Painting Black Spaces Red, Black, and Green: The Constitutionality of the Mural Movement

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"We live by symbols," Justice Oliver Wendell Holmes wrote.* This aphorism certainly rings true in many American inner cities, where murals depicting racial images, such as African symbols and portraits of famous African Americans, pervade the urban landscape. Indeed, the "by" in Holmes's statement applies to inner-city residents with special force because these residents not only live *close to* murals, but also *according to* the symbols contained therein. Pablo Neruda, the Chilean writer and politician, is reported to have described this relationship in more populist language, claiming: "Murals are the people's blackboard."[1] But Neruda's statement obscures the fact that murals are not merely *the people's* blackboard; they are also modes of governmental engineering.

Many, and perhaps most, inner-city murals represent "government speech," because these murals are often funded and selected through official government programs,[2] and are designed to convey particular government messages.[3] As Timothy W. Drescher, a leading commentator on the Mural

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* Oliver Wendell Holmes, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes Jr.* 208 (Richard A. Posner ed., 1997).

1. JANET BRAUN-REINITZ ET AL., ON THE WALL: FOUR DECADES OF COMMUNITY MURALS IN NEW YORK CITY 199 (2009).

2. *See infra* notes 47-61 and accompanying text.

3. As the former director of the Boston mural program explained: "[M]urals have been particularly valuable to the Black community as a kind of forum. As propaganda they're instructive, they make a sociological statement." Robert Taylor, *Wall-to-Wall Boston*, BOSTON SUNDAY GLOBE, Oct. 26, 1969. Likewise, in the foreword to *Toward a People's Art: The Contemporary Mural Movement*, a leading book on the Mural Movement, Jean Charlot explains the dual purpose of murals: "Murals are often used as cosmetic bandaids to cheer up neglected neighborhoods . . . [b]ut they can also become real healing devices." EVA COCKROFT, ET AL., TOWARD A PEOPLE'S ART: THE CONTEMPORARY MURAL MOVEMENT XIV (1998). Similarly, the

Movement, recounts, there have been multiple phases of the Mural Movement; whereas the earliest phases murals were often characterized by privately funded and anti-statist murals, the more recent phases have been characterized by government funding and its accompanying content control. According to Drescher, this increase in government funding for murals has greatly limited artistic input in mural content. Indeed, government funding for murals often has "strings attached," namely that those murals say "'[n]othing about violence, nothing critical, nothing politically left.'"[4] As a result, although the earlier phases of the Mural Movement were anti-statist, in the current Mural Movement, "critical politics [has been] shunned in favor of affirmation"[5] based on "hope, community, race, gender, mysticism, and religion."[6] These government-sponsored messages of "hope, community, race, gender, mysticism, and religion"[7] may raise constitutional problems under the First Amendment's Establishment Clause, which prohibits the government from promoting religion, and the Fourteenth Amendment's Equal Protection Clause, which prohibits the government from classifying persons based on race.

Because many government-sponsored murals seem to violate settled doctrines of constitutional law, it is important to inquire why there has never been a case bringing such a challenge.. One possible explanation is that few people would have standing to challenge a mural's constitutionality; this explanation is unsatisfying, however, particularly with respect to potential Establishment Clause claims, because in several cases the Court has found that citizens have standing to challenge government-sponsored religious displays that offend them.[8] A more persuasive, though more troubling, explanation is

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foreword to *Walls of Heritage, Walls of Pride: African American Murals*, an important text focusing on the African-American Mural Movement, explains that African-American murals are typically based on two goals: (1) "offering an analysis of the black condition and a prescription for changing it" 3. and (2) providing "a neo-African perspective . . . in which African typically based on two goals: (1) "offering an analysis of the black condition and a prescription fior changing it" and (2) providing "a neo-African perspective . . . in which African inspirations – historical, political, and cultural – were synthesized and adapted to address African American needs." JAMES PRIGOFF & ROBIN J. DUNITZ, WALLS OF HERITAGE, WALLS OF PRIDE: AFRICAN AMERICAN MURALS 5 (2000).

4. Timothy W. Drescher, *Introduction* to JANET BRAUN-REINITZ, *supra* note 1, at xvii.

5. *Id.*

6. *Id.*

7. *Id.*

8. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005); McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984). Although standing was not an issue presented before the Court in these cases, the Court implied that the parties had standing because the Court adjudicated these lawsuits without expressing any concern about the issue. *Id.* Moreover, lower courts have specifically interpreted the Court's standing doctrine to provide that "spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." Vasquez v. Los Angeles Cnty., 487 F. 3d 1246, 1253 (9th Cir. 2007). Therefore, if a person passed by a religious government-sponsored mural and experienced a "spiritual harm resulting from . . . [that] direct

that while public interest groups have been vigorous in cleansing affluent public spaces of religious and racial symbols, they have been much less concerned with the government's endorsement of such racial and religious symbols in low-income neighborhoods.

What is perhaps more troubling than the lack of litigation over these government-sponsored murals is the lack of legal scholarship on the subject. Although law reviews are filled with commentaries on whether various religious displays violate the Establishment Clause,[9] there has not been a single article applying the Supreme Court's disestablishment jurisprudence to the Mural Movement. Likewise, in *Written in Stone: Public Monuments in Changing Societies*,[10] Sandy Levinson rigorously analyzes the various constitutional arguments that might be leveled against race-conscious government speech, but completely ignores the Mural Movement. Levinson's neglect of the Mural Movement is particularly surprising because race-conscious murals have been much more common than many forms of race-conscious government speech that he addresses in his book, such as certain monuments and flags. One would expect there to be far more discussion of the Mural Movement, especially given the Movement's policy importance and recent media coverage.[11]

This Article seeks to fill that void. Part I of the Article begins by providing background on the Mural Movement, drawing from its history to explain why so many murals may constitute government speech. Part II then explores the most significant constitutional objections that may be leveled against specific government-sponsored murals. Using images of actual murals to illustrate their constitutional defects, Part II.A focuses on the types of

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contact" with the mural, *id.*, then the person would have standing to bring an Establishment Clause suit in federal court challenging the mural's constitutionality. Accordingly, it seems to follow that citizens have standing to challenge race-conscious murals that offend them. Indeed, just as the Court has permitted citizens to challenge religious displays because of the symbolic harm such displays inflict on non-adherents, lower federal courts have permitted African Americans to challenge the government's flying the Confederate flag due to the symbolic harm that flag inflicts on them. *See infra* note 119.

9. *See, e.g.*, Steven G. Gey, *Religious Coercion and the Establishment Clause*, U. Ill. L. Rev 463 (1994); Daniel Parish, *Private Religious Displays in Public Fora*, 61 U. Chi. L. Rev. 253 (1994).

10. SANDY LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

11. For example, in 2008 and 2009 alone, the New York Times, Washington Post, and Washington Times ran multiple stories on the Mural Movements in Baltimore, New York, and Philadelphia. *See e.g.*, *Baltimore Beautifies With Murals*, WASH. TIMES, Sept. 17, 2008, *available at* http://www.washingtontimes.com/news/2008/sep/17/baltimore-beautifies-with-murals; *Answers About New York City's Community Murals*, N.Y. TIMES, Apr. 22, 2009, *available at* http://cityroom.blogs.nytimes.com/2009/04/22/answers-about-new-york-citys-community-murals; JoAnn Greco, *Philadelphia Honors Its Black Roots*, WASH. POST, Mar. 25, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402932.html; Jon Hurdle, *City Uses Murals to Bridge Differences*, N.Y. TIMES, Oct. 6, 2008, *available at* http://www.nytimes.com/2008/10/07/us/07mural.html?_r=1.

religiously inspired murals that may violate the Establishment Clause, and Part II.B explores the more complicated question of whether some race-conscious murals may violate the Equal Protection Clause. The Article concludes by reflecting on how, given the constitutional problems pervading the Mural Movement and the lack of discourse on the subject, it might be appropriate to reconsider our intuitions about the relationships among race, religion, and constitutional law and theory.

I. PAINTING BLACK SPACES RED, BLACK, AND GREEN

This section provides background on the Mural Movement to emphasize its relationship to trends in urban politics and to explain why many murals constitute government speech. As will be discussed, African Americans initially sought inner-city murals as a way to claim spaces as their own, but after initially facing significant government resistance, murals were eventually absorbed into the state's apparatus, as they became state-funded and state-controlled, thus falling squarely within the parameters of government speech.

Background on the Mural Movement

Although there were some government-funded murals in the 1930s,[12] the Mural Movement did not begin until 1967, when the newly formed Organization of Black American Culture[13] decided "to organize and coordinate an artistic cadre in support of the 1960's bare-bones struggle for freedom, justice and equality of opportunity for African Americans in the United States."[14] The organization's most significant mural was the *Wall of Respect*, a mural that, according to its inscription, was created "to Honor our Black Heroes, and to Beautify our Community."[15] The Organization used the following three criteria to determine whether a leader should be considered a "black hero[]," and thus be included on the *Wall*. The leader must: (1) "honestly reflect[] the beauty of Black life and genius in his or her style;"[16] (2) "not forget his Black brothers and sisters who are less fortunate;"[17] and (3) do

12. According to many accounts, the first government-funded African-American mural was Aaron Douglas's four-panel mural, *Aspects of Negro Life*, commissioned in 1934 for the Countee Cullen branch of the New York Public Library. Two years later, the New Deal's Federal Art Project funded various African-American muralists to create murals for the Harlem Hospital.

13. This was a private organization consisting of African-American scientists, historians, academics, writers, and artists.

14. Jeff Donaldson, *The Rise, Fall, and Legacy of the Wall of Respect Movement*, INT'L REVIEW OF AFRICAN AM. ART, 1991, *available at* https://coral.uchicago.edu:8443/display/chicago68/The+Rise,+Fall+and+Legacy+of+the+Wall+of+Respect+Movement.

15. MARY LACKRITZ GRAY, A GUIDE TO CHICAGO'S MURALS 404 (2001).

16. DIANE GRAMS, PRODUCING LOCAL COLOR: ART NETWORKS IN ETHNIC CHICAGO 57 (2010).

17. *Id.*

"what he does in such an outstanding manner that he or she cannot be imitated or replaced."[18] Consistent with these three criteria, the Organization chose to depict many religious and political figures. As pictured below,[19] the *Wall* included some controversial figures, including Elijah Muhammed (bottom row, second from the left), H. Rap Brown (top row, far left), Marcus Garvey (top row, second from the left), Stokely Carmichael (top row, fourth from the left), and Malcolm X (top row, fifth from the left).

Because it depicted such controversial black leaders, the *Wall of Respect* created intense racial tension. Mural expert Edmund Barry Gaither writes that the *Wall* was so divisive because it presented viewers with an us-them dichotomy; it "pushed viewers to take sides, to be for or against 'the black revolution.'"[20] As a result, the mural provoked massive retaliation, largely in the white community, resulting in police surveillance, threats against the artists, and anonymous bribes to persuade local gangs to deface the wall.[21] Despite this

18. *Id.*

19. *Wall of Respect*, 15 INT'L REVIEW OF AFRICAN AM. ART, no. 1, 1998, *available at* http://xroads.virginia.edu/~UG01/hughes/mural.html.

20. PRIGOFF & DUNITZ, *supra* note 3, at 5.

21. COCKROFT, *supra* note 3, at 4.

controversy, and perhaps because of it, the *Wall* gained popularity in Chicago, eventually becoming "an embarrassment and obstacle to the city administration."[22] Indeed, due to rallies at the site of the mural, the City was forced in 1969 and 1970 to delay its urban-renewal plans to demolish the building on which the mural was painted.

The *Wall* captured national attention, providing a rare example of a local community's power to use self-expression to halt a city's urban-renewal plans. This prompted black communities in Boston, Saint Louis, and Philadelphia to request similar walls; the "*Wall of Respect* became a generic term for these new murals."[23] But unlike the Organization of Black American Culture, which privately funded Chicago's *Wall of Respect*, organizations in other American cities turned to their local governments for funding; their requests were often granted, but under conditions, such as the condition that the murals must express positive messages.[24] As a result, a new type of governmental activity arose – the funding of murals for the purpose of beautifying inner-city buildings and rehabilitating inner-city residents.[25] To determine whether such murals raise constitutional problems, the following section will explore the Supreme Court's decisions concerning government-sponsored displays that constitute government speech.

The Supreme Court's Case Law on When Displays Represent Government Speech

The distinction between government and private speech is important because, although government speech is not subject to the Free Speech Clause, it is subject to other constitutional guarantees, such as the Establishment Clause

22. *Id.* at 7.

23. *Id.* at 8.

24. *Id.* at 8.

25. For example, in 1968, the New York City Department of Cultural Affairs – which was at the time part of the New York City Parks, Recreation, and Cultural Affairs Administration – hired an artist to create a beautification and education program for the Alfred E. Smith housing project's recreation center. PRIGOFF & DUNITZ, *supra* note 3, at 44; *see also* BRAUN-RENITZ ET AL., *supra* note 1, at 18. That same year, Boston started funding murals through "Summerthing," a project of the Mayor's Office of Cultural Affairs. *Id.* In 1971, several Chicago artists started the "Chicago Mural Group," which was later renamed the "Chicago Public Art Group" and is now one of the country's biggest mural-producing organizations; although it is a private group, the National Endowment for the Arts has been the group's largest donor, and the group has also received funding from Chicago and the State of Illinois. ALAN W. BARNETT, COMMUNITY MURALS: THE PEOPLE'S ART 411 (1984). Four years later, in 1975, Baltimore started "Beautiful Walls for Baltimore," which used funding under the federal Comprehensive Employment and Training Act ("CETA") to support muralists selected by the Mayor's Advisory Committee on Arts and Culture. PRIGOFF & DUNITZ, at 45. In 1984, Philadelphia Mayor Wilson Goode started the "Philadelphia Anti-Graffiti Network," which in 1996 became the "Mural Arts Program," operated by the Philadelphia Department of Recreations. JANE GOLDEN ET AL., PHILADELPHIA MURALS AND THE STORIES THEY TELL 80 (2002).

and the Equal Protection Clause.[26] The Supreme Court's first decision regarding the government speech doctrine was *Rust v. Sullivan*,[27] a case about government funding for abortions; in the twenty years since *Rust*, the Court has decided only a few cases addressing government speech.[28] One such case, *Pleasant Grove City v. Summum*,[29] provides the most guidance to date respecting government speech, and strongly suggests that many government-sponsored murals fall within the doctrine's ambit.

In *Summum*, a religious group argued that Pleasant Grove City, Utah violated the First Amendment's Free Speech Clause by refusing its donation of a religious monument to a City park. The City had previously accepted displays from private organizations, including a Ten Commandments monument from the Fraternal Order of Eagles. The City claimed that it accepted only those displays that: (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.[30] The City thus contended that it rejected the Summum's display because the group's display did not satisfy the City's objective criteria.

The question before the Court was if, by applying these criteria to determine whether to accept these other displays, the City effectively controlled them, thereby making these displays official government speech. Under the Court's free speech precedents, if these other displays did represent the City's official government speech, then the Free Speech Clause would permit the City to deny the Summum's religious display on the basis of its content. But if the other displays did *not* represent the City's official government speech, then the Free Speech Clause would forbid the City to deny the Summum's religious display on the basis of its content, unless the City's decision satisfied strict scrutiny. Notably, however, the Establishment Clause would come into play if the displays did indeed constitute government speech; in this case, the Establishment Clause would forbid those displays that promoted a religious message, as the Ten Commandments display arguably did under the Court's case law.[31] But since the Summum did not challenge the City's decision under

26. *See, e.g.*, Westside School District v. Mergens, 496 U.S. 226, 250 (1990) ("There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original).

27. Rust v. Sullivan, 500 U.S. 173 (1991). Scholars have dubbed *Rust* "the progenitor of government speech doctrine." *The Supreme Court: 2004 Term, Leading Cases, Government Speech Doctrine – Compelled Support for Agricultural Advertising*, 119 HARV. L. REV. 277, 278 (2005).

28. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

29. Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

30. *Id.* at 1128.

31. *Compare* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) *with* Van Orden v. Perry, 545 U.S. 677 (2005).

the Establishment Clause,[32] the Supreme Court's decision turned on whether the City's acceptance of privately designed and funded displays constituted government speech, such that its rejection of the Summum's display was constitutionally permissible under the Free Speech Clause.

Writing for the Court, Justice Alito explained that the dispositive factor was whether the City "effectively controlled" the displays.[33] The Court explained that this determination generally depends on whether the government establishes the criteria for selecting whether to accept a display[34] and exercises "final approval authority" over its content.[35] Thus, the Court held that even though Pleasant Grove City did not fund, design, or build any of the monuments in the park, those monuments nonetheless constituted government speech.[36] Indeed, because the City chose which monuments to "display for the purpose of presenting the image of the City that it wishe[d] to project to all who frequent the Park,"[37] the Court held that the monuments that were accepted "have the effect of conveying a government message."[38] In other words, because the displays in the Park represented government speech, the Free Speech Clause permitted the City to deny the Summum's display on the basis of its content.

Importantly, although *Summum* did not involve government-*funded* religious displays, the Supreme Court noted in dicta that "[n]either the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech."[39] The Court thus affirmed that if a message is both publicly funded and displayed on government property, then it is government speech *per se*. When only one of those conditions is present, however, the Court will consider whether the government has effectively controlled the speech. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court held that the government's funding a religious student publication was not subject to the Establishment Clause because, although the government funded the religious publication, the

32. The Summum did not make this Establishment Clause argument because the Summum's goal was to include its display, not to exclude the Ten Commandments display. Because the Summum did not raise or brief the Establishment Clause argument, Justice Alito did not address this issue in the majority opinion, though Justices Scalia and Souter discussed it in their concurrences – of course reflecting their opposing understandings of the Establishment Clause. *Compare Summum*, *supra* note 29, at 1139 (Scalia, J., concurring) *with id.* at 1141 (Souter, J., concurring in the judgment).

33. *Id.* at 1135.

34. *Id.* at 1133.

35. Id. at 1128.

36. *Id.* at 1138.

37. *Id.* at 1134.

38. *Id.*

39. *Id.* at 1133.

publication was student-run, and therefore not government property.[40] *Summum* addressed the opposite scenario, in which the display, although not government-funded, was located on government property. Under the Supreme Court's government-speech doctrine, then, there are two analytical tracks for determining when a message represents government speech.

The first track applies if the message is both government-funded and displayed on government property; in this case, the message is *per se* government speech, exempt from the Free Speech Clause but subject to the Establishment Clause. The second track applies, however, if the message is either not government funded (the *Summum* facts) or not displayed on government property (the *Rosenberger* facts); in this scenario the question is whether the government has effectively controlled the message. On this second track, the government-funding and government-property factors are relevant but not dispositive; each factor suggests the existence of government control over the message but does not, by itself, establish that proposition.

Further, on this second track, courts determine whether there is effective governmental control by considering the government's activity in relation to the particular message. Although the *Summum* Court did not explain precisely which factors are relevant to the "effective control" analysis, it did make clear that whether the government *selects* a display is a critical factor. Indeed, scholars have suggested, largely on the basis of *Summum*, that the government's involvement in the selection process is the overriding consideration in determining whether the government has effectively controlled the display in question.[41]

For example, Claudia Haupt has argued that there are three factors courts generally do and should consider to determine where speech is located on the continuum between the public and private spheres.[42] The relevant factors are: (1) who designed the message,[43] (2) who is the actor actually articulating the message,[44] and (3) who has the ultimate authority to stop the articulation of the message.[45] If the government is the actor responsible for designing, articulating, and stopping the message, then the government effectively controls that message, and thus it is pure government speech. Alternatively, if a private individual or group is the actor responsible for designing, articulating, and stopping the message, then it is pure private speech. Everything between these two poles is mixed speech; within this mixed-speech category lies an

40. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995).

41. *See, e.g.*, Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571 (2011); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 671 (2008); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009).

42. Haupt, *supra* note 41, at 17.

43. *Id.* at 17.

44. *Id.* at 19.

45. *Id.* at 22.

even narrower category of "truly hybrid speech," which arises when, applying the three factors, the government and private individuals appear equally responsible for the speech.[46]

Haupt's analysis helps clarify the Supreme Court's case law concerning whether the government effectively controls speech. Indeed, lower courts have similarly focused on these three factors in their analyses. As will be demonstrated in the following section, these factors indicate that many murals represent government speech.

When Murals Represent Government Speech

In light of the *Summum* Court's analysis, many government-funded murals likely are government speech. To summarize, if a mural receives government funding and is placed on a public building, that mural is government speech *per se*. Alternatively, if a mural either receives government funding or is placed on a government building, that mural is government speech only if the government effectively controlled its message. This "effective control" analysis turns on whether the government has designed, articulated, or stopped the mural's message.

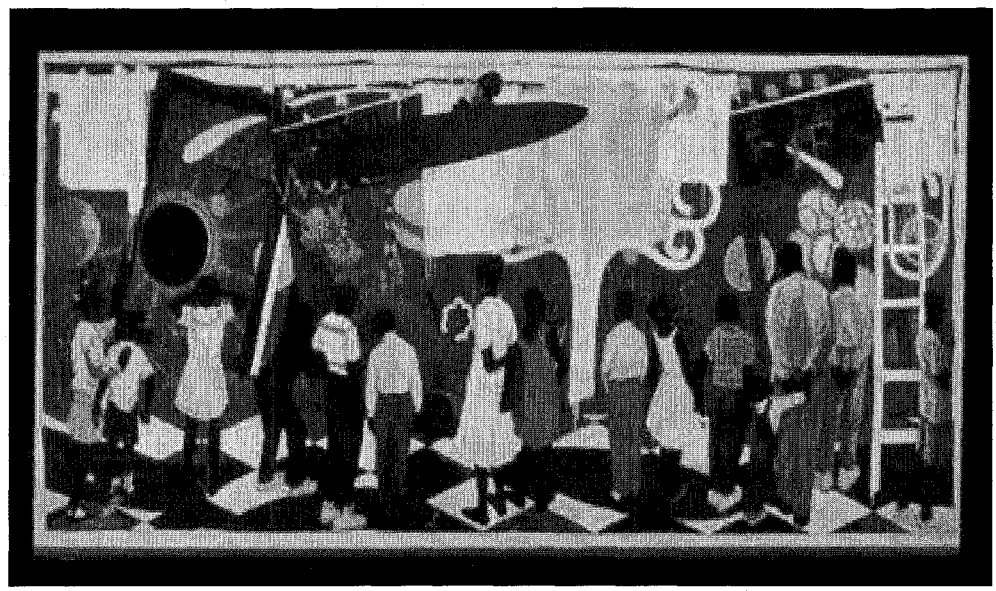
Many murals represent government speech because they are government funded and placed on government buildings. For example, many cities fund murals that appear on public housing projects and public libraries. Consider this well-known Chicago mural, *Knowledge and Wonder*, shown on the following page.[47]

Because this mural was funded by the Chicago Department of Cultural Affairs and is displayed on the Henry E. Legler Regional Library,[48] it is government speech *per se*.

46. Her primary example of "truly hybrid speech" speech is a specialty license plate program in which the governments authorizes the use of particular license plates, but the driver has the right to select one of these license plates and to remove it if the driver no longer wants that plate. *Id.* at 40. Haupt argues that such "truly hybrid speech" is subject to both the Free Speech Clause and the Establishment Clause. *Id.* at 15, 48.

47. This image of *Knowledge and Wonder* is provided by http://www.explorechicago.org/city/en/things_see_do/attractions/tourism/knowledge_and_wonder.html. For more information about this mural, see GRAY, *supra* note 15, at 110-11.

48. GRAY, *supra* note 15, at 110-11.



But many government-funded murals are not placed on public buildings. In these cases, the question is therefore whether the government has effectively controlled the mural's message. Again, this will turn on whether the government is the actor responsible for designing, articulating, and stopping the message. In other words, did the government select the mural? Does the mural contain an inscription attributing the mural to the government, and thus signaling to the viewer that the government, rather than the mural's artist, is articulating the mural's message? Does the government have exclusive authority to alter, conceal, or remove the mural? If the answer to these questions is "yes," then the government has effectively controlled the mural's message, and the mural is government speech. If the answer to all these questions is "no," then the mural is private speech. And if the answers are mixed, then the mural is likely mixed speech, an area that remains unclear under the Supreme Court's government speech doctrine.[49]

In many cities, the answers to the above questions will not be uniformly "yes." Accordingly, murals in those cities are likely to be either private or mixed speech. For example, although the New York City government initiated its mural campaign, it never initiated a widespread administrative effort to control the selection and design of murals. Rather, the City appointed a private artist to oversee the process, and this artist founded "City Community Arts Workshop," later renamed "Cityarts Worskshop" when it became an independent not-for-profit organization.[50] Thus, New York City does not seem

49. For a discussion of how courts should treat mixed public-private speech, see Haupt, *supra* note 41.

50. BARNETT, *supra* note 25, at 410.

to have exercised sufficient control over its murals' content to render murals painted on private buildings government speech.[51] Similarly, the Chicago Mural Group, a private, not-for-profit organization, has generally controlled the content of Chicago's murals. Although the National Endowment for the Arts ("NEA"), the City of Chicago, and the State of Illinois have funded Chicago's murals,[52] the Chicago Mural Group ultimately controls the design and selection of its murals.[53]

In contrast to New York City and Chicago, other cities have effectively controlled their murals such that their murals constitute pure government speech. For example, Philadelphia's "Philadelphia Mural Arts Program," the largest mural program in the United States, enjoys a substantial amount of control over the selection of the City's murals.[54] The Program uses seven criteria "to assess and select mural projects," three of which expressly relate to the mural's compatibility with the "community."[55] Not only does the City select the murals, it is the actor that articulates the messages. Indeed, the Philadelphia Mural Arts Program requires that every mural it sponsors include an inscription attributing the mural to the Program.[56] And although it is unclear whether the City has expressly sought to remove, conceal, or alter a mural on the basis of its content, it seems that the City could take such action without the artist's permission, given the City's plenary authority over the message's content.

Baltimore has exercised similar control over the content of its murals. As explained above, in 1975 Baltimore started the "Beautiful Walls for Baltimore Program," which "used CETA manpower training funds to support local artists who were recruited by the Mayor's Advisory Committee on Arts and Culture."[57] Like the Philadelphia Mural Arts Program, the Beautiful Walls for Baltimore Program also "involved the selection of artists and screening of their designs by a municipal panel."[58] But unlike Philadelphia, Baltimore has expressly used political criteria in approving murals. In fact, the City's "early

51. But note that there have been some exceptions, such as when the City forced Cityarts to remove part of a mural depicting a drug dealer bribing a police officer. BRAUN-REINITZ, *supra* note 1, at 21.

52. *Id.*

53. *Id.*

54. City of Philadelphia Mural Arts Program, http://muralarts.org/about (last visited Dec. 20, 2010).

55. Indeed, the application process requires the city mural administrators to evaluate: (1) "[c]ommunity and/or organizational support for and involvement in the mural;" (2) the "[c]ommitment of mural sponsors to organizing at least two community meetings with Mural Arts Program staff and artist, including nearest neighbors to the wall;" and (3) the "[s]ignificance of project: artistically, for the community or institution, for youth and/or for Philadelphia as a cultural tourism destination, and/or for the Mural Arts Program." *Id.*

56. For an example of such an inscription, proclaiming a Philadelphia mural to have been "painted by PDR/Mural Arts Program," see JANE GOLDEN ET AL., *supra* note 25, at 48-49.

57. BARNETT, *supra* note 25, at 413.

58. *Id.* at 206.

guidelines warned against making political, social or moral statements, and muralists therefore had to tread carefully."[59] In 1987, Baltimore replaced the Beautiful Walls Program with the "Baltimore Mural Program,"[60] which, under the auspices of the Mayor's Office, works with the local community to design its murals and determine their content.[61]

In sum, in many cities murals are likely government speech. In cities such as Chicago and New York, where many of the murals are government-funded but not government-controlled, the test for government speech will generally turn on whether the mural at issue is painted on a public building. In cities such as Philadelphia and Baltimore, the test for government speech is even more straightforward. Because those cities not only fund many murals but also exercise significant control over the design and selection of the murals, their murals almost always represent government speech regardless of whether they are painted on public buildings. Nevertheless, despite these general propositions about these cities, determining whether a particular mural constitutes government speech will require paying close attention to the government's activity with respect to the particular mural. With this caveat in mind, we will begin to explore which murals, to the extent that they represent government speech, may violate the U.S. Constitution, specifically the First Amendment's Establishment Clause and the Fourteenth Amendment's Equal Protection Clause.

II. WHEN GOVERNMENT-SPONSORED MURALS VIOLATE THE U.S. CONSTITUTION

When Murals Promote Religious Messages

Government-sponsored murals are most constitutionally vulnerable under the First Amendment's Establishment Clause. Part II.A.I will begin by exploring several Supreme Court decisions addressing when government-sponsored religious displays violate the Establishment Clause. In reviewing these decisions, particularly those discussing the "endorsement test," Part II.A.I will develop the distinction between framing and embracing religion, a distinction recently articulated by Christopher Eisgruber and Lawrence Sager. According to Eisgruber and Sager, whereas the Establishment Clause permits displays that merely "frame" a religious image or reference, it forbids displays that "embrace" a religious image or reference as true. This framing-embracing distinction clarifies the Supreme Court's "endorsement test," and thus yields great insight into which government-sponsored religious murals violate the Establishment Clause. Part II.A.2 will then apply this framing-embracing

59. *Id.* at 413.

60. Baltimore Office of Promotion & the Arts, http://www.promotionandarts.org/index.cfm?page=artscouncil&id=9 (last visited Dec. 20, 2010).

61. *Id.*

distinction to particular government-sponsored murals to demonstrate why many of these murals violate the Establishment Clause.

The distinction between the government framing and embracing a religious image or reference

Before 1980, the Supreme Court had not considered whether a government-sponsored religious display could violate the Establishment Clause. But in 1980, in *Stone v. Graham*,[62] the Court considered whether a Kentucky law violated the Establishment Clause by requiring all public schools in the state to display the Ten Commandments on classroom walls. The Court applied the then-governing legal standard, the *Lemon* test, which was first articulated in *Lemon v. Kurtzman*.[63] Under the *Lemon* test, a government act violates the Establishment Clause if it: (1) lacks a secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) excessively entangles government and religion.[64]

The *Stone* Court invalidated the Kentucky law for violating the *Lemon* test's first prong. According to the *Stone* Court, the Kentucky law lacked a secular purpose because the Ten Commandments are "undeniably a sacred text."[65] Moreover, the Court held that even though voluntary private contributions financed these displays, they still represented government speech because "the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits."[66] Because the Court found the Kentucky law violated the first prong of the *Lemon* test, it did not consider whether the posting of the Ten Commandments also violated the other two prongs.

Four years after the *Stone* decision, the Court confronted a similar controversy in *Lynch v. Donnelly*,[67] in which it considered whether the City of Pawtucket, Rhode Island violated the Establishment Clause by placing a Christmas nativity scene in a privately owned park. In considering this question, the Court noted that the Establishment Clause could not plausibly be interpreted to bar all public sponsorship of religious displays. After all, "[a]rt galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith."[68] The proper inquiry, the Court concluded, is whether the message, considered in context, expressed the government's establishment of Christianity. Applying this standard, the Court upheld the display at issue, principally because it was

62. Stone v. Graham, 449 U.S. 39 (1980).
63. Lemon v. Kurtzman, 403 U.S. 602 (1971).
64. *Id.* at 612-13.
65. *Stone*, 449 U.S. at 41.
66. *Id.* at 42 (citing Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
67. Lynch v. Donnelly, 465 U.S. 668 (1984).
68. *Id.* at 676.

placed next to secular displays associated with the holiday season, and thus conveyed only the government's recognition of the holidays.

In an influential concurring opinion, Justice O'Connor explained that the crèche was constitutional for a slightly different reason: Its surrounding context did not send the message that it *endorsed* religion. According to O'Connor, a central purpose of the Establishment Clause is to prohibit public endorsements of religion because such "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[69] This has come to be known as the "endorsement test," which prohibits all government-sponsored religious displays that promote such a religious message.

The endorsement test appeared prominently five years later in Justice Blackmun's opinion in *County of Allegheny v. ACLU*,[70] which held that a nativity scene on the staircase of a Pittsburgh, Pennsylvania courthouse was unconstitutional. According to the Court in the *Allegheny* case, the Pittsburgh crèche endorsed Christianity, whereas the crèche in *Lynch* did not; this was because the Pittsburgh crèche was prominently displayed by itself, unlike the Pawtucket crèche, which had been placed among various secular symbols.

Because the *Lynch* Court permitted a crèche surrounded by reindeer but *Allegheny* Court prohibited a crèche without such secular surroundings, many have derided this area of the law as being governed not by the "endorsement test" but by an arbitrary "reindeer rule." To make this area of the law more predictable and principled, some Justices and scholars have urged the Supreme Court to replace the "endorsement test" with the "coercion test" employed in *Lee v. Weisman*.[71] That decision held that a Providence, Rhode Island public middle school violated the Establishment Clause by having a rabbi deliver a short prayer at its graduation ceremony. Writing for the Court, Justice Kennedy explained that that the critical inquiry was not whether the prayer endorsed a religious message, but rather, whether it coerced students to participate in a religious exercise. In the Court's view, the prayer failed to meet this standard because the societal pressure on middle-school students to attend graduation ceremonies and participate in them created a coercive environment such that these students would feel obligated to join the rabbi's prayer. The *Lee* decision did not address whether this "coercion test" would apply to contexts outside public prayers, leaving open whether the Court would apply the "coercion test" or the "endorsement test" to a public display such as a mural.

Further complicating the Court's Establishment Clause jurisprudence, in 2005 the Court issued ostensibly conflicting decisions concerning the

69. *Id.* at 688 (O'Connor, J., concurring).
70. County of Allegheny v. ACLU, 492 U.S. 573 (1989).
71. Lee v. Weisman, 505 U.S. 577 (1992).

constitutionality of Ten Commandments displays on public property. Whereas in *McCreary County v. ACLU of Kentucky*[72] both the majority and dissent invoked the "endorsement test,"[73] the plurality ignored it in *Van Orden v. Perry*, because, in Justice Breyer's words, in such a "borderline case" there is "no test-related substitute for the exercise of legal judgment."[74] In both *McCreary* and *Van Orden*, only Justice Thomas expressed any interest in continuing to apply the "coercion test."[75]

In light of the Court's recent reluctance to apply the "endorsement test," perhaps due to accusations that it is too subjective, some scholars have tried to clarify the test's boundaries such that it has more of the objectivity associated with the "coercion test." For example, Eisgruber and Sager have argued that the "endorsement test" should turn on whether a particular government-sponsored religious symbol might disparage outsiders.[76] To illustrate this point, they imagine that a city museum displays Fra Angelico's painting of the *Annunciation*, a painting that has, in their words, "exquisitely religious" content.[77] Despite this religious content, however, Eisgruber and Sager contend that the government may display such a painting, because "[t]he display of the painting in a museum, as a great and important work of the Italian Renaissance, would properly be understood as an instance of framing rather than embracing the religious content of the painting."[78]

Eisgruber and Sager note that distinguishing between speech that *embraces* religious content and speech that *frames* religious content is an analytical task that courts are well-equipped to perform, because this distinction is firmly rooted in intellectual discourse, resembling the distinction in the philosophy of language between *using* and *mentioning* a proposition. We *use* a proposition when we seek to establish its veracity; we *mention* a proposition when we simply quote it to establish something else about the proposition besides its veracity. Similarly, the government embraces a religious proposition to establish its truth, but frames a religious proposition to establish some other property other than its truth.

This interpretation of the Court's endorsement test as turning on the

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72. McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (holding that Kentucky's recent placement of the Ten Commandments in two county courthouses violated the Establishment Clause).

73. *See id.* at 866, 877.

74. Van Orden v. Perry, 545 U.S. 677 (2005) (upholding the constitutionality of a Ten Commandments monument that had stood for more than 40 years on the Texas State Capitol grounds). Chief Justice Rehnquist's plurality opinion did not employ the "endorsement test;" nor did Justice Breyer's concurrence in the judgment. *Id.*

75. *Id.* at 694 (Thomas, J., concurring) ("The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.").

76. CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

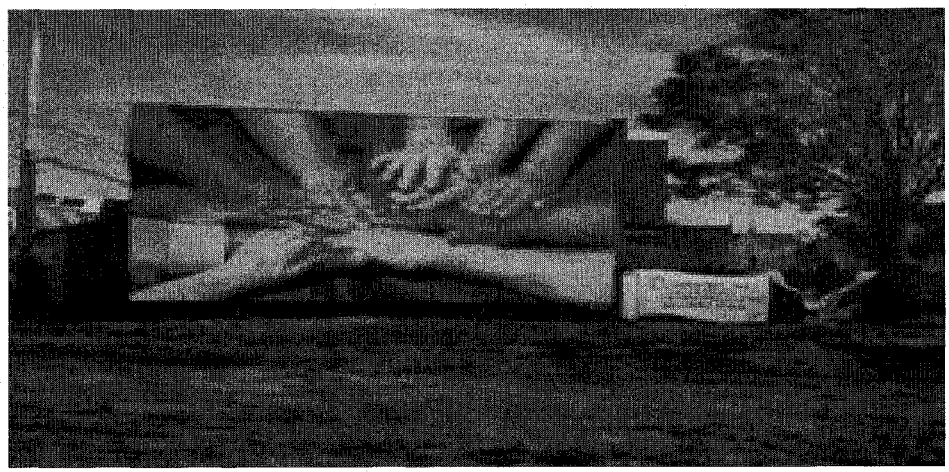
77. *Id.* at 131.

78. EISGRUBER & SAGER, *supra* note 76, at 132.

embracing-framing distinction yields great insight into when a public religious display is likely to violate the Establishment Clause. Recall that in *Lynch*, Justice Burger analyzed the constitutionality of the crèche by assuming the constitutionality of religious paintings appearing in government-supported art galleries.[79] The framing-embracing distinction develops this reasoning, and thus provides a helpful framework for understanding the Court's Establishment Clause decisions. When a government-sponsored display *embraces* or *uses* religious content to establish its truth, the government unconstitutionally endorses that religion by making some bystanders feel like outsiders in the community. In contrast, when a government-sponsored display merely *frames* or *mentions* religious content, as if to quote it, the government does not endorse that religion, and such a display therefore does not violate the Establishment Clause. With this embracing-framing distinction in mind, we will consider the constitutionality of particular government-sponsored murals.

III. APPLYING THIS EMBRACING-FRAMING DISTINCTION TO GOVERNMENT-SPONSORED MURALS

As explained in the introduction to this article, many government-sponsored murals contain Christian images or African religious symbols, and therefore may violate the Establishment Clause. Consider, for example, a 1997 Philadelphia mural, *Peace Wall*, shown below.[80]



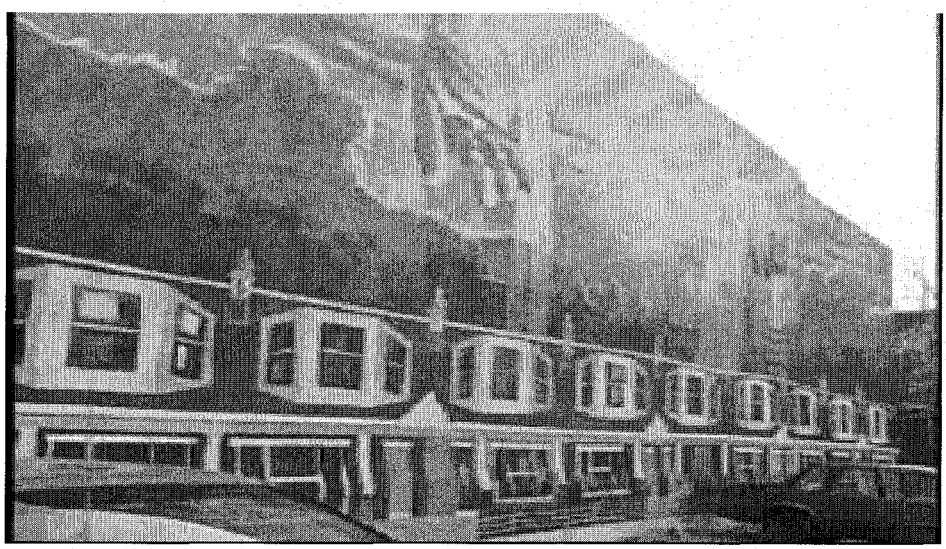
The central image in this mural—the different colored hands joining together—clearly does not raise constitutional problems. What may be constitutionally problematic, though, is the text featured on the right: "Blessed

79. Lynch v. Donnelly, 465 U.S. 668, 676–77 (1984).

80. Jack Ramsdale, *Peace Wall* (Photograph), *in Meet Our Staff*, TEMPLE UNIVERSITY OFFICE OF INSTITUTIONAL DIVERSITY, EQUITY, ADVOCACY, AND LEADERSHIP, http://www.temple.edu/ideal/about/staff.htm (last visited Nov. 20, 2010).

are the peacemakers: for they shall be called the children of God." This is one of the beatitudes from Jesus's Sermon on the Mount, as recorded in the Gospel of St. Matthew.[81] Because the Philadelphia Mural Arts Program designed and selected this overtly religious mural, the mural represents government speech. Thus, this mural might run afoul of the Establishment Clause because it does not frame the text as if to explain what is said in the Gospel, but rather embraces the text as if to establish its truth—namely, that the depicted figures are the blessed children of God.

Another Philadelphia mural that might violate the Establishment Clause is the West Philadelphia mural, *Compassion*, which similarly depicts hands in such a way that seems to embrace the religious idea that the depicted hands are divine.[82]



According to the muralist, Ras Malik, he was inspired to paint the mural because the people in this blighted area of West Philadelphia "wanted what they called a 'spiritual type of mural.'"[83] He began sketching hands coming from the sky, and ended up painting "divine hands reach[ing] down from the sky, pouring blessings onto a block of row houses that almost mirror the real houses across from the mural."[84] By depicting "divine hands" blessing the people in the community, the mural embraces an anthropomorphic notion of God, a view that is incompatible with many faiths. Therefore, this mural might violate the Establishment Clause because observers who reject such a view of

81. *Matthew* 5:9.

82. Ras Malik, *Compassion* (Mural), WHYY, http://www.whyy.org/tv12/mural/muralofday/malik.html (last visited Dec. 29, 2010).

83. GOLDEN AT AL., *supra* note 25, at 46.

84. *Id.*

God could reasonably feel that this mural disparages them by conveying the message that they are outsiders in this West Philadelphia community.

A mural might also violate the Establishment Clause by depicting images that invoke African spirituality.

Consider, for example, the Chicago mural, *Benu: Rebirth of South Shore*, which was painted in 1990 and is shown below.[85]

This mural features Benu (which in Egyptian culture is the phoenix believed to be the soul of the Sun-God Ra) and Orisa Oya (the deity of change in the Yoruba religion). One of the mural's artists, Marcus Akinlana, explains that because "South Shore was one of the communities that was burned out in the riots in the late '60s and early '70s, the Benu was a fitting symbol of the community rising and rebuilding itself."[86] Akinlana further explains: "The biggest figure in the mural is the Orisa Oya, the divinity of change, representing the energy force that was symbolic of the meaning of the mural. Oya is leading the community towards a better future."[87] For onlookers who do not recognize these religious symbols, the artists added an inscription to the mural; the inscription explains the symbols' meanings, and how "[w]e must understand our roots in order to revitalize the positives in our culture."[88] By

85. Marcus Akinlana & Jeffrey Cook, *Benu: Rebirth of South Shore* (Mural), W.O.N. MURAL SOCIETY, http://www.akinlana.net/Gena/Public_Art/pages/benu.htm (last visited Dec. 29, 2010). Note, however, that this mural might not represent government speech. Private organizations (the Chicago Public Art Group and the Neighborhood Institute) commissioned the work, and although the City of Chicago Department of Economic Development provided funding for the mural, many private organizations also donated funding. GRAY, *supra* note 15, at 205.

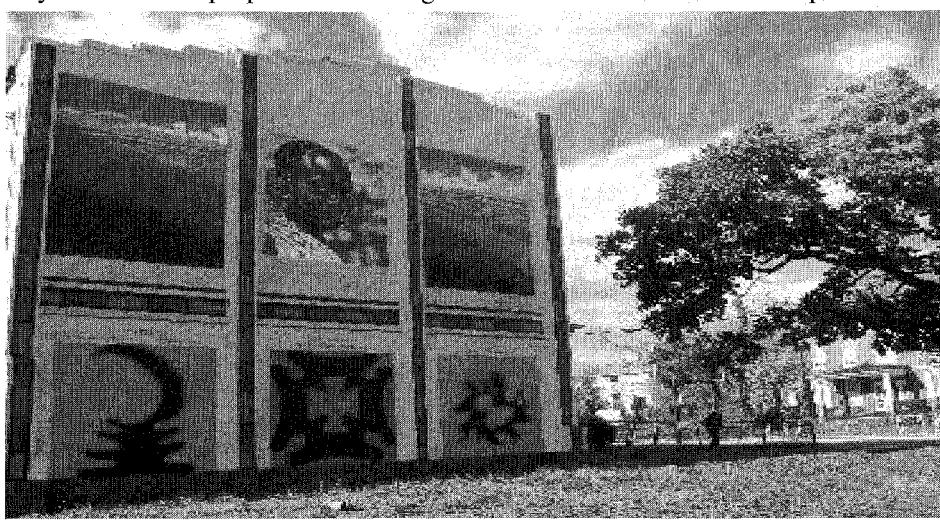
86. Akinlana & Cook, *supra* note 85.

87. *Id.*

88. GRAY, *supra* note 15.

depicting an African deity as having the power to direct the community's future, and by declaring that "we" must understand this deity to improve "our culture," this mural sends the message that viewers who believe in the deity are insiders, whereas non-adherents are not. Indeed, just as the government may not display an image of Jesus leading America to a brighter future because such a display would make many non-Christians feel like outsiders, it may be the case that the government may not display an image of Oya doing so because such a display might similarly make non-adherents of Oya feel like outsiders.

Similarly, the 2005 Baltimore mural, *Reflections*,[89] uses religious African symbols for the purpose of instilling in African Americans a sense of pride.



The mural's top row depicts beaches on either side of a distinctly African-looking woman, who is positioned above W.E.B. Du Bois's famous quote: "The spell of Africa is upon me." The bottom row contains Adinkra symbols (symbols created by the Akan of Ghana and the Gyaman of Cote d'Ivoire), and next to these symbols are their English definitions. On the left is akoben ("vigilance, wariness"); 90 in the middle is fihankra ("security, safety");91 and on the right is bi nka bi ("peace, harmony").92 Because these symbols express a spiritual view of the world,93 this *Reflections* display also might violate the

89. Pontella Mason, *Reflections* (Mural), GEORGE PEABODY LIBRARY, http://www.pentaxforums.com/forums/post-your-photos/35816-george-peabody-library-baltimore-md-usa-2.html (last visited Nov. 21, 2010).

90. Jean MacDonald, *Adinkra Index, West African Wisdom: Adinkra Symbols & Meanings*, http://www.adinkra.org/htmls/adinkra_index.htm (last visited Nov. 21, 2010).

91. *Id.*

92. *Id.*

93. As explained by the The Spirituals Project at the University of Denver, "Adinkra and their accompanying proverbs form a communication system that preserves and transmits the accumulated cultural and spiritual values of the people." *African Tradition, Proverbs, and Sankafa, Sweet Chariot: The Story of the Spirituals*, THE SPIRITUALS PROJECT AT THE

Establishment Clause. Although many onlookers might not realize that the symbols have a religious history and significance, this might not be relevant under the Supreme Court's decisions, because in applying the endorsement test, the Court has held that the issue is not whether the average person would find that the display endorses religion; rather, the issue is whether an informed onlooker would interpret it this way. Because an informed onlooker would realize that these symbols are religious representations, this hypothetical person would likely conclude that the display disparages people in the community not holding these religious beliefs. For example, one could interpret the display as embracing the notion that if an African-American resident does not identify spiritually with her African ancestry, she is not sharing her community's belief system and experience; likewise, the display could make a non-African American resident or passerby feel like an outsider in the community on the basis of that person's religious beliefs.

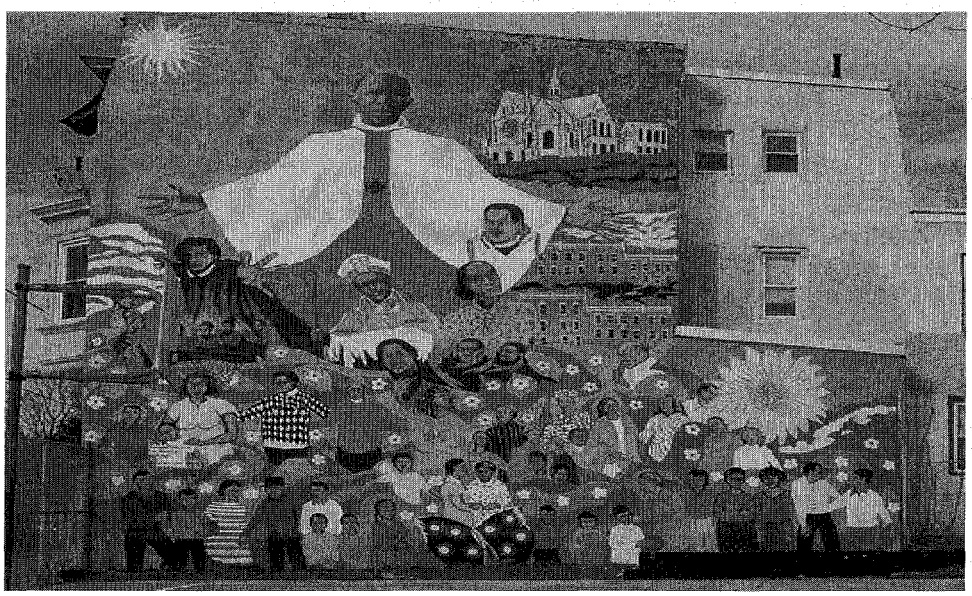
The constitutional defects in such a display might be seen even more sharply if we imagine a similar mural involving another community. Imagine that the City had placed the Star of David alongside a stereotypical depiction of a Jewish person and various images of Israel.[94] The Star of David, like the Adinkra symbols, has both secular and religious purposes, but very few courts or scholars would find that the Establishment Clause permits government endorsements of that symbol. Just as a display might violate the Establishment Clause by embracing a religious viewpoint of what it means to be Jewish, displays dealing with African religious beliefs might violate the Establishment Clause by embracing a religious viewpoint of what it means to be African American.

This is not to say that all government-sponsored murals containing religious images or language should be held unconstitutional. As discussed above, public religious displays are likely to be found permissible if they frame rather than embrace a religious proposition. The Philadelphia mural of Father Paul Washington, a popular Philadelphia religious leader and social activist, illustrates this framing-embracing distinction.[95]

UNIVERSITY OF DENVER, http://ctl.du.edu/spirituals/Literature/sankofa.cfm (last visited Nov. 21, 2010).

94. There is indeed such a mural in New York City—the *Jewish Ethnic Mural*—that is still on the wall of a building in the formerly Jewish section of the Lower East Side. *See infra* image accompanying note 171 for an image of this mural and a discussion of whether it violates the Equal Protection Clause by expressing an ethnic-conscious message.

95. Walter Edmonds, *Father Paul Washington* (Mural), http://explorepahistory.com/displayimage.php?imgId-6076 (last visited Nov. 21, 2010). *See also* GOLDEN ET AL., *supra* note 25, at 87.



The Father Paul Washington mural highlights the complexity of applying the Supreme Court's endorsement test, even with the clarification provided by Eisgruber and Sager's framing-embracing distinction. On the one hand, the mural seems to frame religion because it simply depicts Father Paul Washington as a religious figure. But on the other, the mural could be said to embrace religion because the central figure, Father Paul Washington, is unmistakably religious, and the overall image sends the message that he has saved the other people in the painting. Just as a government-sponsored mural may not depict Jesus as a savior, a government-sponsored mural may not depict a religious figure like Father Paul Washington as a savior.

As this mural illustrates, the framing-embracing distinction poses a challenge because it requires sensitivity to artistic theme; this could be difficult for an art critic, let alone a judge. Despite these difficulties, however, Eisgruber and Sager seem to be right in claiming that the distinction contains sufficient analytical rigor such that courts can apply it in principled ways.[96] Indeed, while there certainly might be disagreement about borderline murals such as this one, it is clear that many of the other murals already discussed would violate the Supreme Court's endorsement test, and that many such murals throughout America are similarly unconstitutional.

But although there are many murals that violate the Establishment Clause,

96. *See generally* EISGRUBER & SAGER, *supra* note 76.

the Equal Protection Clause might actually pose a bigger constitutional problem for the Mural Movement, because murals more often touch on racial as opposed to religious themes. Many of these race-conscious murals might violate the Equal Protection Clause by violating the settled principle that any governmental action that classifies people on the basis of race will be subjected to the strictest of judicial scrutiny. The next section will consider under what circumstances a government-sponsored mural can be said to "classify" people on the basis of race.

When Murals Classify on the Basis of Race

This section will argue that some race-conscious murals may be constitutionally vulnerable, because although the Equal Protection Clause permits many types of race-conscious government speech, it likely prohibits the government from targeting *de facto* racially segregated (i.e., racially homogeneous) areas with speech that uses race to prescribe a particular identity or mode of conduct. Part II.B.1 begins by briefly describing the Supreme Court's general Equal Protection framework. It then proceeds to review the Supreme Court's decisions holding that the Equal Protection Clause applies to race-conscious government speech. Since these arose before the Supreme Court had formally developed its strict scrutiny framework, they do not specify what standard applies to race-conscious government speech. To resolve this question, Part II.B.2 considers another area of the Supreme Court's Equal Protection jurisprudence, namely, its decisions regarding government efforts to construct distinct racial communities. Drawing from this jurisprudence, Part II.B.3 proposes a standard for when race-conscious government speech triggers strict scrutiny: race-conscious government speech triggers strict scrutiny when it targets a racially segregated community in a way that prescribes an identity or mode of conduct on the basis of race. Part II.B.4 concludes the section by applying this standard to particular race-conscious murals to demonstrate that many of these murals may violate the Equal Protection Clause.

Reviewing the cases applying the Equal Protection Clause to race-conscious government speech

A settled proposition in constitutional law is that all governmental classifications based on race trigger strict scrutiny. In other words, such racial classifications are permissible only if the government demonstrates that they are narrowly tailored to achieve a compelling interest, such as redressing past racial discrimination. But almost all of the Supreme Court's Equal Protection decisions have involved the government's distribution of benefits rather than the government's speech. Indeed, before *Brown v. Board of Education*,[97] many

97. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

of the Court's Equal Protection opinions involved the government's depriving blacks of public benefits; and after *Brown*, many of the Court's Equal Protection opinions have involved the government's seeking to promote racial equality through race-conscious measures, such as affirmative action in government contracts and public education. Given that the Court's Equal Protection cases have dealt almost exclusively with race-conscious distributions of government benefits, it is still unclear whether race-conscious government *speech* is subject to strict scrutiny.

Nevertheless, it seems clear that the Equal Protection Clause is at least relevant to the constitutionality of government speech. As Justice Stevens recently stated in his concurrence in *Summum*, "even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."[98] But the *Summum* case, as explained *supra*, involved religiously rather than racially discriminatory government speech.[99] In fact, the Supreme Court has heard only three cases directly addressing the constitutionality of racially discriminatory government speech, and all three clearly found that when government speech tends to induce people to discriminate on the basis of race, it is forbidden by the Equal Protection Clause.[100]

The first Supreme Court case involving the constitutionality of race-conscious government speech was *Lombard v. Louisiana*,[101] which involved three black students and one white student who requested service at a New Orleans lunch counter reserved for whites. After the students were ordered to leave, they refused and were subsequently convicted for violating a Louisiana law requiring people to leave a business after being ordered off the premises. Although at the time New Orleans did not mandate racial segregation in restaurants, the Mayor and the Superintendent of Police publicly announced that the City would not allow "sit-in demonstrations." Because the Court interpreted the officials' statements as prohibiting racial integration in restaurants, the Court held that New Orleans "must be treated exactly as if it had an ordinance prohibiting such conduct."102 Since the Court had previously held such a prohibition on racial integration to be unconstitutional, it ruled that the officials' statements violated the Equal Protection Clause. In the Court's words, the "State cannot achieve the same result by an official command."[103]

One year later, the Court used similar reasoning in Anderson v.

98. *Summum*, 129 S. Ct. at 1139 (2009) (Stevens, J., concurring).

99. *See id.*

100. Lombard v. Louisiana, 373 U.S. 267 (1963); Anderson v. Martin, 375 U.S. 399 (1964) (per curiam); Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam).

101. Lombard v. Louisiana, 373 U.S. 267 (1963).

102. *Id.* at 273.

103. *Id.*

Martin,104 another case involving race-conscious government speech. *Anderson* involved a Louisiana statute that required that the nomination papers and ballots in all primary, general, and special elections must designate the candidate's race. Writing for a unanimous Court, Justice Clark explained, "Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid."[105] Therefore, although "Louisiana impose[d] no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot,"[106] its law violated the Equal Protection Clause by "furnish[ing] a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another."[107] The Court explained that the law induced such racial discrimination because "by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important – perhaps paramount – consideration in the citizen's choice."[108] The Court further explained that even though the Louisiana statute might benefit blacks in black-dominated areas, its "vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls."[109]

Similarly, that same year, in *Tancil v. Woolls*,[110] the Supreme Court approved *per curiam* two cases from the U.S. District Court. One of these U.S. District Court cases, *Hamm v. Virginia State Board of Elections*,[111] had invalidated state-required designations of race in voting and property records, but upheld those designations in divorce decrees. In that decision, the U.S. District Court cited *Anderson* as a basis for holding that, if a statute uses racial designations, "[t]he result of the statute or policy must not tend to separate individuals by reason of difference in race or color."[112] The court also explained, however, that "the designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed *per se*."[113] As an example of a permissible racial designation, the court noted that "the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege."[114] Thus, the court concluded that designating the race of the parties in a divorce decree does not violate the

104. Anderson v. Martin, 375 U.S. 399 (1964).
105. *Id.* at 404.
106. *Id.* at 402.
107. *Id.*
108. *Id.*
109. *Id.*
110. Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam).
111. Hamm v. Va. State Bd. of Elections, 230 F. Supp. 156 (E.D.Va. 1964), *aff'd sub nom.* Tancil, 379 U.S. 19.
112. *Id.* at 157.
113. *Id.*
114. *Id.* at 158 n.5.

Equal Protection Clause, because "[v]ital statistics, obviously, are aided by denotation in the divorce decrees of the race of the parties."[115]

On the basis of these cases, scholars[116] and lower courts[117] have concluded that the Equal Protection Clause applies to race-conscious government speech. In fact, both scholars and the lower courts seem to take for granted that the *exact same* Equal Protection analysis that applies to the race-conscious distribution of benefits applies to race-conscious speech. This is evident in the four cases on the constitutionality of state governments' flying the Confederate Flag.[118]

The four Confederate flag cases were similarly resolved, upholding the constitutionality of the government flying the Confederate Flag on the grounds

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115. *Id.* at n.6.

116. For example, Laurence Tribe suggests that the *Anderson* decision stands for the proposition that the government may not engage in racially discriminatory speech if the effect on private conduct will be "inevitably discriminatory." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1481 n.9 (2d ed. 1988). Mark G. Yudof interprets the *Anderson* decision slightly differently: "While the likely effects of the disclosure of racial information are important, perhaps the real point of *Anderson* is that it is unconstitutional for the government to be in the business of advocating racial discrimination." MARK G. YODOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 262 (1983). In a recent article, Professor Helen Norton, citing *Anderson*, claims "government speech that furthers race, national origin, or gender discrimination may violate the Equal Protection Clause." Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers; Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 24 (2009). Likewise, Professor Abner Greene has claimed that although viewpoint-based government speech is generally permissible, there might be exceptions for some types of government speech, such as government speech "extolling the virtues of . . . or casting aspersions on a particular race." Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 37 (2000). For this reason, Greene contends that although the Constitution permits "government to fund decent art and refuse to fund indecent art . . . it should be considered unconstitutional for government to fund speech praising whites and refuse to fund speech praising blacks." *Id.* at 38. Catherine MacKinnon also suggests that racially discriminatory speech can violate the Equal Protection Clause; she argues that "[e]levation and denigration are all accomplished through meaningful symbols and communicative acts in which saying it is doing it." CATHARINE A. MACKINNON, ONLY WORDS 13 (1993). So "[a] sign saying "White Only" is only words, but . . . [i]t is seen as the act of segregation that it is." *Id.*

117. For example, the Third Circuit held in Hall v. Pa. State Police, 570 F.2d 86 (3d Cir. 1978), that a black plaintiff made a *prima facie* equal-protection claim by alleging that the police department had notified private banks to photograph suspicious black people on bank premises. Citing both the Supreme Court's decision in *Anderson* and the district court's opinion in *Hamm*, the Third Circuit declared that a primary purpose of the Equal Protection Clause is to eliminate "differences in treatment by the state based upon racial criteria." *Id.* at 90. Like the *Hamm* court, the Third Circuit suggested in *Hall* that though some harmless government-sponsored racial designations might be permissible, such designations that have the tendency to promote racial division are impermissible. *Id.* Under this standard, the court found that the police department's policy was unconstitutional, because "[t]he fact that the photographs were to be taken by bank employees and turned over to the police may amount to governmental stimulation of racial prejudice." *Id.* at 91.

118. Coleman v. Miller, 117 F.3d 527 (11th Cir. 1997), *cert. denied sub nom.* Goff v. Johnson, 523 U.S. 1011 (1998); NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990); Miss. Div. of the United Sons of Confederate Veterans v. Miss. State Conference of NAACP Branches, 774 So. 2d 388 (Miss. 2000); Daniels v. Harrison County Bd. of Supervisors, 722 So. 2d 136 (Miss. 1998).

that the Flag represents supposedly race-neutral messages, and therefore does not clearly discriminate on the basis of a race. As the Eleventh Circuit explained in *Coleman v. Miller*, "to some [the Confederate Flag] honors those who fought in the Civil War and to others it flies as a symbol of oppression."[119] Because these courts assumed that the Flag is race-neutral, they applied the same analysis that the Supreme Court has used to evaluate race-neutral laws that have a disproportionate impact on a racial minority.[120] Under this analysis, a race-neutral law violates the Equal Protection Clause only if there is evidence that the law disproportionately affects a particular group, and that the legislature intended to create that effect. Accordingly, the courts in these Confederate Flag cases upheld the flying of the Flag because the plaintiff did not demonstrate "'specific factual proof' in support of his claim that flying the Confederate symbol causes disproportionate racial impact."[121]

Scholars have disagreed on whether these lower courts decisions are correct under U.S. Supreme Court doctrine. For example, Sandy Levinson argues that it is permissible under the Supreme Court's Equal Protection doctrine to fly the Confederate Flag because the Flag represents many meanings, some of which are not inherently racist. As Levinson puts it, "there are simultaneously present at least two determinate meanings of the flag-as-symbol-of-slavery and the flag-as-symbol-of-Southern-culture (independent of slavery)-and-local-autonomy."[122] But some scholars disagree with Levinson on the ground that the Flag clearly represents white supremacy. For example, James Forman has argued that the Flag represents white supremacy and that governments sponsor the Flag primarily to convey this racist message.[123] Likewise, Robert Bein has suggested that state-sponsorship of the Flag violates the Equal Protection Clause because it represents the social and political exclusion of African Americans.[124] It is interesting to note that, despite their sharp disagreement about the constitutionality of state-sponsorship of the flag, all three scholars assume that the Equal Protection Clause applies to race-conscious government speech in the same way it applies to the government's race-conscious distributions of goods.

This assumption appears to be based on the notion that the Equal Protection Clause is about more than the distribution of material goods; it also entrenches a deeper and more fundamental principle – the principle that in all its functions the government must be remain at least partially blind to matters

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119. *Coleman*, 117 F.3d at 530.

120. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (upholding a Washington law because plaintiff failed to demonstrate both discriminatory intent and discriminatory effect).

121. *Id.* at 530 (citing *NAACP*, 891 F.2d at 1563).

122. LEVINSON, *supra* note 10, at 96.

123. James Forman Jr., *Driving Down Dixie: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991).

124. Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 922-23 (1998).

of race and color. Color-blindness as a constitutional principle was of course born in Justice Harlan's racially progressive dissent in *Plessy v. Ferguson*.[125] Following Harlan's lead, the Civil Rights Movement championed the principle, and it was not until many years later that the conservative legal movement began using it to support its own agenda to eradicate affirmative action. In fact, in its brief in *Anderson v. Martin*, the NAACP claimed that race-conscious government speech violates the color-blindness principle unless it consists of a merely descriptive collection of data, such as the speech represented in the U.S. Census.[126] Based on a careful examination of how various groups have appealed to color-blindness as a constitutional principle, Kull documents that "[t]he unavoidable fact is that over a period of some 125 years ending only in the late 1960s, the American civil rights movement first elaborated, then held as its unvarying political objective, a rule of law requiring the color-blind treatment of individuals."[127] Brest likewise writes that this "antidiscrimination principle rests on fundamental moral values that are widely shared in our society."[128]

As the NAACP argued in *Anderson*, if color-blindness requires the government to disregard race in how it allocates resources, it follows that it should similarly require the government to disregard race in its official speech. Based on this principle, and the consensus among courts and scholars that the Equal Protection Clause applies to government speech, there is good reason to believe that some types of race-conscious government speech constitute racial classifications and are thus subject to strict scrutiny.

What types of race-conscious government speech does this include? As the NAACP conceded in *Anderson*, it should not include all government speech that distinguishes between races for that would require the invalidation of many benign government policies. Indeed, in a multicultural nation like the U.S., race-conscious government speech is pervasive, appearing in the government's collection of population data and its endorsement of various ethnic holidays.[129]

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125. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens").

126. *See* Brief for Appellants, at 7-8, Anderson v. Martin, 375 U.S. 99 (1964) (No. 51), 1963 WL 106020, at *7-8 ("Racial differences do exist, and acknowledgement of these differences, even by the State, can occasionally serve some useful purpose. The national census, by taking note of race, contributes information of considerable value to social research. The constitutional ban on racially discriminatory state action could not be enforced if courts were truly blind to racial groupings.").

127. ANDREW KULL, THE COLOR-BLIND CONSTITUTION viii (1992).

128. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976).

129. Note, however, that some countries, such as France, have laws prohibiting the collection of race-based data. But this has led to some racially myopic public policy; for this reason, France is considering changing its law on this issue. Antoine Morris, *Next Census in France May Track Race, Ethnicity and Religion,* THE LEADERSHIP CONFERENCE, http://www.civilrights.org/archives/2009/04/255-french-census.html (last visited Nov. 21, 2010).

To distinguish between speech that should and should not be permissible under the Equal Protection Clause, the following subsection will briefly explore how the Supreme Court has addressed government efforts to construct distinct, racial spaces.

How the Court has consistently invalidated efforts to construct separate communities for people on the basis of race

The Supreme Court's decisions regarding the construction of racial spaces are important for our purposes because, like racial segregation ordinances, some race-conscious murals send the signal that certain spaces belong to certain racial groups. We therefore will be able to develop our understanding of how the Constitution applies to race-conscious murals by examining the Court's cases addressing the race-conscious creation of space.

At the outset we should cover some background ideas on the notion of space, a topic that has played a central role in urban race relations. Scholars from various disciplinary perspectives have provided theoretical[130] and empirical[131] accounts of the interactions among race, space, power, and knowledge. The most thorough legal treatment of this subject is David Delaney's *Race, Place, & The Law, 1836-1948*, in which he traces the various ways the government has sought to separate whites and blacks and demonstrates that "spatial configurations are not incidental to power relations such as those predicated on race but are integral to them."[132] Perhaps because space is intimately related to power relations, courts have consistently invalidated residential segregation efforts, even during periods in which the

130. For a theoretical account of the relationship between space, power, and knowledge, see the writings of French philosopher and social critic Michel Foucault, who has perhaps captured this relationship best – or at least has been most obsessed with it. In "Questions on Geography," he defended his "spatial obsessions" on the ground that if "knowledge can be analysed in terms of region, domain, implantation, displacement, transposition, one is able to capture the process by which knowledge functions as a form of power and disseminates the effects of power." MICHEL FOUCAULT, Questions on Geography, *in* POWER/KNOWLEDGE 146, 149 (Jeremy W. Crampton & Stuart Elden eds., Colin Gordon trans., 2007). Similarly, in his essay "The Eye of Power," Foucault wrote, "A whole history remains to be written of spaces – which would at the same time be the history of powers." MICHEL FOUCAULT, *The Eye of Power*, *in* POWER/KNOWLEDGE 63, 69 (Jeremy W. Crampton & Stuart Elden eds., Colin Gordon trans., 2007).

131. Empirical work suggests that, as Foucault might have imagined, residential segregation influences how residents perceive the world and their political power to control it. For example, Melissa Marschall and Dietlind Stolle have found that when controlled for other variables, a neighborhood's racial composition is related to whether the African-American residents display trust in strangers, with African Americans in racially segregated areas showing significantly less "generalized trust." Melissa J. Marschall & Dietlind Stolle, *Race and the City: Neighborhood Context and the Development of Generalized Trust*, 26 POL. BEHAV. 125 (2004). Likewise, Claudine Gay has documented how African Americans living in segregated areas are more likely to resent other racial groups, and to perceive racial discrimination as a significant barrier to their individual advancement. Claudine Gay, *Putting Race in Context: Identifying the Environmental Determinants of Black Racial Attitudes*, 98 AM. POL. SCI. REV. (2004).

132. DAVID DELANEY, RACE, PLACE, & THE LAW, 1836-1948, at 7 (1998).

judiciary was extremely hostile toward racial integration and equality. For example, a popular segregation technique in the early twentieth century was to prohibit blacks from buying homes in predominately white areas, and whites from buying homes in predominately black areas. Despite the popularity of such laws, various state supreme courts, such as those in Maryland,[133] North Carolina,[134] and Georgia,[135] invalidated their local residential segregation ordinances before the U.S. Supreme Court unanimously declared all racial segregation ordinances unconstitutional in *Buchanan v. Warley*.[136]

What is striking about *Buchanan* is that it was decided only 21 years after *Plessy v. Fergusson*,[137] which upheld the constitutionality of separate but equal public facilities. As Kull writes, "[b]oth the result [of *Buchanan*] and its rationale were plainly inconsistent with *Plessy* in its commonly accepted meaning."[138] Nevertheless, the Court did not so much as suggest in *Buchanan* that it intended to overrule *Plessy*. Instead, the Court circumvented *Plessy* on the ground that *Buchanan* involved segregation of where people could live, as opposed to segregation of public facilities, and thus implicated a right of a more personal and intimate nature. Writing for a unanimous Court, Justice Day expressly limited the Court's holding to residential segregation; he declared that "this attempt to prevent the alienation of the property was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution."[139] Importantly, however, the Court did not treat the issue in *Buchanan* as merely involving property rights, as the state supreme courts had done in their cases on the issue. Rather, the Court invoked the broad principle of color-blindness to declare that residential segregation is unconstitutional because the Due Process Clause prohibits the government from constructing race-based communities.

In contemporary jurisprudence, the *Buchanan* Court's reasoning would fit more neatly under the Equal Protection Clause. Nevertheless, its decision reflects ideas concerning private liberty that comport with our contemporary understanding of the Due Process Clause.[140] Most relevant for our purposes, the

133. State v. Gurry, 88 A. 228 (Md. 1913).

134. State v. Darnell, 81 S.E. 338 (N.C. 1914).

135. Carey v. City of Atlanta, 84 S.E. 456 (Ga. 1915).

136. Buchanan v. Warley, 245 U.S. 60 (1917).

137. Plessy v. Ferguson, 163 U.S. 537 (1896).

138. KULL, *supra* note 127, at 139.

139. *Buchanan*, 245 U.S. at 82.

140. For example, in analyzing the reasoning in the *Buchanan* decision, Delaney traces its discussion of property rights back to the petitioner's brief, which, in Delaney's words, "focus[ed] on the metaphorical spatiality of liberalism." DELANEY, *supra* note 132, at 129. Chief among these liberal principles was the "no-harm principle," expressly derived from John Stuart Mill's *On Liberty*. *See* JOHN STUART MILL, ON LIBERTY (4th ed. 1869). Indeed, the petitioner's brief argued that although the city had broad police powers to regulate the community, these powers "must confine themselves to prohibiting acts harmful to the community generally." *Id.* This use of Mill's no-harm principle resonates with contemporary interpretations of the Due Process Clause.

Court announced that residential segregation raises different constitutional issues than the segregation of public facilities. The decision paved the way for the proposition that the government may not use racial designations to construct racially homogenous communities.

The Court's *Buchanan* decision of course did not end residential segregation; rather, as Delaney explains, the Court's decision in *Buchanan* simply required "a different legal foundation" for whites seeking a legal mechanism to ensure they lived apart from blacks.[141] Since whites could no longer enforce residential segregation through official laws, they selected the alternative strategy of using private property documents, such as restrictive covenants, to ensure that homeowners could not sell their homes to blacks. After *Buchanan*, these racially restrictive covenants were pervasive.[142]

The Supreme Court put an end to this practice in *Shelley v. Kraemer*.[143] Drawing on its *Buchanan* decision, the Court held that although parties are generally free to contract however they wish, courts may not enforce racially restrictive covenants because "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."[144] And five years later, the Court held in *Barrows v. Jackson*[145] that courts may not award damages against parties that violate racially restrictive covenants. These decisions together held that restrictive covenants could no longer be used as a tool for maintaining residential segregation.

Unfortunately, over the years residential segregation has persisted,[146] even

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See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a Texas statute banning homosexual sodomy).

141. DELANEY, *supra* note 132, at 147.

142. For example, at one point up to 80 percent of Chicago contained such covenants. *Id.* at 151.

143. Shelley v. Kraemer, 334 U.S. 1 (1948).

144. *Id.* at 10.

145. Barrows v. Jackson, 346 US 249 (1953).

146 In their groundbreaking book, *American Apartheid: Segregation and the Making of the Underclass*, Douglas S. Massey and Nancy A. Denton used an index of segregation to measure how residential segregation in the U.S. had changed between 1970 and 1990. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). The study found that during this period black-white segregation decreased slightly, but this decrease was principally due to decreasing segregation in the West and South – *not* to decreasing segregation in the Northeastern and Midwestern inner cities. *Id.* Moreover, the nation's largest urban black communities – such as Baltimore, Detroit, and New York – remained extremely segregated, with almost a third of all blacks still living in hyper-segregated areas. *Id.* Similarly, Paul A. Jargowsky found that between 1970 and 1990, black urban poverty actually increased; and further, examining the years 1970 to 2000, he found that extreme poverty tracts (neighborhoods with 40% or more poverty) expanded geographically such that the black population in these high-poverty areas increased from under 2.5 to over 2.8 million. PAUL A. JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY (1997).

after the Court's landmark decision in *Brown v. Board of Education*,[147] prohibiting racial segregation of public education. Perhaps the Court's most dramatic decision after *Brown* on the constitutionality of residential segregation is *Hills v. Gautreaux*,[148] where the Supreme Court held that the Chicago Housing Authority had to place some Chicago public-housing units in suburban areas because the City had violated the Equal Protection Clause by placing the vast majority of its public housing in the City's black inner-city areas. Drawing from this decision, Owen Fiss derives the constitutional principle that the government has a positive obligation to help inner city residents move to more integrated communities. As Fiss writes in his recent book, *A Way Out*, "[p]erhaps the most glaring [problem in America] is the presence in our cities of communities known as ghettos."[149] To remedy this problem, Fiss concludes that the state has "an obligation . . . to eliminate a social formation that it helped create that is responsible for producing and perpetuating the black underclass."[150] Whether or not we agree with Fiss that *Hills v. Gautreaux* or any other Supreme Court decision requires the government to eliminate residential segregation, it seems that there is broad agreement that the Court's case law forbids the government to construct racially homogenous communities. The next subsection will explore how this principle relates to the constitutionality of race-conscious government speech.

How the Court's spatial jurisprudence relates to its government-speech jurisprudence

As explained *supra*, in *Anderson v. Martin*[151] the Supreme Court unanimously invalidated Louisiana's use of racial designations on election ballots because the practice "furnish[ed] a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another."[152] The Court declared that it was irrelevant whether those racial designations applied to white and black candidates alike; the fact that the government speech was likely to promote racial discrimination was "sufficient to make it invalid."[153] Also recall that in *Tancil v. Woolls*,[154] the U.S. Supreme Court affirmed *per curiam* the U.S. District Court's decision in *Hamm v. Virginia State Board of Elections*,[155] which applied the *Anderson* standard to invalidate state-required racial designations in voting and property records, but

147. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
148. Hills v. Gautreaux, 425 U.S. 284 (1976).
149. OWEN FISS, A WAY OUT 3 (2003).
150. *Id.* at 40.
151. Anderson v. Martin, 375 U.S. 399 (1964).
152. *Id.*
153. *Id.* at 403.
154. Tancil v. Woolls, 379 U.S. 19 (1964), *aff'g* Hamm v. Va. State Bd. of Elections 230 F. Supp. 156 (E.D. Va. 1964).
155. Hamm, 230 F. Supp. 156, *aff'd sub nom.* Tancil, 379 U.S. 19.

upheld the use of racial designations in divorce decrees. Citing the Supreme Court's decision in *Anderson*, the U.S. District Court held that race-conscious government speech "must not tend to separate individuals by reason of difference in race or color."[156] In other words, the court held that racial designations in voting and property records are unconstitutional because they induce people to consider race when voting and choosing residences, but racial designations in divorce decrees are constitutional because they merely serve to collect "[v]ital statistics."[157]

These cases suggest that the Equal Protection Clause marks a distinction similar to the framing-embracing distinction, described supra, that applies in Establishment Clause cases. This framing-embracing distinction provides that government speech may *frame* religion, such as when it displays the Ten Commandments to teach what the Commandments actually say, but government speech may not *embrace* religion, such as when the government displays the Ten Commandments to make a claim about theological truth.[158] Interestingly, in developing their framing-embracing distinction, Eisgruber and Sager compare government religious endorsements to government racial classifications. They even cite Justice Harlan's dissent in *Plessy* as demonstrating a "morally precocious" understanding of the "social meaning" of the government's use of criteria that influence a person's standing in a political community.[159] They argue that the government may not use religion because, as when it uses race, the government "signif[ies] who is 'in' and 'out' of competing large-scale social and ideological structures, and assign[s] powerful and pervasive judgments of identity and stature to the status of being in or out."[160]

Other scholars have elaborated on this similarity between religious and racial government speech. For example, in a recent article Gellman and Looper-Friedman urge that, when challenging the constitutionality of religious government speech, litigants should look beyond the Establishment Clause and rely also on the Equal Protection Clause.[161] Gellman and Looper-Friedman make this argument on the ground that "the injury of government religious expression is much less a question of proselytization than of treating some Americans differently from (or as if they are different from) others."[162] Therefore, Gellman and Looper-Friedman contend that the government's endorsement of religious messages "falls naturally within the purpose and

156. *Id.* at 157.

157. *Id.* at 158 n.6.

158. EISGRUBER & SAGER, *supra* note 76, at 132.

159. *Id.* at 128.

160. *Id.* at 126.

161. Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665 (2008).

162. *Id.* at 666.

scope of the Equal Protection Clause."[163] Given their belief that one purpose of the Equal Protection Clause is to prohibit government speech that "treat[s] some Americans differently from (or as if they are different from) others,"[164] it would seem to follow that they also believe that the Equal Protection Clause prohibits some types of race-conscious government speech.

Although religious government speech and race-conscious government speech are similar in many ways, there are some difficulties in applying the endorsement test to race-conscious government speech. While the distinction between embracing and framing a religious proposition is relatively clear, the distinction between embracing and framing a racial proposition appears murky. For example, does the government embrace or frame a racial proposition in collecting data about different racial groups? On the one hand, it could be argued that the government embraces race by collecting such data because it suggests that racial differences are real and meaningful, not merely socially constructed. But on the other hand, it could be argued that data collection simply describes how people see the world and does not affirm whether racial differences really exist beyond our social constructions of such distinctions.

Given the difficulty in applying the embracing-framing distinction to race-conscious government speech, a more useful way to evaluate race-conscious government speech is to recognize a distinction between *describing* and *prescribing* race. This approach is suggested in the NAACP's brief in *Anderson v. Martin*; as explained *supra*, the NAACP argued in that brief that the government should be prohibited from engaging in all types of race-conscious speech except for such speech that is merely descriptive, such as the type of racial designations present in the U.S. Census. The basis for excepting descriptive government speech from this general rule is that it is not associated with the harmfulness of racial classifications – that is, the harm of the government making people feel like insiders and outsiders on the basis of their race. Sharply contrasted with such descriptive speech is race-conscious government speech that *prescribes* an identity or mode of conduct on the basis of race, such as a sign saying that black people may not use a particular public facility. To draw from our discussion of religious government speech, we can see that when the government *describes* a racial population it is merely *framing* race, but when the government *prescribes* a particular identity or mode of conduct on the basis of race, the government is *embracing* the idea that racial differences are real and meaningful. Thus, to describe racial composition is akin to framing a religious proposition, and to prescribe identity or conduct on the basis of race is akin to embracing a religious doctrine as true.

This is not to assert that all government prescriptions of identity or conduct on the basis of race should be held unconstitutional. Some

163. *Id.*
164. *Id.*

prescriptions do not raise the insider/outsider dichotomy central to this distinction between describing and prescribing race. For example, when public schools celebrate Martin Luther King Day, the government prescribes a racial identity or mode of conduct by holding that racial integration is a social good. This message undoubtedly upsets many racial separatists in both majority and minority groups. But, as Professor Michael Dorf explains, Martin Luther King Day gives public schools "an excellent opportunity to teach lessons about the great civic value of equality."[165] Even though many groups might oppose the government's inculcation of the proposition that integration is good, it is clearly a stretch to say that the government's endorsement of Martin Luther King Day violates the Equal Protection Clause.

In contrast to such benign invocations of race, racially prescriptive government speech that targets particular spatial areas on the basis of race raises this insider/outsider dichotomy and therefore raises constitutional problems. As discussed in Part II.B.2, the Supreme Court has repeatedly held that the government may not use racial classifications to construct communities. By connecting this spatial principle to the describing-prescribing distinction we have just established, we can develop a clearer notion of what types of race-conscious government speech should be impermissible. When the government uses race-conscious speech in a prescriptive way to construct the notion that some neighborhoods belong to a particular racial group, that speech furthers the separation of races by sending the unmistakable signal that if a person does not conform to that race-based prescription, he or she is an outsider in that community. We see evidence of this principle in *Anderson v. Martin* and *Tancil v. Woolls*, where the Supreme Court invalidated race-conscious government speech for seeking to prescribe how people elected their politicians and chose their residences. It is this prescriptive linking of space, belonging, and race that the Equal Protection Clause prohibits.

Therefore, in light of the Supreme Court decisions discussed in Part II.B.1 and Part II.B.2, it seems that the constitutionality of race-conscious government speech should turn on two factors: (1) whether the speech is racially descriptive or prescriptive; and (2) whether the speech is spatially transferrable without regard to race or spatially targeted on the basis of race. Only if the race-conscious government speech is both racially prescriptive and spatially targeted on the basis of race should the speech constitute a racial classification, subject to strict scrutiny, because in this instance the speech contributes to constructing a community on the basis of race. Now that we have determined the relevant constitutional standard for race-conscious government speech, we are ready to apply this standard to particular government-sponsored murals. The next section undertakes this task.

165. Michael Dorf, The Uses of Official Holidays, DORF ON LAW (Jan. 18, 2010), http://www.dorfonlaw.org/2010/01/uses-of-official-holidays.html (last visited Nov. 19, 2010).

Applying this Equal Protection standard to race-conscious, government-sponsored murals

The least constitutionally problematic government-sponsored murals under this standard are murals that are racially descriptive (as opposed to prescriptive) and spatially transferable (as opposed to targeted). Thus, if a mural were to depict a white person in a way unrelated to his or her race, and if there were no reason to believe that the government placed that mural in a particular space because of race, then there would not be anything constitutionally problematic about that mural. A good example of such a mural is *Reach High and You Will Go Far*,[166] located in downtown Philadelphia and depicted below:

Although the *Reach High* mural features a black girl, the mural does not prescribe any identity or mode of conduct based on this racial depiction; the mural's message would be identical, or nearly identical, if the girl were a different race. Moreover, the City placed this mural in Logan Square, an area that Golden et al. describe as "an odd stretch of the city—semiresidential, semicorporate—an area without a strong or unified community identity."167

166. Joshua Sarantitis, *Reach High and You Will Go Far* (Mural), *available at* http://www.zographos.net/reachhigh.htm (last visited Nov. 28, 2010).

167. GOLDEN ET AL., *supra* note 25, at 89.

What makes Logan Square such an "odd stretch" for this mural is that Logan Square is not a predominantly black part of Philadelphia, whereas almost all Philadelphia murals depicting black people are placed in predominantly black areas of the City. In fact, it is so unusual for a mural depicting a black person to be placed in a non-black area like Logan Square that, as Golden et al. recount, a local community group "made reference to the girl's skin color" in "deem[ing] the painting inappropriate" for "a 'prosperous' neighborhood."[168] Despite the race-based controversy the *Reach High* mural caused, it is absolutely devoid of constitutional defects, because the City clearly demonstrated that it was not targeting a black area, and by positioning the girl in a race-neutral context, the City did not prescribe any sort of identity or mode of conduct on the basis of her race.

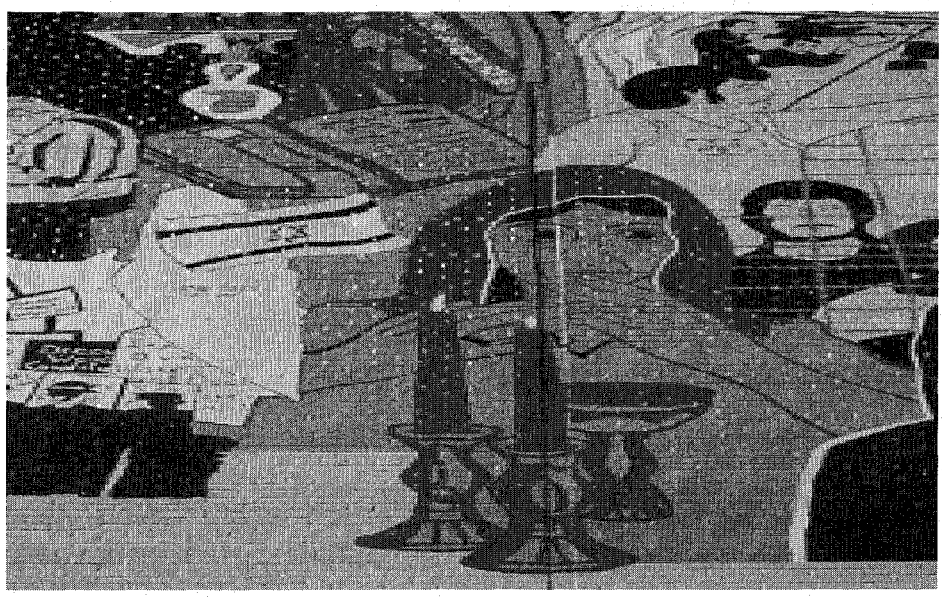
A more constitutionally suspect, but still permissible, race-conscious mural would commit the vice of prescribing a racial identity or mode of conduct, but would be saved by the fact that the government would place that type of mural in any area without regard to race. There are very few examples of such murals – which should be obvious based on the response to the *Reach High* mural. Given that a seemingly uncontroversial mural like the *Reach High* mural stirred up a protest from white residents simply because the mural depicted a black person, it would seem that the response would be much more intense if the government placed an African-themed mural in such an area. For this reason, such murals are almost always placed only in the most segregated black parts of town. The rare exceptions to this rule arise in so-called "transitional areas," such as the Lower East Side in New York City, where "blacks and Latins have moved in among the remnants of the old Jewish and Italian immigrant communities."[169] In 1972, Cityarts helped create a mural, *Arise from Oppression*, which depicted black and brown figures emerging from bondage. This mural was placed on the Henry Street Playhouse, directly across from the Bialystoker House, a Jewish home for the elderly. The Jewish residents objected to the mural, and in response, Cityarts helped create on the Bialystoker House a "historical-cultural mural on the struggle of the Jewish immigrant masses."[170] This mural, the *Jewish Ethnic Mural*, is still on that wall. A segment of the mural is shown on the following page: [171]

168. *Id.*

169. COCKCROFT, *supra* note 3, at 94.

170. *Id.* at 95.

171. *Jewish Ethnic Mural* (Mural), *available at* http://www.flickr.com/photos/31875952@N02/2984875298/in/set-72157608485892503/ (last visited Nov. 28, 2010).



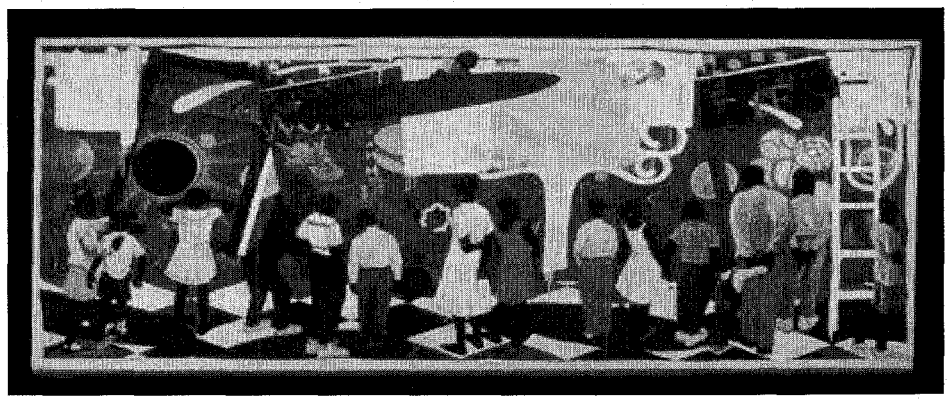
Although this is just a small section of the mural, many Jewish symbols are apparent, including the Hebrew letters and the Israeli flag. Not visible in the image is the statement, "Our strength is our heritage, our heritage is our life," which appears in the far right corner of the mural. This mural clearly prescribes what it means to be Jewish. According to the mural, to be Jewish is to care about one's heritage, to be devoted to Israel, and to be familiar with Hebrew.[172] Nevertheless, even if this mural represented government speech,[173] it might not violate the Equal Protection standard proposed in this article because, although the mural is placed on a predominantly Jewish building, the larger community itself is not predominantly Jewish. This highlights one difficulty in applying the standard – the difficulty of identifying the relevant community.

More common are race-conscious murals that have the opposite combination of factors – that is, they commit the vice of spatially targeting a racially segregated part of a city, but are saved by the fact that they merely describe or frame the racial composition of the area. The most benign mural in this category is the mural that features anonymous figures belonging to the majority group in that area. For example, many murals in Chinatowns feature images of unidentified Chinese people. These murals are permissible because they do not represent an idea of what Chinese people *should* be doing, but instead depict Chinese people simply being people.

172. As discussed in text accompanying note 94, this mural would likely violate the Establishment Clause– that is, if the mural represented government speech.

173. It is unclear whether this New York mural represents government speech because many New York murals were not controlled by the government.

Similarly, if a mural depicts a particular race doing something related to the building on which the mural is placed, then that mural is likely permissible because it is likely not prescribing an identity or conduct on the basis of race, but rather describing the function of that building. For example, if a mural on the wall of a library depicted black people reading books, that mural would not be prescribing black people to read more, but rather would be describing what people regularly do in the library. A well-known Chicago mural, *Knowledge and Wonder*,[174] shown below, illustrates this distinction nicely:



This mural, placed on the Henry E. Legler Regional Library, depicts black people but does not prescribe anything about what it means to be a black person. The mural simply describes how young people, regardless of race, view and use the library. In the artist's words, the mural presents "the kinds of things that young minds think and dream of."[175]

A more complicated, but still permissible, mural in this category is a mural that depicts historical figures. If a mural simply depicted historical figures who have a special relationship to a particular area, such as figures born in that community, then there would be a race-neutral basis for the mural, even if the depicted figures were of the same race as the majority of the people in that area.[176] By contrast, if a mural depicted such historical figures not because of their relationship to the area but because they represent a particular racial theme, then there would be a tougher question about whether the mural was prescribing an identity or mode of conduct on the basis of race. For example, the *Wall of Respect*, discussed above, and the subsequent murals that adopted

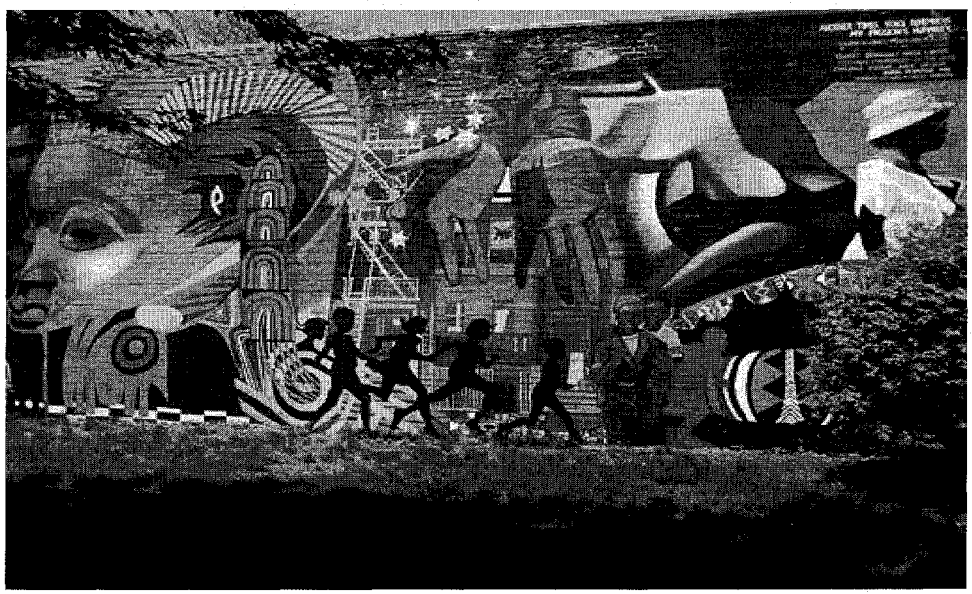
174. Kerry James Marshall, *Knowledge and Wonder*, EXPLORE CHICAGO, http://www.explorechicago.org/city/en/things_see_do/attractions/tourism/knowledge_and_wonder.html. *See also* GRAY, *supra* note 15, at 110-11.

175. *Id.* at 111.

176. Note how this reasoning is similar to how it is permissible under the Establishment Clause for the government to display religious messages if they have some link to the American tradition. In Eisgruber and Sager's language, such traditionally grounded religious messages are framed as historically relevant rather than embraced as truth. *See* EISGRUBER & SAGER, *supra* note 76.

its theme, featured radical black political and religious leaders in an effort to instill racial pride in black residents. Nevertheless, although there is a plausible argument that these murals prescribe an identity or mode of conduct on the basis of race by conveying the message that black people should be proud of being black and thus should be militant in opposing racial oppression, these murals are likely permissible because they seem to say more about what the depicted historical figures represent than about what black people in the community should believe themselves.

The only race-conscious murals that should be subject to strict scrutiny are those murals that both spatially target racially segregated areas and prescribe an identity or mode of conduct on the basis of race. There are many such murals, particularly in cities with significant low-income communities consisting primarily of African Americans. For example, the mural, *Another Time's Voice Remembers My Passion's Humanity*,[177] featured below, is painted on the Elliott Donnelley Youth Center in a black area of Chicago:



As the artist describes the mural's meaning, it is "a statement of strength within family and community,"[178] and to convey this statement, the mural uses "one of the ancient traditions of family – the Kente,"[179] which is "only worn on very special first-time occasions – baptism, deaths, births, weddings, etc."[180] Like the Jewish mural depicted above, this mural prescribes a race-based meaning: It sends the message that to be black is to care about family in a way

177. This image is provided by Chicago Public Art Group, Community Public Art Guide, http://www.cpag.net/guide/2/2_pages/2_6_08.htm (last visited Nov. 28, 2010).

178. PRIGOFF & DUNITZ, *supra* note 3, at 78.

179. *Id.*

180. *Id.*

that draws from African traditions. Accordingly, because this mural appears to be government speech,[181] it would be subject to strict scrutiny under the proposed Equal Protection standard, and likely would not pass muster. There are many similar murals in low-income, black areas, and many of these murals would also be unconstitutional under the Equal Protection standard proposed in this article.

Even without such a pronounced African theme, a mural might still violate the Equal Protection Clause by linking a racial identity with a particular family structure. An example of such a mural is the Chicago mural, *Pyramids of Power: The Black Family*,[182] which is a ceramic tile mosaic placed on the Henry Booth House, a building that serves the surrounding public housing project. The image, shown below, profiles a black family consisting of one father, one mother, and one child:

As the Chicago Public Art Group describes the mural, it "consists of three interlocking pyramids and other symbolic elements to suggest the stability, strength, and structure of family."[183] The Chicago Public Art Group also contends that "[w]hile the piece honors single-parent households, it also affirms the need for men and women to work together to raise children."[184] It is difficult to see how the mural honors single-parent households, since the mural

181. Recall that a mural is government speech *per se* if it is both funded by the government and placed on government property. The upper right corner of the mural explains that the Elliott Donnelley Youth Center, the National Endowment of the Arts, and the Chicago Public Art group funded the mural. Moreover, the mural was painted on the Elliott Donnelley Youth Center; the youth center is part of the Chicago Neighborhood Learning Network, which is administered by the Chicago Public Schools Office of School and Community Relations. Chicago Neighborhood Leaning Network, http://www.cnln.cps.k12.il.us/ (last visited Nov. 28, 2010).

182. This image is provided by Chicago Public Art Group, Community Public Art Guide, http://www.cpag.net/guide/3/3_pages/3_4_16.htm (last visited Nov. 28, 2010).

183. *Id.*

184. *Id.*

seems to declare that a strong family requires two parents, but it is easy to see how the mural conveys the message that men and women must work together to raise children. Moreover, the mural clearly conveys this message in a racially prescriptive way; it expresses the idea that the black family *should* look a certain way. Indeed, the very title of the mural, *Pyramids of Power: The Black Family*, makes this clear. The mural thus targets a black community – namely, the residents of a predominantly black public-housing project – with the message that men and women should marry and stay together to raise children. While it may be permissible for the government to convey this message about family by using a race-neutral theme, or by using this same mural but not placing it in a location that suggests it is targeting the black community, the Equal Protection Clause precludes the government from promoting a message in such a way that suggests that it is a matter of public policy to encourage black parents to take care of their children.

CONCLUSION

This article demonstrates that many types of government-sponsored murals violate the Establishment Clause by embracing religious propositions as true, and violate the Equal Protection Clause by targeting hyper-segregated areas with messages that prescribe an identity or mode of conduct on the basis of race. Given the pervasiveness of constitutionally suspect murals, one might wonder, as mentioned in the Introduction, why there has never been a case involving a mural's constitutionality. The lack of Article III standing is not a persuasive explanation; almost anyone who regularly walks or drives by such a mural would have standing to challenge the constitutionality of a religious mural under the Establishment Clause. This logic would also seem to apply to challenges to murals under the Equal Protection Clause, as evinced in the Confederate Flag cases.

The likely answer is that people in low-income, urban areas generally do not know or care about such constitutional violations, and that people outside these communities do not know or care about inner-city murals. In other words, the complex interplay among race, space, power, and knowledge has made it such that hyper-segregated, low-income communities are isolated, not only from jobs and opportunities, but also from constitutional norms. And this interplay has also made it such that wealthier and whiter communities – where people do generally have the resources to know and care about these constitutional norms – do not ever see these murals, because the murals are lodged away in areas cut off from the dominant culture. Thus, while the nation fights over the constitutionality of Ten Commandment monuments and the Pledge of Allegiance, the government is adopting even more sectarian religious messages in inner cities; similarly, while the nation fights over race-conscious university admissions policies, the government is adopting race-conscious

messages in inner cities – without being subject to any constitutional scrutiny in the process.

Murals reveal the inconsistencies in our constitutional sensibilities. Liberals might approve of race-conscious murals, because they believe that race-conscious measures designed for benevolent purposes, such as affirmative-action programs, are generally constitutional. But religious murals should bother liberals, since they generally support a much stricter separation between church and state than do conservatives. In contrast, many conservatives might approve of religious murals because they believe that government may, and even should, promote religious messages. But race-conscious murals should upset conservatives, since they often argue that the Constitution requires strict color-blindness. Both liberals and conservatives should be complaining that murals are violating their most sacred constitutional norms, but neither side is.

In a sense, then, this article underscores how inner cities are treated as extra-constitutional zones. Just as law-enforcement officers in inner cities act in ways that would be condemned elsewhere, so too government engages in speech in inner cities in ways that would be condemned as unconstitutional in affluent areas. This substantially undermines our commitment to the rule of law. After all, what do constitutional norms mean if we apply and interpret them in racially and spatially bound ways? Moreover, what does it say about our commitment to racial equality if racial minorities have been able to obtain murals from their local governments, but have not been able to get more financially useful goods, such as jobs and social-service programs, even when the mayor and city council members are also minorities? Although racial minorities initiated the Mural Movement, it appears that local governments have appropriated it, using murals to placate the poorest and most needy communities, as though cultural symbols were reasonable substitutes for material goods. Not only are these symbols inadequate replacements for economic and social equality, but they may be unconstitutional, too.