ga. 1990).

12. *See infra* note 21 and accompanying text.

13. *See infra* note 27 and accompanying text.

14. *CSX Transp., Inc. v. Easterwood*, 933 F.2d 1548, 1553-58 (11th Cir. 1991).

15. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993).

16. *Id.* at 1742.

17. *Id.* at 1743-44. Justices Thomas and Souter dissented concerning preemption of the excess speed claim. *Id.* at 1744 (Thomas, J., concurring in part and dissenting in part).

18. *Id.* at 1737. *Cf. Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2625 (1992) (Blackmun, J., concurring in part and dissenting in part) (stating that “[w]e resort to principles of implied preemption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law . . . only when Congress has been silent with respect to pre-emption”).

regulations must "cover[ ] the same subject matter as Georgia negligence law."<sup>19</sup>

Justice White found that regulations issued under the FRSA clearly covered the subject of train speed.<sup>20</sup> The regulations classified all tracks according to various hazards posed by track conditions and established maximum speeds for each class of track and type of train.<sup>21</sup> Justice White rejected Easterwood's argument that the regulation could not preempt state law because "the Secretary [of Transportation]'s primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments."<sup>22</sup> The plain meaning of the FRSA's preemption clause, he explained, did not "call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations . . . cover the subject matter of train speed."<sup>23</sup> Justice White therefore denied Georgia the power to require a slower speed by virtue of state negligence law than that imposed by federal law: The regulation "must be read as not only establishing a ceiling, but also precluding additional state regulation."<sup>24</sup>

Justice White found, however, that the regulations under the FRSA did not cover the adequacy of crossing signals.<sup>25</sup> He rejected two possible sources of preemption: the Highway Safety Act of 1973 (the "Highway Act")<sup>26</sup> and the Manual on Uniform Control of Traffic Devices (the "Manual").<sup>27</sup> The Highway Act required states using federal funds to upgrade railroad crossings to conform these crossings to federal regulations.<sup>28</sup> The regulations, however, did not preempt a state claim because they only "establish the general terms of the bargain between the federal and state governments: the States may obtain federal funds if they take certain steps to ensure that the funds are efficiently

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19. *Easterwood*, 113 S. Ct. at 1738.

20. *Id.* at 1742.

21. See 49 C.F.R. § 213.9-213.143 (1992).

22. *Easterwood*, 113 S. Ct. at 1743.

23. *Id.*

24. *Id.*

25. *Id.* at 1739-40.

26. 23 U.S.C. § 130(d) (1988).

27. U.S. DEPT. OF TRANSP., FEDERAL HIGHWAY ADMIN., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS (1988) (incorporated into federal regulations at 23 C.F.R. §§ 655.601-603 (1992)).

28. 23 C.F.R. §§ 646.214(b)(1), 655.601-603 (1992).

spent.”<sup>29</sup> The regulations do not purport to replace, explicitly or implicitly, state negligence law.

Justice White also refused to hold that the Manual preempted state law. He found it “implausibl[e]” that state law could be displaced by “an elliptical reference in a Government manual otherwise devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals.”<sup>30</sup> The Manual disavowed any such intent: “It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation.”<sup>31</sup>

Justice Thomas, with whom Justice Souter joined, dissented from the Court’s holding that the speed claim was preempted.<sup>32</sup> Rather than follow Justice White’s plain meaning approach, Justice Thomas focused on the regulation’s purpose.<sup>33</sup> Justice Thomas noted that CSX admitted it had a state statutory duty to prevent collisions, including an “attempt to stop or slow the train if possible to avoid a collision.”<sup>34</sup> Given this statutory duty, “[s]peed limits based solely on track characteristics . . . cannot be fairly described as ‘substantially subsuming the subject matter of . . . state law’ regulating speed as a factor in grade crossing safety,” because local hazards, poor weather, or other conditions may affect a train’s ability to avoid a collision and therefore require a slower speed.<sup>35</sup> As evidence of the lack of preemption, Justice Thomas pointed out that in the original Notice of Proposed Rulemaking for the speed regulations,<sup>36</sup> the Secretary did not consider “variable factors such as population density near the track” precisely because these were considered “beyond the scope” of the proposed regulations.<sup>37</sup>

Justice Thomas concluded that “the Secretary [of Transportation] ha[d] not even considered how train speed affects crossing safety.”<sup>38</sup> That was not the regulation’s purpose. Rather, the regulation simply established maximum national speed limits; it was

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29. *Easterwood*, 113 S. Ct. at 1739.

30. *Id.* at 1740.

31. MANUAL, *supra* note 27, at 1A-4.

32. *Easterwood*, 113 S. Ct. at 1744 (Thomas, J., concurring in part and dissenting in part).

33. *Id.*

34. *Id.* (quoting Reply Brief for Petitioner, No. 91-790 at 3).

35. *Id.*

36. 36 Fed. Reg. 20336 (1971).

37. *Easterwood*, 113 S. Ct. at 1744.

38. *Id.* at 1745.

not intended to assign accident liability. Utilizing this purposive approach, Justice Thomas found a narrower scope for preemption. Unlike the majority, he did not consider one federal regulation on speed to be sufficiently comprehensive to preempt all state actions based on speed. Instead, he sought to follow "the most natural reading of the Secretary's regulations: the Federal Government has chosen neither to regulate train speed as a factor affecting grade crossing safety nor to prevent States from doing so."<sup>39</sup> He believed that "[r]espect for the presumptive sanctity of state law should be no less when federal pre-emption occurs by administrative fiat rather than by congressional edict."<sup>40</sup>

*Easterwood* may reflect a shift in the Court away from prior case law that more greatly respected federalism toward an increased respect for Congress's plain meaning and the separation of powers. Traditionally, the Supreme Court's preemption jurisprudence has given great deference to state and local governments concerning health and safety regulation.<sup>41</sup> In recent decisions, the Court has warned lower courts to pause before asserting preemption in matters concerning health and safety, reminding them of the presumption that state and local regulations "can normally coexist with federal regulations" on similar subjects.<sup>42</sup> Given the "historic police powers of the States," the Court has required a "clear and manifest purpose of Congress" to assert preemption,<sup>43</sup> which may "seldom" be inferred "solely from the comprehensiveness" of a federal regulatory scheme.<sup>44</sup> Respect for states' traditional police powers, therefore, requires a court to undertake an analysis of the statute's purpose.

Purposive interpretation protects state control of historic police powers and thus narrows the scope of preemption. *Jones v. Rath Packing Co.*'s<sup>45</sup> holding that preemption attaches only if a state or local law "stands as an obstacle to the accomplishment

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39. *Id.*

40. *Id.*

41. See, e.g., *Hillsborough County v. Automated Medical Labs. Inc.*, 471 U.S. 707 (1985); *Pacific Gas and Elec. Co. v. State Energy Comm'n.*, 461 U.S. 190 (1983),

42. *Hillsborough County*, 471 U.S. at 718. See also *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (stating that "[t]he test of whether . . . the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives").

43. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

44. *Hillsborough County*, 471 U.S. at 718.

45. 430 U.S. 519 (1977).

and execution of the full purposes and objectives of Congress"<sup>46</sup> exemplifies why the purposive approach tends to limit expansive readings of preemption clauses. *International Paper Co. v. Oullette*<sup>47</sup> similarly used a restrictive theory of preemption to hold that a state or local regulation stands unless it "actually conflicts" with a federal scheme—either through its goals or "if it interferes with the methods by which the federal statute was designed to reach this goal."<sup>48</sup> By rejecting the purposive approach, *Easterwood* may have broadened the scope of preemption.

The *Easterwood* Court's avoidance of an inquiry into the purposes of the federal regulations at issue contrasts with the purposive approach of *Gade v. Solid Wastes Management Association*,<sup>49</sup> in which the Court held that "the key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted."<sup>50</sup> Similarly, *Easterwood* breaks with the rationale of *Cipollone v. Liggett Group, Inc.*,<sup>51</sup> the leading preemption case from the October 1991 Term. *Cipollone*, like *Easterwood*, concerned the vitality of state common law actions in the face of a federal regulatory scheme. The *Cipollone* Court decided, in part, that a federal requirement for warning labels on cigarette packages under one relevant statute did not "by its own effect foreclose additional obligations imposed under state law."<sup>52</sup> Requiring a warning label "does not automatically pre-empt a regulatory field . . . . [T]here is no *general, inherent conflict* between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions."<sup>53</sup>

Applying *Cipollone's* purposive approach to *Easterwood* would likely have produced a different result. The FRSA preemption clause speaks only of uniformity "to the extent practicable." Had the Court employed *Cipollone's* purposive approach to determine whether there was a "general, inherent conflict" between a regulation establishing maximum speeds and a negligence action, *Easterwood's* claim might well have been allowed. In *Easterwood*,

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46. *Id.* at 525-26 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

47. 479 U.S. 481 (1987).

48. *Id.* at 491 (quoting in part *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

49. 112 S. Ct. 2374 (1992).

50. *Id.* at 2387.

51. 112 S. Ct. 2608 (1992).

52. *Id.* at 2611.

53. *Id.* at 2618 (emphasis added).

however, the Court retreated from *Cipollone's* directive to construe preemption clauses as narrowly as possible.<sup>54</sup>

Perhaps the Court's retreat from *Cipollone* may be explained by the purposive approach's failure to provide certainty. A practical difficulty with *Cipollone's* purposive analysis is that one can define the appropriate subject any way one wishes. For instance, *Easterwood* claimed that the regulations on track speed were meant to prevent derailments, while CSX alleged that the regulations were also concerned with crossing safety.<sup>55</sup> Resolution of the dispute virtually requires judicial intervention. The plain meaning approach avoids these problems by employing a straightforward analysis of the statute's plain language.<sup>56</sup> Yet its effect is to undermine the principle that state and federal regulations should be read as complementary to the extent possible.<sup>57</sup> In other words, while the plain meaning approach may further the principles underlying the separation of powers, it tends to hinder federalism.

The purposive approach, on the other hand, avoids some of the dangers of excessive preemption. The facts of *Easterwood* demonstrate that these dangers are especially relevant when, as in *Easterwood*, the federal statute provides no private right of action. Grade crossings are not static over time, and it is doubtful that federal regulation alone is sufficient to assure grade crossing safety under all circumstances.<sup>58</sup> The appeal of prioritizing grade crossing improvements to achieve the most efficient use of scarce federal funds is obvious, but there is a danger: What if the gov-

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54. The Court said:

The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.

*Id.* at 2626 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

55. Of course, establishing safe speeds at grade crossings for particular classes of track may be one way to prevent derailments.

56. There are fewer advantages, however, to applying a plain meaning approach when a federal regulation, rather than a federal statute, is at issue. Because Article I procedures do not apply to federal regulations, a regulatory preemption inquiry should be more searching.

57. See *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

58. See Dale Haralson and Adam Levine, *Grade Crossings and Train Speed: Preemption*, TRIAL, Feb. 1991, at 23 (stating that "uniformity is not possible with respect to grade crossings due to the ever-changing nature of the hazard. Population growth, neighborhood development, increases in traffic patterns, or any number of other factors may render inadequate what was once a suitable warning at a grade crossing.").

ernment is wrong? What recourse has the citizen then? There is a vast difference between the fear of “patchwork” regulations and the very real possibility of inadvertently excusing negligence through inadequate regulatory drafting. The common law has a flexibility that may be desirable in a particular regulatory setting; indeed, the threat of state tort liability is a powerful incentive for a regulated industry to work with government to develop the most practical and effective solution to a health or safety problem. To this extent, the approach of *International Paper* and Justice Blackmun in *Cipollone*—that Congress does not automatically seek to preclude all relevant state common law actions—has a powerful appeal.<sup>59</sup> In the absence of congressional guidance, it permits a court to read federal and state regulatory schemes in a complementary fashion; yet both will survive preemption analysis only through a purposive reading.

From this perspective, the most difficult, even troubling, statement in Justice Scalia’s *Cipollone* dissent is his criticism of the Court’s message to Congress regarding legislative drafting:

the result is extraordinary: The statute that says *anything* about pre-emption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of Congresses will dare to say anything about pre-emption.<sup>60</sup>

Clearly, it is “not necessary for a federal statute to provide explicitly that particular state laws are pre-empted.”<sup>61</sup> Yet a call for greater precision in the drafting of statutes is surely welcome. Clarity provides greater certainty in the application of preemption law and reduces the dockets of the courts. There would have been little debate in *Easterwood* had the FRSA, like other statutes such as the Employee Retirement Income Security Act,<sup>62</sup> listed the preemption status of common-law actions. It is because Congress’s Supremacy Clause power is so great that Congress should

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59. Cf. *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990) (the existence of a federal remedy “does not by itself imply pre-emption of state remedies”). Indeed, the Court noted that one could argue that the regulations and negligence law work together by giving the railroad an incentive—the removal of liability—to provide the best possible information regarding grade crossing safety to the states and so help the states identify and correct the most dangerous crossings first. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2620; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

60. *Cipollone*, 112 S. Ct. at 2634 (Scalia, J., dissenting).

61. *International Paper v. Ouellette*, 479 U.S. 481, 491 (1987).

62. See 29 U.S.C. §§ 1144(a)-(c) (1) (1988). See also *Cipollone*, 112 S. Ct. at 2630 (Blackmun, J., concurring in part and dissenting in part).

wield it only with care, as Justice Frankfurter noted in *Bethlehem Steel*.<sup>63</sup>

One should be careful, though, not to overstate the point. *Easterwood* does not eliminate the general presumption against federal preemption in matters of health and safety—the “historic police powers” of the states. The decision, however, may subtly narrow the presumption by, in Justice Thomas’s words, invoking a broad “regulatory background” as a basis for preemption rather than insisting on explicit congressional authority.<sup>64</sup> This is a far different view from the traditional position that state and federal regulation should be viewed as complementary whenever possible.

Congress, in proposing the FRSA, noted that the railroad industry “has very few local characteristics. Rather . . . it has a truly interstate character calling for a uniform body of regulation and enforcement.”<sup>65</sup> This is undoubtedly true. But nearly a century of experience in administrative law has shown that it is also the siren song that every industry wishing to remove itself from state and local regulation will sing. As *Hillsborough County* noted, there are many areas where the federal interest is “to ensure minimum standards, not uniform standards.”<sup>66</sup> Given the virtually constant federal pressure for uniform standards and broad regulatory schemes, drawing the line between the two is particularly difficult and requires constant vigilance by the friends of federalism.

The Court could have, within the framework of its recent cases, chosen a narrower standard for preemption. That it chose not to is an implicit narrowing of *Cipollone*’s promise to read preemption clauses as narrowly as reasonably possible. Given the ambiguous nature of the preemption clause in the FRSA and the fact that *Easterwood* concerned a federal *regulation* more directly than a statute, it is unfortunate that the Court declined to inquire into the regulation’s purpose—and thus to rely on the rich tradition of implied preemptive authority—before asserting preemption as to the train’s speed. A narrower, more purposive reading of preemption clauses is a judicial attempt to ensure that

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63. See *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947).

64. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1745 (1993) (Thomas, J., concurring in part and dissenting in part).

65. H.R. Rep. No. 91-119, 91st Cong., 2d Sess. (1970) at 13.

66. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 722 (1985).

both Congress and federal regulators act carefully and deliberately before asserting preemption.

The situation is untidy. A purposive approach contradicts the ordinarily preferable reliance on the plain meaning of statutes and instead assert the original understanding of the balance of power between the federal government and the states. But this is the cost of federalism—the cost of governing a nation of varied topography and climate, in which people choose to be governed by different authorities at different levels in a federal state.

Justice Thomas's warning—that "[r]espect for the presumptive sanctity of state law should be no less when federal preemption occurs by administrative fiat than by congressional edict"<sup>67</sup>—is particularly apt in an era marked by increasing federal regulation and federal power. In questions concerning the preemption of the states' historic police powers, both the Constitution and prudence suggest that it is better to pause before automatically asserting preemption in the absence of a clear congressional mandate. It is better to remember the nation's first railroad safety adage—"stop, look, and listen"—than simply to railroad on through.

*John S. Gardner*

EQUAL PROTECTION AND RACE-CONSCIOUS REAPPORTIONMENT:  
*Shaw v. Reno*, 113 S. Ct. 2816 (1993).

In 1977, in *United Jewish Organizations v. Carey* ("UJO")<sup>1</sup> the Supreme Court upheld race-conscious redistricting undertaken to comply with the Voting Rights Act of 1965 ("the Act").<sup>2</sup> The Court reasoned that compliance with the Act, which requires that changes in voting practices must "not have the purpose . . . [nor] the effect of denying or abridging the right to vote on account of race or color,"<sup>3</sup> would often necessitate the use of racial considerations in drawing district lines.<sup>4</sup> "The permissible use of racial criteria," said the *UJO* Court, "is not confined to eliminat-

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67. *Easterwood*, 113 S. Ct. at 1745 (Thomas, J., concurring in part and dissenting in part).

1. 430 U.S. 144 (1977).

2. 42 U.S.C. §§ 1971, 1973 - 1973p (1988).

3. 42 U.S.C. § 1973c (1988).

4. *UJO*, 430 U.S. at 159.

ing the effects of past discriminatory districting or apportionment."<sup>5</sup> Subsequently, however, a plurality of the Court fundamentally revised equal protection jurisprudence concerning "remedial" or "benign" race-conscious legislation by holding racial classifications, regardless of which race they seek to benefit, subject to strict scrutiny.<sup>6</sup> This standard requires that racial classifications, even if ostensibly designed to favor the minority, be narrowly tailored to further a compelling governmental interest.<sup>7</sup>

In *Shaw v. Reno*,<sup>8</sup> "the most stunning decision of the past term,"<sup>9</sup> the Court addressed the application of strict scrutiny to redistricting undertaken in compliance with the Voting Rights Act. Rather than acknowledge that subsequent cases implicitly overruled *UJO* by subjecting all race-conscious legislation to strict scrutiny, the Court disingenuously attempted to reconcile *UJO* with subsequent cases. In the process, the Court obscured *Shaw's* sweeping implication that a litigant need *not* show personal cognizable harm to file an equal protection claim in a redistricting case.

The *Shaw* litigation grew out of North Carolina's attempt at redistricting after the state gained an additional congressional seat based on the 1990 census.<sup>10</sup> Pursuant to section 5 of the Voting Rights Act,<sup>11</sup> North Carolina submitted its redistricting plan to the U.S. Attorney General for approval. Although the plan included one majority-black district, the Attorney General found the plan insufficient and rejected it as violative of section 5 of the Act.<sup>12</sup>

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5. *Id.* at 161.

6. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1988) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion).

7. In *Croson*, Justice O'Connor indicated that the first prong of the strict scrutiny standard—that there be a compelling governmental interest which justifies the racial classification—could be met only by racial classifications "reserved for remedial settings." 488 U.S. at 493. Thus, strict scrutiny requires "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274.

8. 113 S. Ct. 2816 (1993).

9. Stuart Taylor, Jr., *Race: The Most Divisive Issue*, *LEGAL TIMES*, July 26, 1993, at S27.

10. See *Shaw*, 113 S. Ct. at 2819.

11. 42 U.S.C. § 1973(c) (1988). Under § 5 of the Act, covered states are required to seek approval of either the Attorney General or a three-judge panel of the United States District Court for the District of Columbia before changing any "standard, practice or procedure with respect to voting," so as to ensure that the "standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.*

12. The Attorney General stated that,

The North Carolina General Assembly responded by adding a second majority-minority district, the Twelfth District, comprising "a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long,"<sup>13</sup> that "slinks down the Interstate . . . corridor until it gobbles in enough enclaves of black neighborhoods . . . dissecting at least 12 counties in the process."<sup>14</sup> If you "drove down the interstate with both car doors open," quipped one state legislator, "you'd kill most of the people in the district."<sup>15</sup>

Although the Attorney General tacitly approved the revised plan by failing to object to it within the statutorily-specified period, several white North Carolinians filed suit in federal court against the Attorney General and various North Carolina government officials.<sup>16</sup> The plaintiffs alleged that, by intentionally concentrating a majority population of black voters in a district "in no way related to considerations of compactness, contiguousness, or jurisdictional communities of interest,"<sup>17</sup> either defendants had misinterpreted and unconstitutionally applied the Act, or alternatively, that the Act was unconstitutional on its face because it required race-conscious redistricting.<sup>18</sup>

A three-judge panel of the District Court for the Eastern District of North Carolina granted the state defendants' motion to dismiss the suit for failure to state a claim on which relief could

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the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state . . . . For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district . . . . These alternatives . . . [were] dismissed for what appears to be pretextual reasons.

Letter from John R. Dunne, Assistant U.S. Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, North Carolina, 4-5 (Dec. 18, 1991) (on file with author).

13. *Shaw v. Barr*, 808 F. Supp. 461, 464 (E.D.N.C. 1992).

14. *Id.* at 466-67 (Voorhees, C.J., concurring in part and dissenting in part).

15. Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting*, WASH. POST, Apr. 20, 1993, at A4.

16. *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992). Under the Act, the Attorney General must interpose his objection to a plan within 60 days of its submission. See 42 U.S.C. § 1973(c) (1988).

17. *Id.* at 465.

18. See *id.* at 468.

be granted.<sup>19</sup> The panel found that *UJO* foreclosed plaintiffs' claim that race-conscious redistricting was *per se* unconstitutional. The panel also found that, under *UJO*, the Act was not unconstitutional as applied because plaintiffs had not alleged, nor could they have proved, that the North Carolina plan "was adopted with the purpose and effect of discriminating against white voters such as the plaintiffs on account of their race."<sup>20</sup> Chief Judge Voorhees dissented,<sup>21</sup> reading *UJO* to allow race-conscious reapportionment only when traditional districting considerations of compactness and contiguity were followed. Because the challenged district plan lacked those characteristics, he argued that plaintiffs had stated a claim upon which relief could be granted.

On appeal, the Supreme Court reversed.<sup>22</sup> Writing for the Court,<sup>23</sup> Justice O'Connor held that the plaintiffs had stated a valid equal protection claim against the state defendants and that courts must subject race-based redistricting to strict scrutiny.<sup>24</sup> Noting "how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past,"<sup>25</sup> Justice O'Connor declared that "[I]aws that explicitly distinguish between individuals on racial grounds fall within the core of the [Equal Protection Clause's] prohibition."<sup>26</sup> The Court conceded that redistricting presents a unique situation because the "legislature always is *aware* of race when it draws district lines, just as it is aware of . . . a variety of other demographic factors."<sup>27</sup> Although "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination,"<sup>28</sup> redistricting legislation that is "so bizarre on its face that it is 'unexplainable on grounds other than race' demands the same close scrutiny that we give other state laws that

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19. *See id.* at 473. The court also granted the federal defendants' motions to dismiss for lack of subject matter jurisdiction (FED. R. CIV. P. 12b(1)) and failure to state a claim (FED. R. CIV. P. 12b(6)). *See id.* at 466-67.

20. *Id.* at 472. Subsequently, North Carolina elected its first black representative since Reconstruction under the plan. *See Shaw*, 113 S. Ct. at 2843 (Blackmun, J., dissenting).

21. *Id.* at 473.

22. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

23. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas.

24. *See id.* at 2824. The Court, however, upheld the panel's dismissal of the claim against the federal defendants for lack of subject matter jurisdiction. *See id.* at 2823.

25. *Id.* at 2824.

26. *Id.* at 2823.

27. *Id.* at 2826 (emphasis in original).

28. *Id.*

classify citizens by race.”<sup>29</sup> Emphasizing that the North Carolina redistricting statute could not be explained by reference to any characteristic other than race,<sup>30</sup> the Court held that plaintiffs stated an equal protection claim “by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race”<sup>31</sup> without sufficient justification. On remand, therefore, the district court must subject race-based redistricting to strict scrutiny to determine whether it is narrowly tailored to further compelling governmental interests.<sup>32</sup>

Justice White, joined by Justices Blackmun and Stevens, dissented.<sup>33</sup> Justice White argued that because the facts of the case “mirror[ed] those presented in” *UJO*, the plaintiffs’ claim should have been dismissed for failing to allege a cognizable injury.<sup>34</sup> He explained that the claim accepted by the majority was “heretofore unknown;”<sup>35</sup> the Court’s prior cases had found only outright deprivation of an individual’s right to vote, or diminution of a group’s voting strength, to be a constitutional violation. Because the plaintiffs could successfully allege neither, Justice White would have dismissed their claim. Alternatively, Justice White contended that North Carolina’s redistricting plan satisfied strict scrutiny because he found the plan narrowly tailored to further the compelling state interest of compliance with the Voting Rights Act.<sup>36</sup> He emphasized, however, that strict scrutiny was inapplicable because unlike other contexts in which it has been applied, the plaintiffs in *Shaw* were not harmed by the legislation.<sup>37</sup> Justice Blackmun, in a separate dissent,<sup>38</sup> emphasized his agreement with Justice White’s view that race-conscious reappor-

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29. *Id.* at 2825 (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

30. *Id.*

31. *Id.* at 2828.

32. *See id.* at 2830.

33. *Id.* at 2834 (White, J., dissenting).

34. *Id.*

35. *Id.* at 2838.

36. *Id.* at 2842.

37. *Id.* In cases such as *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1988) (plurality opinion) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion), the plaintiffs suffered some immediate injury from the challenged legislation: the loss of a municipal construction contract in the former, the loss of a job in the latter. Because plaintiffs in *Shaw* could demonstrate neither of the harms recognized in *UJO*, Justice White felt they had suffered no such constitutionally cognizable injury, rendering strict scrutiny inapplicable.

38. *Shaw*, 113 S. Ct. at 2843 (Blackmun, J., dissenting).

tionment violates the Equal Protection Clause only when a particular group is denied "equal access to the political process."<sup>39</sup>

Justices Stevens<sup>40</sup> and Souter<sup>41</sup> each filed individual dissents arguing that strict scrutiny was an inappropriate standard. Justice Stevens argued that "[w]hen an assumption that people in particular a minority group . . . will vote in a particular way is used to *benefit* that group, no constitutional violation occurs."<sup>42</sup> Justice Souter argued that because race-conscious reapportionment differs from the other contexts in which the Court has addressed race-conscious legislation, reapportionment legislation should be exempt from the strict scrutiny standard otherwise applied to race-conscious legislation.<sup>43</sup> Redistricting, he explained, differs in two ways from other contexts in which the Court has addressed race-conscious legislation. First, "electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons. . . ."<sup>44</sup> Second, redistricting differs from other contexts in which "the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race."<sup>45</sup> Justice Souter agreed with Justice White that here, absent either of the harms recognized in *UJO*, North Carolina's redistricting plan imposed no such disadvantage on whites.

While the Court accurately applied its revised equal protection jurisprudence as elucidated in *Croson*, its attempt to reconcile its holding with *UJO* was misleading and unnecessary. Justice O'Connor distinguished redistricting statutes, such as that challenged in *Shaw*, "that . . . cannot be understood as anything other than an effort to classify and separate voters by race,"<sup>46</sup> from those right-to-vote cases, such as *UJO*, in which the legislature is "aware of race,"<sup>47</sup> among many other factors, when drawing district lines. The former, argued Justice O'Connor, is an explicit racial classification. Such reapportionment presents a particularly acute threat because

reapportionment is one area in which appearances do matter.  
A reapportionment plan that includes in one district individu-

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39. *Id.*

40. *See id.* (Stevens, J., dissenting).

41. *See id.* at 2845 (Souter, J., dissenting).

42. *Id.* at 2844 (emphasis in original).

43. *See id.* at 2847.

44. *Id.*

45. *Id.* at 2846.

46. *Id.* at 2830.

47. *Id.* at 2826.

als who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.<sup>48</sup>

Such legislation entrenches racial stereotypes by indicating that all members of a given race think alike, and suggests to those elected that they represent only a particular racial group rather than their entire constituency.<sup>49</sup> The latter, *UJO*-type cases, on the other hand, do not classify citizens solely on the basis of race and therefore need not be subject to strict scrutiny. In such a case, a claimant must demonstrate both a legislative purpose and effect of diluting a racial group's voting strength to establish a constitutional infirmity.

Justice O'Connor should have acknowledged that *UJO* has been overruled by subsequent cases. Decided in 1977, *UJO*'s statement that "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment"<sup>50</sup> predates subsequent Court rulings that subject even remedial race-conscious legislation to strict scrutiny. Beginning in 1986, the Supreme Court in *Wygant v. Jackson Board of Education*<sup>51</sup> and *Richmond v. J.A. Croson Co.*<sup>52</sup> established that racial classifications "must be specifically and narrowly framed to accomplish"<sup>53</sup> a compelling state interest, regardless of the class supposedly benefited by the legislation, because "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority. . . ."<sup>54</sup> *Wygant* and *Croson* thus effectively overruled *UJO* by establishing the presumptive infirmity of race-conscious legislation. Indeed, after *Croson*, any explicitly race-conscious reapportionment—even absent "tortuously configured"<sup>55</sup> districts—should be subject to strict scrutiny. The unusual shape of such districts merely serves the probative function

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48. *Id.* at 2827.

49. *See id.*

50. *United Jewish Organizations v. Carey*, 430 U.S. 144, 161 (1977).

51. 476 U.S. 267 (1986).

52. 488 U.S. 469 (1988).

53. *Wygant*, 476 U.S. at 280.

54. *Croson*, 488 U.S. at 493.

55. *Shaw v. Barr*, 808 F. Supp. 461, 473 (E.D.N.C. 1992).

of demonstrating that the legislation is “‘unexplainable on grounds other than race.’”<sup>56</sup>

The Court’s confused focus on reconciling *Shaw* with *UJO* unfortunately masked *Shaw*’s innovative expansion of what constitutes cognizable injury under the Equal Protection Clause. Under race-based preferential treatment programs, members of the disfavored racial group necessarily suffer some deprivation in order to provide the preferred group some benefit.<sup>57</sup> In the re-districting context, however, white voters suffer no deprivation unless they can show that the legislation fences them out of the political process.<sup>58</sup> A citizen accorded the right to vote suffers no individual harm regardless of the legislative district in which he is placed, and suffers harm as a member of a group only if re-districting serves to deplete the voting strength of that group.<sup>59</sup> Because a voter has no right that the candidate he favors win, placing the voter in a district that minimizes his opportunity to elect the candidate of his choice imposes no constitutionally cognizable harm.

Because plaintiffs in *Shaw* suffered neither of the above harms, it is unclear who suffered the injury recognized in *Shaw*.<sup>60</sup> The Court’s reliance on decisions striking down discrimination against minorities<sup>61</sup> suggests that by defining a legislative district

56. *Shaw*, 113 S. Ct. at 2825, citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Cf. *Shaw*, 113 S. Ct. at 2827, wherein the Court said that “traditional districting principles such as compactness and contiguity . . . are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.” This clause suggests that the Court, by claiming that normally-configured districts, even if redrawn to comply with the Voting Rights Act, do not qualify as racial classifications, was providing itself a way to avoid holding suspect all reapportionment taken in compliance with the Act. See also *id.* at 2828 (“we express no view as to whether ‘the intentional creation of majority-minority districts, without more’ always gives rise to an equal protection claim”) (citing *id.* at 2839, opinion of White, J., dissenting).

57. Thus, in *Wygant* the Court referred to the “innocent persons [who] may be called upon to bear some of the burden of the remedy.” *Wygant*, 476 U.S. at 281.

58. *Shaw*, 113 S. Ct. at 2837 (quoting *UJO*, 430 U.S. at 165 (opinion of White, J.)).

59. While the voting strength of a particular race will necessarily be depleted within a district drawn to favor another race, the test of depletion of voting strength contemplates the strength of the group in the entire area being reapportioned.

60. Justice Souter took issue with what he perceived to be the Court’s assertion of “stigmatic harm” to whites, calling it “utterly implausible . . . to presume” that the district “‘generates’ within the white plaintiffs here anything comparable to ‘a feeling of inferiority as to their status in the community that may affect their hearts and minds.’” *Shaw*, 113 S. Ct. at 2849 n.9 (Souter, J., dissenting) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

61. See *id.* at 2824 - 28 (citing, *inter alia*, *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Loving v. Virginia*, 388 U.S. 1 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

solely on the basis of race, blacks may be socially stigmatized or politically disadvantaged.<sup>62</sup> If the injury were limited to blacks, however, the white plaintiffs in *Shaw* would presumably lack standing to challenge the redistricting legislation.<sup>63</sup>

Yet the Court suggested that all citizens, regardless of race, are cognizably injured by segregatory practices. The Court emphasized that plaintiffs “did not even claim to be white: Thus, the court believed that plaintiffs were not alleging a harm peculiar to their race.”<sup>64</sup> Rather, the Court found that the reification of stereotypes and signalling to elected officials that they represent only a particular racial group are “cognizable [harms] under the Fourteenth Amendment.”<sup>65</sup> Indeed the Court found that the “central purpose” of the Equal Protection Clause is “to prevent the States from purposefully discriminating *between*”—not against—“individuals on the basis of race.”<sup>66</sup> Thus, any racial classification by definition harms *all* races, leading Justice O’Connor to conclude that “[n]othing . . . precludes white voters (or voters of any other race) from bringing the . . . claim that a reapportionment plan rationally cannot be understood as any-

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62. The state’s decision to create a second majority-minority district to protect “white incumbents while minimizing minority electoral strength” in the southern part of the state speaks to its manipulation of citizens on racial grounds. Letter from John R. Dunne to Tiare B. Smiley, *supra* note 12, at 5. By defining black citizens on the basis of race alone, the state isolated this so-called homogeneous class in a convoluted district that ensured their inability to vote against white candidates representing their geographical location. For example, some residents of District Twelve are surrounded on essentially all sides by District Nine. Legislation impacting the citizens of District Nine’s geographical area necessarily affects those members of District Twelve subsumed by District Nine. By placing those citizens in District Twelve, the state mutes their voice in electing a representative whose functional constituency includes them. While defining District Twelve based on race ensured the election of a black representative, it denied the district’s residents the opportunity to vote for a candidate who would represent their interests on any issue other than race. Cf. *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992), *aff’d*, 113 S. Ct. 30 (1992) (finding North Carolina’s redistricting plan not to constitute a political gerrymander).

63. Cf. *Powers v. Ohio*, 111 S. Ct. 1364 (1991) (holding that a white criminal defendant had standing to raise black prospective jurors’ equal protection claim against prosecutor’s discriminatory use of peremptory challenges). While the Court found that defendant in *Powers* had suffered injury-in-fact, which bestowed him with third-party standing, that assertion is difficult to reconcile with *Holland v. Illinois*, 493 U.S. 474 (1990), which found discriminatory peremptory challenge abuse not violative of a white defendant’s Sixth Amendment rights. It is unclear what injury-in-fact the defendant in *Powers* suffered that would not rise to the level of a Sixth Amendment violation. See *Powers*, 111 S. Ct. at 1379 (Scalia, J., dissenting).

64. *Shaw*, 113 S. Ct. at 2824.

65. *Id.* at 2828.

66. *Id.* at 2824 (emphasis added).

thing other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."<sup>67</sup>

Such a holding represents a sweeping innovation in the Court's equal protection jurisprudence. Even in *Croson*, which declared that "[c]lassifications based on race carry a danger of stigmatic harm," which "may in fact promote notions of racial inferiority and lead to a politics of racial hostility,"<sup>68</sup> the Court found the equal protection violation to be that "certain citizens [were denied] the opportunity to compete . . . based solely upon their race."<sup>69</sup> In *Shaw*, however, the Court recognized that no such denial or deprivation was present. Although the *Shaw* Court did not find an actual equal protection violation, it recognized that assertion of the diffuse and intangible, albeit real, harm of factionalization, rather than qualitatively different treatment, states a claim under the Equal Protection Clause. Such an acknowledgement augurs a new era in the Court's Fourteenth Amendment jurisprudence, one which the Court should have more forthrightly acknowledged.<sup>70</sup>

*Jonathan M. Sperling*

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67. *Id.* at 2830.

68. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1988).

69. *Id.*

70. The Court is scheduled to hear three consolidated cases this term dealing with redistricting and the Voting Rights Act, which may further elucidate the Court's approach to race-conscious reapportionment. *See De Grandy v. Chiles*, 794 F. Supp 1076, *prob. juris. noted*, 113 S. Ct. 1249 (Feb. 22, 1993) (pursuant to 28 U.S.C. § 1253) (direct appeals from decisions of three-judge courts).