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“RECOGNIZING RACE” AND THE ELUSIVE IDEAL OF RACIAL NEUTRALITY

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Response to: Justin Driver, Recognizing Race, 112 Colum. L. Rev. 404 (2012).

I

In 1960, Louisiana enacted a statute requiring that the race of any candidate for office be listed on the ballot opposite the candidate’s name.¹ In *Anderson v. Martin*,² the Supreme Court had no difficulty declaring that statute unconstitutional. The Court said that the case had “nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate”³ The problem, the Court said, was that “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, which may decisively influence the citizen to cast his ballot along racial lines.”⁴ The Court also rejected the argument that the statute “is nondiscriminatory because the labeling provision applies equally” to persons of all races.⁵ “[W]e view the alleged equality as superficial,” the Court said.⁶ “Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid.”⁷

The decision in *Anderson v. Martin* was obviously right. In context, the Louisiana law was part of a system of racial discrimination against African Americans, as the Court recognized when it declared the “alleged equality” to be “superficial.”⁸ Beyond that, it seems very problematic for a state, in any

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1. See *Anderson v. Martin*, 375 U.S. 399, 401 (1964).

2. *Id.* at 404.

3. *Id.* at 402.

4. *Id.*

5. *Id.* at 403.

6. *Id.* at 404.

7. *Id.*

8. *Id.*; see also *id.* (“Obviously, Louisiana may not bar Negro citizens from offering themselves as candidates for public office And that which cannot be done by express

circumstances, to list a candidate's race on the ballot. That would be true even if other things were listed—for example, a candidate's party affiliation (as is routinely done), a candidate's position on a critical issue (as has sometimes been done),⁹ a slogan of the candidate's choosing, the candidate's home town within the election district, or other bits of information that might influence a voter. Race, and some other characteristics (like religion), still seem off-limits.

But why, exactly? What is the principle underlying *Anderson v. Martin*, and how far does it extend? Candidates' races seem to matter to voters, as the Court in *Anderson* implicitly acknowledged. And it is certainly not always a bad thing to take note of a candidate's race. Senator John McCain's concession speech in 2008, when he lost the presidential election to then-Senator Obama, talked about the significance of Senator Obama's race, explicitly and movingly. The message that Senator McCain conveyed was as far removed from what the Court imputed to the Louisiana statute as it is possible for something to be.¹⁰ It is certainly wrong to say that people's race should always be emphasized—always be brought before our eyes—but it also seems mistaken to say that it should never be.

Professor Justin Driver's thoughtful and elegant Essay¹¹ can be seen as a meditation on these questions. The Essay displays the characteristic virtues of its author's work.¹² It tackles a subject that has not been systematically

statutory provision cannot be done by indirection.”)

9. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1497–98 (2001) (discussing use of ballot notations in state legislative elections to bring about, in effect, popular election of U.S. senators before adoption of Seventeenth Amendment); Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 Va. L. Rev. 1533 (1999) (discussing use of ballot notations to encourage elected officials to support term limits); see also *Cook v. Gralike*, 531 U.S. 510 (2001) (holding unconstitutional state-mandated ballot notation designed to encourage members of Congress to vote for term limits).

10. Senator McCain said:

This is an historic election, and I recognize the special significance it has for African Americans and for the special pride that must be theirs tonight. . . . A century ago, President Theodore Roosevelt's invitation of Booker T. Washington to visit—to dine at the White House was taken as an outrage in many quarters. America today is a world away from the cruel and prideful bigotry of that time. There is no better evidence of this than the election of an African American to the presidency of the United States. Let there be no reason now—(cheers, applause)—let there be no reason now for any American to fail to cherish their citizenship in this, the greatest nation on Earth. (Cheers, applause.) Senator Obama has achieved a great thing for himself and for his country.

Senator John McCain, *Speech Conceding Presidential Election* (Nov. 4, 2008) (transcript available at <http://www.nytimes.com/2008/11/04/us/politics/04text-mccain.html?pagewanted=all>) (on file with the *Columbia Law Review*).

11. *Recognizing Race*, 112 Colum. L. Rev. 404 (2012) [hereinafter *Driver, Recognizing Race*].

12. See generally Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 Calif. L. Rev. 1101 (2012) (arguing that scholarship has overlooked conservative Warren Court decisions) [hereinafter *Driver, Constitutional Conservatism*]; Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 Nw. U. L. Rev. 149 (2011) (offering analysis and criticism of “interest-convergence” theory of Civil Rights Era decisions); Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 Sup. Ct. Rev. 345 (arguing that theory of “living constitutionalism” must account for purposeful breaks with precedent).

investigated, but should be. It gives us a careful and illuminating picture of the historical context, where that's relevant. And its sharp analytical insights are beholden to no preconceptions. Professor Driver follows the arguments where they lead.

Professor Driver is concerned specifically with judicial opinions. His question is: In what circumstances should opinions identify the race of the individuals involved? Anyone hoping for an unequivocal answer—"routinely" or "never"—will be disappointed. Rather than trying to give that kind of answer—which would be sure to be wrong, as Professor Driver shows—he describes how the question should be approached. He wants judges to be reflective, not instinctive, about when they mention race. He wants them to be sure they have thought through the reasons for identifying the race of the people they discuss in their opinions, and the implications of doing so.

Professor Driver also wants judges not just to have reasons for mentioning race, but to articulate those reasons. That is a separate and important idea. An inability to articulate one's reasons for doing something does not mean that there are no good reasons. The ability to make good judgments may outrun one's ability to explain why they are good judgments.¹³ But in the case of judgments about when race should be mentioned in an opinion, I think Professor Driver is right to say that the reasons should be articulable. Most people's intuitive judgments about race are not fully trustworthy, and a requirement that reasons be articulated will hold those judgments up to a critical light.

In this connection, I would emphasize, even more than Professor Driver does, the effect that this exercise—specifically explaining why an individual's race is being mentioned—will have on judges. Professor Driver is also concerned with the effect that referring to race will have on the audience, and properly so. But very few judicial opinions are widely read by the public at large. The principal effect of Professor Driver's suggestions, if they were adopted, might be to bring about an extended version of what he calls the "intrinsic" benefits.¹⁴ Specifically, judges would be more aware generally of how their attitudes affect decisions about race. Ideally, judges—if they thought about why they were recognizing race whenever they did and spelled out their reasons—would become more critical of the predispositions and blind spots that they, like everyone else, have about race. In that way, the effects of the greater judicial self-consciousness that Professor Driver advocates will propagate beyond the opinions in which race might be mentioned explicitly. In principle, that greater self-awareness might influence judges' work across the wide range of cases that, in one way or another, are related to American race relations.

13. This is, I believe, a central theme of, for example, Michael Oakeshott, *Rationalism in Politics*, in *Rationalism in Politics and Other Essays* 5, 8 (1991) (describing "practical" knowledge as one that "is not reflective and (unlike technique) cannot be formulated in rules").

14. See Driver, *Recognizing Race*, *supra* note 11, at 440 ("[J]udges would be required to exhibit more thought when they write race-conscious decisions. Increased thought regarding such matters, though not free of potential downsides, could dramatically improve the current state of racial recognition.").

II

Professor Driver's Essay also raises a more fundamental question, one to which he adverts in his distinction between "anticlassification" and "colorblindness."¹⁵ That is a question about what it means to treat race in a neutral way. The notion of racial neutrality shows up, of course, in many contexts, notably in debates about affirmative action. Those debates are often framed as a choice between maintaining racial neutrality, on the one hand, and introducing race consciousness in order to benefit minority groups, on the other. Professor Driver implicitly raises the question whether the notion of racial neutrality is a useful one.

Specifically, one could imagine a skeptical response to Professor Driver's Essay that takes the form of asking: What is special about mentioning race in an opinion? Judges mention, or decline to mention, many personal characteristics of the people they discuss in their opinions. Sometimes it is appropriate to refer to an individual's age, or wealth, or marital status, or physical appearance; sometimes it is not. Judges—this skeptic might say—should just treat race as they would treat any other demographic characteristic. Sometimes personal attributes like these are relevant; but sometimes mentioning them would be, in Professor Driver's word, gratuitous. If they are relevant, then, other things equal, they should not be mentioned asymmetrically. Sometimes mentioning these characteristics might make an opinion more interesting, just as a piece of storytelling; but then there may be a risk of encouraging stereotyping or prejudice. All of these things are true of other characteristics besides race, so why not treat all those characteristics in the same way?

There is something appealing about this idea, and I think Professor Driver's arguments can be seen, in part, as addressing the broader question of when any personal characteristics should be mentioned in judicial opinions. But we still need an account that gives us the analysis and context that Driver provides, because just saying "treat race like any other characteristic" is mostly unhelpful. Race in American society is different from other characteristics in ways that are undeniable, and the implications of those differences are not easy to specify. That, in turn, draws into question some familiar distinctions, such as the distinction between race-consciousness and race-neutrality. This, I believe, is Professor Driver's point in making the distinction between colorblindness and anticlassification.

This point can be illustrated by the opinions in *Batson v. Kentucky*¹⁶ and later cases that extended its holding. In *Batson*, which was decided in 1986, the Supreme Court ruled that a prosecutor may not use a prospective juror's race as the basis for a peremptory challenge.¹⁷ Subsequent cases extended *Batson* beyond criminal to civil cases, and to defense lawyers (and to gender-based

15. *Id.* at 450–56.

16. 476 U.S. 79 (1986).

17. See *id.* at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

challenges, too).¹⁸ On the one hand, the holdings of these cases seem preordained. The Court held in 1880 that a state may not enact a statute excluding blacks from jury service.¹⁹ Why should the government be able to do at retail what it cannot do on a wholesale basis? In 1965, the Supreme Court, in *Swain v. Alabama*, refused to bar prosecutors from using race-based peremptory challenges,²⁰ and that decision was widely, and justifiably, criticized.²¹

On the other hand, there are some legitimate questions, both analytical and practical, about the *Batson* line of cases (questions that, ironically, are more legitimate now than they were at the time of *Swain*). Justice Rehnquist's dissent in *Batson* identified the analytical issues:

[T]here is simply nothing “unequal” about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most certainly has not explained—how their use violates the Equal Protection Clause.²²

Justice Thomas's dissent in *Georgia v. McCollum*, which extended the *Batson* rule to defense counsel,²³ raises the practical question. Justice Thomas asserted that “black criminal defendants will rue the day” that the Court began to subject peremptory challenges to the *Batson* rule, because that rule will prevent their lawyers from defending their interests as fully as they otherwise would.²⁴ Lawyers who use a peremptory challenge to excuse a prospective juror are doing so because they think their client's interests will be served by not having that person on the jury. At least that seems to be a safe general assumption, most of the time, today: A lawyer who used a peremptory challenge to indulge his or her own prejudices, at the expense of the client's

18. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (extending *Batson* to gender-based peremptory challenges); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (criminal defendants); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (private litigants in civil litigation); see also *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that excluded juror and defendant need not be of same race).

19. *Strauder v. West Virginia*, 100 U.S. 303, 309–12 (1880).

20. See 380 U.S. 202, 221–22 (1965) (“To subject the prosecutor's challenge in any particular case to the demands . . . of the Equal Protection Clause would entail a radical change in the nature . . . of the challenge. The challenge . . . would no longer be peremptory, each and every challenge being open to examination . . .”).

21. See Driver, *Constitutional Conservatism*, supra note 12, at 1130–39 (criticizing *Swain* and citing contemporary critics).

22. 476 U.S. at 137–38 (Rehnquist, J., dissenting) (footnote omitted).

23. 505 U.S. at 59.

24. *Id.* at 60–61.

interests, would be guilty of grievous malpractice, and probably today—unlike at the time of *Swain*—there does not seem to be any reason to suspect that such an unreconstructed form of prejudice is common. But this means that the *Batson* rule has real costs to parties. They cannot take full advantage of their peremptory challenges, when the reason for exercising some of them is based on a prospective juror's race.

The dissenters' position, in other words, is that the *Batson* line of cases reflects a mistaken idea about racial neutrality. Race neutrality, according to then-Justice Rehnquist and Justice Thomas, consists of treating race like any other characteristic. In deciding whom to challenge, lawyers make (in Justice Rehnquist's words) "seat-of-the-pants" and sometimes "crudely stereotypical" judgments about any number of traits—a prospective juror's job, education level, even clothing style. True racial neutrality, the dissenters would say, consists of just adding race to that list—treating it like everything else. And *Batson*'s mistaken departure from that conception of racial neutrality inflicts real harms on people—criminal defendants and other litigants—who should not have to bear those costs.

It is not obvious why the dissenters' argument is wrong. On the other hand, it is certainly not obviously right, either. For one thing, the dissenters assume that lawyers may take advantage of prospective jurors' likely prejudices when they are choosing a jury: They can try to pack the jury with jurors who will be inclined, without having heard any evidence, to be sympathetic to their client or unsympathetic to their opponent. This is a common strategy, and presumably it is acceptable in certain circumstances, but it was certainly not acceptable for prosecutors in the Jim Crow South—where *Swain* arose—to exclude African-Americans from the trial of an African-American accused of raping a white woman. That is one way in which race, in certain contexts at least, is not like other characteristics.

More abstractly, Justice Rehnquist's argument is an echo of the claim that the Court brushed aside in *Anderson v. Martin*. If the same regime (identifying candidates' race, or allowing race-based challenges) applies to everyone, why does it matter that that regime does not ignore the race of the people involved? To put the point in general terms, the dissents from the *Batson* approach are defending what is usually called racial profiling. A lawyer who uses a race-based peremptory challenge is engaged in a form of profiling. The argument in defense of profiling—or, to use a less loaded term, in defense of statistical discrimination—is that sometimes race correlates with a characteristic that can legitimately be considered in making a decision: a prospective juror's likely inclinations (in the case of peremptory challenges), or the likelihood that an individual will be engaged in some form of unlawful activity (in the case of police profiling of alleged suspects). In such instances, the argument goes, it may be rational for an unbiased actor to take race into account; that may be the best way to achieve the legitimate objective. The law should not forbid that kind of use of race, according to this argument, and if it does, it will impose unnecessary costs—on litigants, or on those who will pay for reduced police efficiency or increased law violation.

But profiling, of course, is widely rejected, and the rejection of statistical

discrimination is the core of the rule of the *Batson* line of cases. Those cases have a different conception of race neutrality: It consists not in treating race like everything else, but rather of not allowing race to affect a particular decision, like a decision about who will serve on a jury. The law is quite consistent on this point—statistical discrimination is treated as impermissible in nearly every context.²⁵ But the difficulty of the issue is not acknowledged very often. One unusually candid example is in Justice O'Connor's concurring opinion in the case that extended the *Batson* rule to gender-based peremptory challenges:

Nor is the value of the peremptory challenge to the litigant diminished when the peremptory is exercised in a gender-based manner. We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. . . . [O]ne need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. . . .

Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. I previously have said with regard to *Batson*: "That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a . . . statement about what this Nation stands for, rather than a statement of fact." . . . Though we gain much from this statement, we cannot ignore what we lose. In extending *Batson* to gender we have . . . diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.²⁶

The rejection of statistical discrimination rests on the premise that race is not like everything else: that in order to have true racial neutrality, we have to treat race differently from other things. But this is not the only plausible conception of racial neutrality. This is, I think, Professor Driver's point in distinguishing "anticlassification" from "colorblindness." The anticlassification principle forbids the government "from racially categorizing individuals."²⁷ But it allows one to "acknowledge the racial dynamics that exist in society."²⁸ Colorblindness, by contrast, "forbid[s] the government from taking account of racial considerations among not only individuals, but

25. See, e.g., Samuel R. Bagenstos, "Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights, 89 Va. L. Rev. 825, 851 (2003) ("[I]t is clear that the law forbids statistical discrimination even in cases where it is efficient for the employer to engage in that conduct . . ." (citing *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716–17 (1978))).

26. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148–50 (1994) (O'Connor, J., concurring) (citations omitted) (quoting *Brown v. North Carolina*, 479 U.S. 940, 941–42 (1986) (O'Connor, J., concurring in denial of certiorari)).

27. Driver, *Recognizing Race*, supra note 11, at 451.

28. *Id.*

within *society* as a whole.”²⁹

Professor Driver’s account acknowledges the attractiveness of each of these conceptions, without pretending that the choice between them is simple. His insistence that judges avoid gratuitous or asymmetrical references to race, and that they be self-conscious about the use of racial identifiers, reflects the value of the approach taken in *Batson* and in the principles that forbid racial profiling. It is all too easy to slip into using race when it is not necessary, or without a full understanding of the costs of using it. That is true of profiling, just as it is true of recognizing race in an opinion. But Professor Driver also acknowledges the value of judicial opinions that identify the larger racial dimensions of an issue, something that can be done without identifying the race of the parties.³⁰ Indeed, as Professor Driver suggests, sometimes it will be more effective to address the effect that a legal principle or a government practice has on minority groups in a case that does not involve a member of a minority group.³¹

Professor Driver’s recognition of the value of both of these ways of dealing with race is one of the strengths of his argument, and it suggests a more general point about when government actors—not just judges—may properly take race into account. Too often, that issue is analyzed on the basis of relatively simple ideas about race: that the recognition of race is an unfortunate thing, that it should be allowed as little as possible, and that we should move as quickly as possible to a system in which it is not allowed. But matters are more complicated than that. It is not even clear what it would mean to refuse to recognize race. Treating race like other characteristics might mean recognizing it often in individual cases. But a refusal to recognize race in individual cases means that we are incurring costs because we know that race presents special issues in our society. Professor Driver’s prescriptions about when people’s race should be identified in judicial opinions are that judges should be nuanced, self-aware, principled, and attuned to the specifics of the situation. It is hard to think of a better way for dealing with any of the issues that arise about the government’s use of race.

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29. *Id.*

30. *Id.* at 451–52.

31. See, e.g., *id.* at 443–46 (“Many persistent problems of inequality that have disproportionately large impacts on racial minorities may not be alleviated even by the eradication of racial prejudice. Accordingly, individuals who remain concerned about racial inequality may be well advised to contemplate advocating nonracial remedies.” (footnote omitted)); *id.* at 452–54 (“A particular legal problem may have a significant racial dimension, even if the case on which the Court grants certiorari does not involve a member of the racial group most commonly identified with that problem.”).