3-1994

A Response to Professor Choper: Laying Down Another Ladder

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Professor Simson has commented on Professor Choper's Establishment Clause approach, so I will confine my remarks to the free exercise section of Choper's lecture.[1] Choper described his intent as twofold: primarily to outline an approach to the Religion Clauses and secondarily, to contrast the religion cases with equal protection doctrine.[2] I think it is clear that he undertakes the contrast in order to *defend* his approach against doctrinal arguments that arise from equal protection parallels.

I have no quarrel with his free exercise approach standing alone. Indeed, I think I would applaud the results in almost any free exercise case I can imagine. I am no happier than he is at the Court's introduction of an intent requirement into the free exercise case law. Nevertheless, I am disturbed by Choper's remarks. The contrast he develops between race discrimination and free exercise claims risks further damage to race discrimination claims by bolstering the Court's present approach to the intent-effect distinction in race discrimination claims.

Regarding the intent-effect distinction, Choper starts by noting that actions intended to disadvantage either a racial or religious group are both properly subject to exacting scrutiny, but that the Court has declined to give anything but the most deferential review to race-neutral laws that have disproportionately advantaging effects on racial minorities.[3] Although he first hedges on whether or not this interpretation of the Equal Protection Clause is correct[4] he quickly adds that " 'generally applicable religion-neutral laws that have the effect of burdening a particular religious practice' are *more threatening* to

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1 Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994). I would also take issue with Choper's description of affirmative action—but will not do so here.

2 *Id.* at 491.

3 *Id.* at 508.

4 *Id.* In his response to questions, Choper acknowledged that he would be "less than candid" if he did not admit that he was inclined toward the view that disadvantaging race neutral laws should not be afforded heightened scrutiny. Jesse H. Choper, Address at the Cornell Annual Robert S. Stevens Lecture Series (Sept. 8, 1993).

constitutional values than government action that has a disproportionate impact on minority racial groups."[5]

It is here that we part company. For reasons I will shortly address, I would prefer to avoid any such hierarchical comparisons of constitutional wrongs. First, however, I would note that the reasoning Professor Choper offers to support his judgment of which disparate effects more threaten constitutional values is persuasive only to one already persuaded.

Professor Choper argues that unintentionally burdening a religious practice is more offensive than unintentionally burdening a minority racial group.[6] He contends that race neutral laws do not injure members of minority racial groups "because of" their race, whereas religion neutral laws that burden a particular religious practice *do* injure persons "because of" their religion.[7] I have two objections to this analysis.

First, I think that race-neutral laws often *do* injure "because of" race. When a decisionmaker—whether a legislator, a judge or a juror—acts with unconscious racial bias, such actions would generally be labeled "race-neutral" under present law,[8] yet to my mind they are clearly made "because of" race. Or a decisionmaker's choices may reflect selective indifference[9] to a racial outgroup; a legislator might be undeterred by the negative effects on a racial minority of otherwise desirable legislation when she would be deterred were those effects visited on her own racial group. Here too I think it fair to say that the loser lost "because of" her race.[10]

Moreover, even in the situation Choper seems to think is more typical—where the racially disproportionate impact is completely untouched by racial considerations on the part of the decisionmaker—I think the person of color *is* disadvantaged "because of" her race. Choper argues that the person of color is harmed not "because of" her race but *only "because the minority group members are disproportionately represented in the larger group affected."*[11] I think it is snapshot history to say that such persons do not suffer adverse consequences "because of"

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5 Choper, *supra* note 1, at 508 (quoting Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 886 n.3 (1990)) (emphasis added).

6 *Id.* at 509.

7 *Id.*

8 *See generally* Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the relationship between the unconscious and racially discriminatory practices).

9 *See* Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

10 Thus I disagree with Choper's assertions that inquiry into the motivations of lawmakers is a "manageable task" and that intentional racial discrimination "will ordinarily be fairly clear." Choper, *supra* note 1, at 496.

11 *Id.* at 508 (emphasis added).

their race. As Professor Choper himself pointed out, the "larger group affected" often is the poor, or the poorly educated. With a less restricted time frame, it is clear that many African Americans and other racial minorities *are poor* because of their race and thus they *are* disadvantaged "because of" their race by legislation that adversely affects the poor or poorly educated. That this disadvantage does not happen all at once does not mean that it is not attributable to race.

I suspect that Choper might respond that a significant difference remains, for he also claims that religion-neutral laws that burden a particular practice constitute "because of" discrimination in that "*all persons who suffer the special operative consequences adverse to their belief system* are necessarily members of that religion and all members of that religion suffer the special operative adverse consequences."[12] The implication is that the same could not be said for disadvantaging race neutral laws; generally, not all members of a racial minority are disadvantaged and not all persons disadvantaged by the legislation are members of the minority group.

But the distinction created by the set of exclusive sets Choper has constructed is a sleight of hand. Of course, only persons with the religious belief in question will "*suffer . . . consequences adverse to their belief system*";[13] this is so by definition. Other persons, however, *will suffer from the operation of the statute.* Unless I misunderstand the peyote example, *many* other persons will suffer from not being able to use the peyote they desire. Moreover, I suppose that in many cases, some members of the religious group would suffer *no* disadvantaging effects; their age, gender, status or occupation would exempt them from the conflict between religious duties and secular advantage that others in the religious group would face. Finally, some persons of the disadvantaged religious group who do suffer under the statute will not suffer *religious* consequences. Perhaps they will choose to go to jail or leave the country, thus making choices and suffering consequences very similar to those of some nonreligious peyote users. That the religious person can be said to suffer those consequences for a different reason, that is, her religious beliefs, does not differentiate the two kinds of disparate effects. The person of color who suffers under a statute that disadvantages the poorly educated can be said to suffer "for a different reason," that is, the history of racial discrimination that deprived her of a decent education, than does the white person disadvantaged by that statute. Thus I am not persuaded that religion-disadvantaging effects are more "because of" than are race-disadvantaging effects.

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12 *Id.* at 509 (emphasis added).

13 *Id.* (emphasis added).

The second reason I am not persuaded by the "because of" distinction Choper utilizes to place free exercise "effects" on a different footing than racially disparate effects is my view that "because of" discrimination provides a too limited vision of the goal of equality embodied in the Fourteenth Amendment. It seems to me that the Fourteenth Amendment is best read to have a cluster of objectives, which include but are not limited to "because of" race discrimination. This is a much larger topic, about which others have written extensively, so I will simply say that I would not prioritize "because of" discrimination as the central meaning of the Fourteenth Amendment. From the victim's perspective, effects are of far greater importance than intent.[14] Regardless of whose perspective is adopted, some particular effects are of great importance; certainly subordination, stigma, second class citizenship, and prejudice are among the evils that must be eradicated before racial equality is possible.[15]

Thus, I reject this comparison between effects on race and religion both because it is unpersuasive and because it presumes the paramountcy of "because of" discrimination as the focus of the Fourteenth Amendment. I also would abjure such a comparison as counterproductive. It reminds me of a related discussion that I have every year with my constitutional law class *comparing* the reasons for treating race as suspect with the reasons for treating gender as suspect. This discussion all too often degenerates into a fierce "which is worse?" argument. Unfortunately, such wars of gender rights versus race rights are not limited to first year students.[16]

In any such competition among oppressed groups, whether between racial and religious minorities or between racial minorities and white women, much can be said for either side. But saying it tends to make combatants out of natural allies and distracts us from common interests. I doubt that such jockeying for position is likely to increase the level of protection for either oppressed group. Struggles for the higher rung only legitimate the ladder; here too, it is time to lay the ladder down.[17]

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14 *See generally* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978) (examining disadvantages in employment, education, and housing which do not violate antidiscrimination law).

15 *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 941-46 (1989) (reviewing various conceptions of discrimination and citing their proponents).

16 For a recent hair-raising example, see Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992).

17 "We cannot exploit, or neglect, any particular set of individuals and expect our global human community to thrive . . . . When we keep the whole in mind, we have laid the ladder down." BETTY JEAN CRAIGE, LAYING THE LADDER DOWN: THE EMERGENCE OF CULTURAL HOLISM 116 (1992).

Still, I wish to reiterate that I am sympathetic to Choper's desire to gain protection for religious practices impeded by neutral statutes. I understand his desire not to have the intent-effect distinction—which *is* well established in race doctrine, although I hope not permanently—to be transplanted into free exercise doctrine. I just wish he would proceed in a way that did not further entrench what I consider to be wrongheaded thinking about racially disparate effects. I wonder if instead of arguing whether religion-disadvantaging effects or racially disparate effects are worse (or which more closely resemble "because of" discrimination), Choper might reformulate his argument to trace how the effects are simply *different.*[18]

They are different in the kind of harm they threaten, rather than the degree of a single kind of harm. It seems to me that in assessing racially disparate effects we are most concerned with distributive justice, while with respect to effects on religious practice we are most concerned with coercing beliefs. Although persons may suffer economic losses for religious beliefs, and persons may be pressured to "pass" to escape various racial effects, the primary concerns in these two areas are sharply different. These different animating concerns to me would be reason enough to unhook the two analyses—and would render unnecessary comparisons between the *severity* of the threat posed to constitutional values by statutes neutral-but-disadvantaging to race and religion.

18 *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms)*, 1991 DUKE L.J. 397, for an example of such an argument.