Suing Alma Mater

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Published by Johns Hopkins University Press

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Of course, I do not expect that only my aggrieved friends and allies—categories that are not always clear or consistent—should be able to use civil rights laws and theories. In fact, I reject this favoritism viscerally, both because I do not require my friends to hold my views (else I would have even fewer friends) but also because it is only fair that if I get to use all the tools, so should others, even those with whom I vehemently disagree, such as conservatives—especially radical conservatives and Christian activists—and immigration restrictionists. Audre Lorde famously remarked, “The master’s tools will never dismantle the master’s house,” but I have a more modest agenda than dismantling any house: I want the restrictionists and the conservatives to acknowledge what I willingly concede to them—my use of all the legitimate tools and full participation in the discourse. Also on my wish list are two items: that they stop re-litigating the civil war of Grutter and accept its modest reach and that they start thinking constructively about how to help undocumented students, who someday will be members of our community, after the adults in Congress bring about comprehensive immigration reform.

For example, over the years, I have worked with and organized specialized programs and “pipeline” projects—the various programs undertaken to improve the flow of students into professions, such as high school newspaper editors working with newspapers, pre-med students working in labs with scientists, or pre-law students attending court with attorneys or observing judges. In my heart, I have always been somewhat skeptical of these programs, even as I have been involved in them much of my professional life, as I made my way to law school and the law profession without ever having known a lawyer as I was growing up. That I live in Texas much of the year leads some observers to think that
I must be an advocate for pipeline programs, but I have objected to the metaphor for many years, and once wrote:

[A pipeline] is a foreign mechanism introduced into an environment, an unnatural device used to leach valuable products from the earth. It requires artificial construction; in fact, it is a dictionary-perfect artifice. It cuts through an ecosystem and can have unintended and largely uncontrollable, deleterious effects on that environment. It can, and inevitably does, leak, particularly at its joints and seams. It can also rust prematurely, and if any part of it is blocked or clogged, the entire line is rendered inoperative.

For the admissions process, I prefer the metaphor of the “river.” It is an organic entity, one that can be fed from many sources, including other bodies of water, rain, and melting snow. It can be diverted to create tributaries without altering its direction or purpose, feeding streams, canals, and fields; it can convey goods, drive mills and turbines, create boundaries, and irrigate land—all without diminishing its power. . . .

The metaphor chosen to describe the admissions process is important for its characterization of the problem, for the evidence mounted to measure the problem, and for the solutions proffered to resolve the problem. Let me illustrate briefly. Characterizing the problem of minority underenrollment at any level as a “pool problem” suggests a supply shortage or, at best, a failure to cast one’s line in the right fishing hole. The pipeline metaphor reinforces this view of the problem, suggesting that minority enrollment is simply a delivery glitch, or that admissions committees would admit minorities if they only used better conveyances. After all, pipelines do not produce anything of value; they only carry or convey products. While both the supply function and the conveying function are important, they are not, individually, rich enough metaphors to portray the complex phenomenon of both functions intertwining to produce undergraduates and transform them into graduate or professional students.

A river, in contrast, provides nutrients and conveys resources, unlike its more static counterparts that do one or the other, but not both. . . . It constantly changes form, seeking new flows and creating new boundaries. It can even wear down rock, as observers of the Rio Grande Gorge and Grand Canyon can attest. This is what I wish to convey; that demography and efforts by schools to do the right thing will inevitably lead to improvement over time.²

Perhaps because of my religious training, I hold the view that anyone can be saved, and I am almost always the most optimistic person in the room. Having said that, I may be one of the few observers who does not think of these programs
in purely legal terms but in cultural or organizational theories or normative terms. Things come in threes for me, so I offer these three lenses to view these programs. Consider them as motivational, efficacy, and boundary-spanning grounds; they also are proxies for other questions: What are the real issues? Who are your friends? and Where do you look for guidance?

First, I do not look for help among scholars and observers who urge that “class-based” differentiation be employed rather than racial algebra, both because brahmins are likely to preserve their class-based privileges no matter the regime, as occurs with alumni preference programs, and because the operationalization of these approaches is fraught with technical and conceptual difficulties. Try and determine “need” for a need-based financial aid program in a law school, where most students have accumulated undergraduate debt—unless they were wealthy or had other social class advantages—and the only real differentiation is among those with more than $100,000 debt and those with less. As unfair and complex as undergraduate need-determination is for financial aid packaging—and the system is both—at least there is a definable “family” built into “expected family contribution” calculations. For every complaint that the rise of biracial or multiracial individuals has made it impossible to ascertain race, there is a thermodynamic parallel of the impossibility of employing other class- or need-based criteria for parceling privilege.

Well-intentioned commentators such as Richard Kahlenberg have attempted to finesse this issue by raising different questions. In citing the work of others, he notes:

> Academics tend to look at the issue of race and class in affirmative action differently than judges. For example, . . . Carson Byrd, Wornie Reed, and Ellington Graves of the Center for Race and Social Policy at Virginia Tech, argue that “conflating class and race will not solve the problem of racial inequality.” The authors suggest that “even members of racial and ethnic minorities who achieve middle- or upper-middle class status face discrimination every day. Money does not shelter people from racism.” They conclude, “Class cannot serve as a proxy for race and ethnicity, or vice versa.” We should pursue “both race-conscious and class-sensitive approaches.”

How are these types of arguments likely to hold up in the event that the Supreme Court decides to take the Fisher case? One immediate problem is that the Court has never suggested that racial preferences are justified as a way to combat societal discrimination. Going back to the 1978 Bakke case, which permitted universities to use race as a factor to promote diversity, a majority of the Court rejected
the idea that racial preference is an appropriate response to general societal discrimination. Justice Powell noted that societal discrimination could not justify imposing disadvantages on white applicants like Allan Bakke, “who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”

In Bakke, Justice Powell did, of course, provide universities with a green light for using race where there was no race-neutral way to produce sufficient racial diversity. Here, Byrd, Reed and Graves make an argument that is likely to have more resonance with the Court. Poor white and Asian American students, they note, tend to have “higher GPA’s and test scores than those of poor blacks, Latinos, and American Indians.” As a result, “College-admissions policies based on socioeconomic status are unlikely to increase racial and [ethnic] equality in higher education.”

But a skeptical Supreme Court may press this issue, noting that at the University of Texas, economic affirmative action and the top-10-percent plan produced a class that was 4.5 percent African-American and 16.9-percent Hispanic in 2004, a combined rate that was higher than the “critical mass” achieved through racial means at the University of Michigan Law School in the Grutter case (between 13.5 and 20.1 percent minority.) Likewise, research by Anthony Carnevale and Stephen J. Rose found that class-based affirmative action could produce classes that were 10-percent black and Hispanic at the most selective 146 colleges and universities, down from 12-percent when using race, but up from 4 percent if basing admissions strictly on grades and test scores. Employing additional factors not used by Carnevale and Rose—such as wealth—could boost racial diversity further.

By definition, socioeconomic affirmative action won’t guarantee a degree of racial diversity as efficiently as using race, but here it’s important to note that the Court won’t be asking what will produce the greatest racial diversity—only a “critical mass.” As the minority representation among high school graduates grows in this county, over time, race-neutral alternatives will become more and more likely to produce critical mass, making it harder to justify the use of race.

If this line of thinking is depressing to those who care about racial, ethnic, and socioeconomic diversity, consider this: While Byrd, Reed and Graves suggest preserving the use of race is an avenue for addressing “both” class and racial inequality, a growing body of evidence suggests that universities have for years been pursuing racial diversity without giving a thought to socioeconomic inequality. Ironically, only when universities are constrained from using race have they aggressively sought class diversity. They do so not for its in own sake, but as an indirect way of addressing race—effectively pursuing both goals at once.
My own take on this line of reasoning is that the Virginia Tech authors get it more right than Kahlenberg, who has argued for what he characterizes as race-neutral, class-based, economic affirmative action measures. On the plus side, he is against alumni privilege and edited an important 2010 work on the subject, one whose title gives away its premise: *Affirmative Action for the Rich: Legacy Preferences in College Admissions.* But anyone who elides whether the University of Texas actually employed “economic affirmative action and the top-10-percent plan” to “produce” its student body ignores whether financial aid is truly redistributive (his “economic affirmative action”). More to the point, this perception misunderstands how the percent plan actually worked before and after it was diluted from 10 percent to 7 percent and fundamentally ignores its nonracial implementation. The *Fisher* case also fundamentally misconstrues how the plan operates to help more whites than it does African American or Mexican American students. Because the changes to the plan have only taken effect in 2011–2012, the most recent data are not yet available for detailed analysis, but it is instructive to see how the plan worked in 2007, before the legislature recalibrated the requirements for the UT-Austin campus: at UT-Austin, first-time freshman enrollment included 48 percent white, 0.5 percent American Indian, 6 percent African American, 21 percent Asian American, 23 percent Hispanic, and 2 percent international. In other words, in this program, almost half of the participants were white, a counter-story to all—including the Fifth Circuit judges who wrongly criticized the plan for its allegedly antimajoritarian features.

But perhaps worse is that Kahlenberg and others would characterize this situation as one of sufficient “critical mass” in the numerator where the denominator is Texas public schoolchildren—which I consider a fair measure, although there are others—and where white Texas schoolchildren have declined in total numbers and as a percentage of the total. In 2005–2006, they were down to 36.5 percent, having declined by more than 8 percent over the previous decade. By 2011, their percentage had declined to 31.2 percent. Is almost half of a remedial program such as the percentage plan, enacted by minority advocates in a predominantly white legislature to counter *Hopwood*’s devastating effect, sufficient “critical mass” in a state where whites were only 36.5 percent of the state’s public schools? While the highly competitive University of Michigan Law School might plausibly characterize 20 percent of its class (including all minorities) as sufficient critical mass, can the flagship campus of Texas consider the same 20 percent mass to be sufficiently critical? Is it even a “mass” in Texas?

It might be fairly said that neither *Bakke* nor *Grutter* permit quota plans, but at some point the concept of a critical mass must mean something different in
Texas than it would mean in Maine without invoking the specter of quotas, especially when the trends are so demonstrable and when the discussion is enrollment management. In the larger canvass of complex admissions decisions for the millions of college applicants each year, decisionmakers must live and operate in a real world, not the parallel universe of a never-never land, where even the nonracial plans advantage whites. Worse, those very plans are offered as serious evidence that enough is being done or, more likely, too much is being done. Courts have to contextualize these enrollment figures, and schools must narrowly tailor their criteria.

It might be argued that the percentage plans, which operate differently in the various states that employ them or a version of them, have stanched the losses that *Hopwood* inflicted in the years following that case; once *Grutter* reaffirmed the *Bakke* precedent of twenty-five years earlier, it is difficult to see, even by squinting, that racial diversity can be achieved by anything other than racial means, however imperfect. If the biblical admonition is correct that we will always have the poor among us and if we cannot measure poverty in a more fair and equitable way, why does “economic affirmative action” warrant such strenuous support? If discussions about the taxation of millionaires at the national level drive political claims of “class warfare,” how would using imprecise, shape-shifting, and non-efficacious class-based admissions be more acceptable to elites or to middle-class white parents who will still suspect that they are getting the short end—just of a different stick? And these class advocates are, arguably, in the same pews I find myself in, or the same choir in which I sing. Here, I do not want any more help from my friends, who cannot meet their burden of persuasion.

On the other side of the aisle, conservative organized interests regularly monitor educational programs and benefits that appear to have gender or racial/ethnic restrictions. In chapter 1, I detailed some of the aggressive tactics of those who oppose reasonable efforts to integrate college and university student bodies and faculties, even when the means are not racial, as in percentage-plan admissions. At the same time, even good-faith supporters of such efforts are not always as helpful as they could be, and sometimes they just make mischief. I would analogize these to the bumptious immigration reforms for undocumented drivers’ licenses undertaken in a naive and unnuanced manner in 2007 by New York’s governor Eliot Spitzer, only to have to beat a hasty retreat, soiling the nest. As I saw these events unfold, I prayed: Please save us from our supporters.

For higher education examples, consider two good-faith efforts by credible and established organizations. In its recent efforts to help colleges and universities
craft legally viable options, a group sponsored by the College Board issued a series of reports to respond to the *Gratz v. Bollinger* and *Grutter v. Bollinger* decisions and to the rise of statewide racial initiatives. The reports help sort out the complex issues, as the March 2007 *From Federal Law to State Voter Initiatives* concludes: “Attention to longer term investments (such as support for pipeline-building programs) and shorter term strategies (such as rigorous evaluation and pursuit of all available avenues—race-conscious and race-neutral—likely to advance institution goals) can frame a comprehensive and coherent action agenda that is compelling in the court of law, just as it is in the court of public opinion.”

In another 2007 report, *Echoes of Bakke*, three of the same authors write:

It is important that institutions seeking to justify race-conscious policies in such ways [by using diversity practices] heed the Court’s long-standing admonition (re-affirmed in the school assignment cases) that “societal discrimination” can never be a compelling interest justifying race-conscious measures by a discrete institution. The Court has observed consistently that interests unlimited in scope or time can never meet the threshold of strict scrutiny analysis. (Consider the following: At what point can a single institution pursuing broad social goals declare that its race-conscious policies have succeeded, and how would that institution establish such evidence?)

The first recommendation (that schools pursue pipeline programs) suggests that these programs are somehow immune from purposive conservative organizational challenges and that such programs appreciably add to the sum. They are assuredly not immune and, overall, with few exceptions, have not added to the sum. I have monitored such programs across disciplines for years and have reluctantly come to believe that most of them are so small, transitory, soft-money-dependent, and contingent that they almost mask the failure of mainstream opportunity structures. Money and resources for these initiatives come and go, depending on foundation priorities, and the cycle rediscovers minority pipeline programs every few years, as the mandala turns. Virtually no institutional reward structures encourage senior faculty, especially the accomplished ones, to undertake pipeline programs, whether minority-specific or more generic. And while I have never considered doing this kind of work as a tradeoff against my more fundamental scholarship activities or teaching obligations, many colleagues do consider this work as less important and more peripheral. If you are in a public institution or in a college or university in a state with racially restrictive constitutional provisions (or governor initiatives, as in Florida), then
the game may hardly be worth the candle. More importantly, I cannot in good faith identify a single institution in the country, at least not historically white ones or major producer schools, that could ever plausibly conclude that its race-conscious policies have succeeded and worry about what evidence could be adduced to extricate itself from litigation. If UT-Austin, with its embarrassing Sweatt legacy, its laziness that was evident in Hopwood, and its underachievement, doesn’t give rise to a constitutional institutional remedy based on its historical record in court, virtually no school could muster such a defense.10 Such admonitions strike me as counterproductive and chimerical, or, at the least, unnecessary.

The American Association for the Advancement of Science (AAAS) makes a very eloquent argument in Standing Our Ground for science, technology, engineering, and mathematics (STEM) programs to diversify those essential fields, but it is not clear to all observers that diversity programs can turn on perceived labor needs or national priorities.11 I appreciate the efforts that some professional associations have played in undertaking and producing specialized programs to diversify their professions and to draw attention to the problems, but this supportive role and cultivation of the process cannot fundamentally alter the production function of campus-based efforts, where they really count. Various programs must affect and shape students (and junior faculty, for those programs that seek to develop the professoriate) in their academic programs to be truly transformative and meaningful; no peripheral agency or organization, however well-intentioned, can substitute for the home garden. I certainly think that professional associations and scholarly communities can cajole, shape, cheerlead, and assist, but at the end of the day, what counts is training and credentialing students (and faculty) where they are and where they will serve. Relying on the periodic and transitory attention of funders or the profession as a whole cannot provide the long-term, personal, and institutional commitments needed to remedy the serious problems. I applaud and recognize efforts by these well-meaning organizations, which are on the right side of the issue and of history, and many others, but I question the extent to which they can counter the systemic failure of graduate programs to recruit and graduate underrepresented U.S. minority students. Of course, there are institutionally based programs, including some that are well established and long-running.12 But until the major elite feeder schools institutionalize these efforts to produce minority scientists, engineers, scholars, lawyers, and so on, such specialized and targeted programs cannot meet the increasing needs of society.

And rather than help with these underlying problems, restrictionist and conservative groups would rather challenge and dismantle them than add positively
to the efforts. Where are they in offering initiatives to actually do something about the problems, rather than simply standing by and shooting the wounded on the battlefield? When will they sue an institution that is almost exclusively white or one that consistently underperforms by not enrolling minority students? When will they publicly challenge public college legacy admissions, such as, it turned out, were in existence at the University of Michigan? Where are their integrative and developmental efforts? When will they propose acceptable pipeline programs, rather than attacking them? Why advocate against race-neutral programs, such as percentage plans, especially when these challenges have not prevailed in courts and when white applicants prosper disproportionately by them? Why oppose state residency status to the undocumented, even when in California the major beneficiaries of A.B. 540 (the state statute according resident tuition for undocumented students) were the 80 percent who were U.S. citizens, largely whites? If they would undertake this line of inquiry, rather than acting in a nihilist and obstructionist fashion, we might engage in constructive action and discourse rather than seeing them simply sue every time they think a white Christian applicant has been slighted.

A number of progressive higher education advocates have held their breath since Parents Involved in Community Schools v. Seattle School District No. 1, the Seattle and Louisville case decided in 2007 by the U.S. Supreme Court, as the racial attendance policies were held to be unconstitutional in the K–12 sector. Many decisions in one sector bleed into the other, but this decision may augur less for college and university law than it does in signaling how race cases will be decided by the Court in the future. It is true that there are college-siting and attendance cases that have clear racial consequences (as seen in the LULAC v. Richards case, examined in chapter 7), but Parents Involved will, in my estimation, not have substantial postsecondary implications, at least not for admissions cases, such as Fisher v. University of Texas, which, after Grutter and Parents Involved, upheld UT-Austin’s modest use of race in its undergraduate admissions program. The Grutter holding is likely safe for the time being, more because the court will be unlikely to accept such a case for some time. Regents of the University of California v. Bakke held sway for over twenty-five years (erosing and losing force) before it was largely reaffirmed by the University of Michigan Law School admissions case.

In Parents Involved, the Court accepted that strict scrutiny was a legitimate interest in admissions and enrollment diversity, which had been upheld in Grutter “in the context of higher education.” It also differentiated the postsecondary context:
In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” The Court explained that “context matters” in applying strict scrutiny, and repeatedly noted that it was addressing the use of race “in the context of higher education.” The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.15

But the U.S. Supreme Court and other courts have not always consistently identified a line between higher education and K–12 cases. For example, I list three (of many) examples where the differentiation has been clear and not-so-clear: high school newspapers and yearbooks, grooming standards, and inequities claimed on the basis of “regions” within a state. Where newspapers and yearbooks are concerned, *Hazelwood School District v. Kuhlmeier* reads: “We have nonetheless recognized that the First Amendment rights of students in the [K–12] public schools ‘are not automatically coextensive with the rights of adults in other settings,’ and must be ‘applied in light of the special characteristics of the school environment.’”16 A case involving grooming standards, *Lansdale v. Tyler Junior College*, held: “Today the court affirms that the adult’s constitutional right to wear his hair as he chooses supersedes the State’s right to intrude. The place where the line of permissible hair style regulation is drawn is between the high school door and the college gate.”17 One judge in the case dissented on this very issue: “I dissent, first, because I see no distinction between high schools and junior colleges under the *Karr v. Schmidt* holding, which is now the law of this Circuit.”18 In *Richards v. League of United Latin American Citizens*, on the issue of residence and attendance zones in higher education, another court differentiated between the sectors: “The constitutional directive to maintain ‘an efficient system of public free schools’ does not apply to higher education as that term is used in this case.”19

I have made three observations and attempted to muster evidence for maintaining gains and increasing access for disadvantaged groups, particularly at the postbaccalaureate professional and graduate level, although my points apply with equal weight to the undergraduate experience and the transition from high school to college. First, restrictionist and conservative and religious pressures
will likely increase, especially as the number and percentage of people of color increase and as immigrants and non-Christians grow in the U.S. polity and community. Second, mainstream and progressive groups offer advice and make suggestions that are unlikely to be efficacious. And third, the Supreme Court does not always make a fine distinction between K–12 and higher education.

On this point, it is true that the high wall between the two sectors has been observed in the breach by judges, but it is a line nonetheless. The Seventh Circuit, as one example, has ignored Justice Kennedy’s admonition in leaching Garcetti into college cases, thereby confirming Justice Souter’s warning, as regrettably occurred in 2008’s Renken v. Gregory. In Isenalumhe v. McDuffie, a U.S. District Court in New York in 2010 also extended the case to what it termed an “appointment [that] has become a nearly ten-year war of attrition.” Even when the Third Circuit has acknowledged Garcetti’s academic freedom reservation, it did so in a crabbed fashion in Gorum v. Sessoms, a 2009 ruling that left unclear whether faculty advising duties fall under its reach. I am surely not the first person to make these points, and others have made one or the other observation in ways that are both eloquent and trenchant. But I have always considered myself an observer who was the last in the room to resort to legal action and the least likely to resort to the courts, unless all else fails. Therefore, when I see the issues today being conducted in administrative law frameworks or to have become so legalized, especially in conservative religious jihads against the secular state, my first reaction is despair.

Notwithstanding the naysayers and the restrictionists, whose agendas are aimed not at progressive action or equity but largely at preserving white privilege, I think that the country’s demography is in not in their favor. When the smoke clears and the adults take over, we will not merely endure but prevail. I believe this even more in the context of comprehensive immigration reform, where nativists and restrictionists are monkey-wrenching modest efforts to incorporate undocumented college students, such as opposing residency requirements and DREAM Act legislation. They have not prevailed in any of their court challenges to these initiatives, even as they lay claim, with extraordinary hubris, to the legacy of the Mexican American Legal Defense and Educational Fund (MALDEF) efforts to resist such nativism. I do not believe that Christianity is in peril in the United States, particularly in our colleges, or that there is a threat to its proper and meaningful role in our secular nation-state, although any observer can see that threats and hateful speech to Muslims are on the rise, sometimes even by other persons of faith. And there is a growing strain of intolerance among conservative Christians who have aligned themselves with political
conservatives who act as if only they have the keys to the kingdom. They do not.

The Alliance Defense Fund has armed itself for its own crusade, contending: “We must continue the fight for religious freedom and the right of conscience, so that the life-changing message of Jesus Christ can be proclaimed and transform our culture. Each win for the Body of Christ is a loss for the opposition. It’s that black and white.” The ADF’s battleground is an exceedingly narrow view both of religious freedom and of the question of whose culture is at risk. Muslims and Jews are the target of much religious bigotry in the United States and worldwide, and I am not certain if Christian groups have entirely thought through what a win for “the Body of Christ” means when Mormons cannot join the Christian Legal Society, when other groups are excluded from participating on pretextual grounds, or when the BYX fraternity sues after prevailing because the University of Florida had already settled for what BYX terms all the wrong reasons.

The terms “black and white” used in this context also have a disturbing and ironic racial resonance. Exactly who constitutes the “opposition” in such a Manichean worldview, and how is it implemented? Why is it that religious free exercise cases are brought almost exclusively by Christians, who overwhelmingly form the religious majority in the United States? Who anointed them in this plural religious community? Indeed, it is likely that these very demographic trends, which make conservative and predominantly white and Christian groups uneasy, will make it more difficult to preserve their historical advantages when there are simply more qualified people of color, more people of different faiths, and more immigrants. Mark my words: When that day dawns, there will be much more support for pipeline programs and for the cultivation of what will then be considered “minority” talent. Ask Professor Adams, who counts himself the only Christian conservative in his department, who not only sued but also found a ready vehicle for his litigation in a national legal organization trolling for such aggrieved clients. And their organizational roadmap was drawn by minority and progressive plaintiff organizations.

This book project has brought me full circle to the late political scientist Stephen K. Bailey, whose ideas drew me to this evolving field some forty years ago:

Today, as we perceive this elemental paradox in the tensions between the academy and the state, it is useful to keep in mind its generic quality. For at heart we are dealing, I submit, with a dilemma we cannot rationally wish to resolve. The public interest would not . . . be served if the academy were to enjoy an untroubled im-
munity. Nor could the public interest be served by the academy’s being subjected to an intimate surveillance. . . . Whatever our current discomforts, because of a sense that the state is crowding us a bit, the underlying tension is benign. . . . The academy is for the state a benign antibody and the state is the academy’s legitimator, benefactor, and protector. Both perspectives are valid. May they remain in tension.26

Today’s “underlying tension” is largely a script of the struggles over religious accommodation and racial and gender integration. The first is one that earlier higher education scholars did not scan or foresee on the horizon, while the latter has been evident in higher education for over a century. Legal and first amendment scholar Rodney Smolla has perceptively observed that the United States polity, like Caesar’s Gaul, “might be divided into three strains of thought, representing three different positions on the ‘separation spectrum,’ three different judgments as to how much separation of church and state should be required under our constitutional system. The different strains of thought may be labeled ‘high separationists,’ ‘middle separationists,’ and ‘low separationists.’ These labels are intended to be nonjudgmental.”27 His examples along this spectrum or sliding scale strike me as accurate and fair: “Theoretically, an extreme high separationist might not permit religious displays, symbols, or language in any governmental enterprise. Such an individual might wish to banish religious art from public museums, prohibit the study of religions at universities, and ban publicly supported symphonies or choral groups from performing religious music.”

But such extreme separationism is rarely, if ever, seriously advanced, and most high separationists will acknowledge that government may permit the study or performance of religious phenomena for academic, artistic, or musical purposes. The academic study of religions at state universities (such as in religious studies departments), the display of religious art in government museums, or the performance of religious music by government symphonies are thus accepted as undertaken for a secular academic or artistic purpose. A state university symphony and choir performing Handel’s Messiah is sharing the music for its musical value, not as an expression of worship.28

Middle separationists will tolerate relatively modest invocations of general religious sentiments by government that are not sharply denominational. The middle separationist will not be offended by “In God We Trust” on currency, the inclusion of the phrase “under God” in the Pledge of Allegiance, or the opening of public events and ceremonies with a “nondenominational prayer.” Middle separationists are particularly apt to support governmental religious language, symbols or rituals
if the practice has a long historic pedigree. Prayers to begin legislative sessions fall within this category.

Middle separationists are likely to have a number of nuanced positions. Invocations of religion are generally more permissible when directed at the general population than when directed at children or done within the public school setting. It will matter a great deal to middle separationists whether the practice is perceived as an endorsement of religion, particularly of one religion. Most middle separationists will deem such endorsements impermissible, and as jurists they will align with the high separationists to strike such measures down. Similarly, it will matter a great deal to middle separationists whether there is a coercive quality to the expression, and whether there is a “captive audience” that is forced to listen to it, particularly when those captive audience members are children.

Low separationists are likely to find no constitutional fault in government displays of religious language or symbols, or government participation in religious rituals. Short of an official recognition of one established church, or government coercion of professions of faith or belief, low separationists tend to treat such government displays as permissible.

I adopt these guidelines and aggressively stake out a space in the middle separationist camp, particularly with college cases, where students are legally adults and where they can choose from among many sources and influences, in contrast to the more doctrinaire public schooling. I also find myself in the position of noting that a number of the disputes I have chronicled here are not nuanced whatsoever and involve low separationists who have arrogated religious exercise in their favor, but only insofar as the decision would protect their own faith, usually Christianity and, within that universe, usually evangelical Christian free exercise.

It is clear that the struggles will continue in determining the extent to which student organizations can try to have it both ways. In the context of registered student organizations that wish to receive the financial and other material support of a public institution, the U.S. Supreme Court held that an “all-comers” policy requiring all student groups to accept all members may not discriminate on the basis of viewpoint. A college’s policy such as this would be “justified without reference to the content [or viewpoint] of the regulated speech.” The permissible “all-comers requirement draws no distinction between groups based on their message or perspective.” But the most active litigants in this field are certainly Christian purposive organizations that continue to want it both ways. On the one hand, they wish to have full support of the state and its
largesse and endorsement while wishing at the same time to exclude all who do not share their ascriptive requirements, such as a professed sexuality, a clear religious choice, or a feature that will be nourished by the group.

In my experience, virtually all affiliational student groups draw the believers, or those inclined to believe, to their membership. This is the magnet pull of such groups; while numerical majoritarianism is fine as far as it goes, true growth and development are more likely to flourish in a diverse and plural world, such as the one we live in. Like any other social organism, including families, there will always be core participants and those more comfortable on the periphery. Anyone who wishes only to join groups that align perfectly and steadfastly with what a nineteen-year-old thinks of as his or her orientation is misapprehending the entire point of having such a comprehensive regime of student groups on most public campuses. Could Christians at the University of Florida seriously demand and receive support for forty-eight Christian groups? While I can envision a hostile takeover of a Young Republican Organization by rabid Young Democrats, identification with a political party or partisan agenda will, unremarkably, draw political partisans—an appropriate purposive function and democratic lesson that is envisioned by the whole structure of these groups as small-scale laboratories for student learning and programming. They will survive and likely thrive. Or, if they wished to prevent Young Democrats from infiltrating their ranks, they could be subsidized instead by the national party rather than by the state taxpayers or student fees—and would likely do so without wringing their hands. While I could imagine a Muslim group taken over by Christians, I cannot envision the reverse happening, given the sheer demography and disposition of the likely participants. And if that did happen and the Muslim group wished to expel all nonbelievers, it could do so but would then not be allowed to take state support for its programs and recognition by the public college administration. These issues are being hammered out in Alpha Delta Chi v. Reed, a Ninth Circuit case wending its way after CLS v. Martinez; as these cases multiply and dominate the federal courts, they, too, will suck all the oxygen out of the room. But the Alliance Defense Fund, taken at its purposive word, will not be happy until its sectarian jihad is accomplished and evangelical Christians—as narrowly trademarked by their singular creed—have full access to all college resources and enjoy full financial and organizational resources from secular institutions, even while denying all apostates and sinners from membership in their many organizations.

I am certain that I have not persuaded many others to my view that these are essentially fools’ errands that entangle the state with what have become religious
missions disguised as First Amendment protections. I believe that not only should the state resist, especially when purposive groups wish to exclude others from their membership on personal characteristics, but also that the groups would not be helped by prevailing and should not wish to do so. Any truly popular or efficacious group can find the requisite support without having to yield to the state college or without having to render unto Caesar. And this is how they should make their way. Further, they should examine their consciences about what charitable instincts they are developing when they exclude others who would wish to join them in the larger purpose of their fellowship or programs. If there is a rogue group or intermittent leadership, so be it. This, too, shall pass.

In my documentation of the hundreds of cases I considered and reviewed for this book, I could find no more than a small handful of non-Christians who have ever brought a legal action based on free exercise against a college and not a single one that survived to be decided by the U.S. Supreme Court. One such case was undertaken in 1998 by Orthodox Jews who sued Yale College in *Hack v. Yale* for its mandatory residence hall policy, which the students interpreted as violating their belief that coed living arrangements were morally wrong. They lost their claim for want of a nail—one I believe they probably should have won for its operational details and the exceptions already carved out. 32 This is not to say that there have not been other such cases, but the rights being asserted are largely if not exclusively by certain Christians and for certain Christians, even if they are advanced in the name of comprehensive free exercise and universal religious freedom. And it goes without saying that Christians or those claiming that their religious free exercise rights were not accorded them do not win all these cases.

And some cases are close calls. For example, the snarky language employed by some of Axson-Flynn’s teachers revealed an intolerance and insensitivity that were very troubling to the Tenth Circuit. A remand with a better fact pattern and less veiled hostility to LDS students might have prevailed even in that case, but I cringed when I saw the remarks directed at her, even if she was too thin-skinned and even if she did choose the elective class. But in the end, it is hard to fully apprehend how a public college in Utah can oppress Mormon students. Apart from such outliers, faculty members must have the autonomy to coordinate their class assignments, and the students should simply have rendered unto Caesar here.

And the opposite type of error has also occurred. Why does Professor Bishop, as noted in the Primer, feel the need to bring his Christian precepts into the exercise physiology class and then offer supplemental instruction where he
promises to elaborate upon his religious views? I cannot imagine a Hindu or other minority religion adherent doing the same thing, and I have not found a case resulting from such hubris. While the Bishop v. Aronov case predated Garcetti, it is clear from its reasoning that Professor Bishop’s situation would likely be reached by Garcetti, and he would be even more likely to lose than he was in 1991.

In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute. Though Dr. Bishop’s sincerity cannot be doubted, his educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. The University’s conclusions about course content must be allowed to hold sway over an individual professor’s judgments. By its memo to Dr. Bishop, the University seeks to prevent him from presenting his religious viewpoint during instructional time, even to the extent that it represents his professional opinion about his subject matter. We have simply concluded that the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings.33

I have been unable to find another case such as this where a non-Christian sought to proselytize in class, although there are a number of cases where Christian professors insisted upon either praying or preaching in class. In a country where pluralism, nourished in particular by immigration and globalization, has such wide and deep roots, this singular purposive focus is unlikely to serve as an integrative force or to be a promoter of the common good. The day that a Mormon, Muslim, Sikh, Wiccan, or a Seventh-day Adventist attempts to do the same will be the day that many persons supportive of evangelical instruction will reconsider the premise that it is fair and necessary and right to share one’s religious views with others in a secular class and in a public college.34

After the rise of the purposive religious legal organizations focusing on this agenda, and especially after 1981’s Widmar v. Vincent changed the landscape, the litigation patterns in lower courts and the U.S. Supreme Court have not been the “tensions between the academy and the state,” as described by Stephen Bailey, but the cultural wars and tensions over religious accommodation and free exercise and the perennial tensions between a deracinated color-blind country and the real world: one requiring affirmative action for diversity. I hope that they remain in tension and that the next half century will be as fruitful for religious plurality and tolerance.
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