

## Putting Down: Expressive Subordination and Equal Protection

Jeffrey S. Helmreich



### ABSTRACT

William M. Carter, Jr., divides race-conscious policies into those that concretely disadvantage minorities and those that do not subordinate them at all, but merely express the policymaker's race-consciousness. The main aim of this Article is to introduce a third category that his dichotomy excludes: race-conscious policies that amount to expressive subordination. To subordinate people expressively is to treat them as inferior, even when doing so imposes no concrete disadvantage. For example, state action that targets racial minorities in an insulting way (such as granting them free assimilation programs or directing police to discreetly check their license plates) constitutes expressive subordination, regardless of what further harm it inflicts. And, I argue, strict equal protection scrutiny is no less appropriate for such policies than for more concrete forms of racial subordination.

### AUTHOR

Jeffrey Helmreich is a Ph.D. Candidate in Philosophy at UCLA and a Program on Negotiation Research Fellow at Harvard Law School.

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## TABLE OF CONTENTS

INTRODUCTION .....	114
I. MISTREATING OR MESSAGE-SENDING? .....	115
II. EXPRESSIVE SUBORDINATION .....	118
III. MAJORITARIAN DEMOCRACY .....	121
IV. DOES THE COLORBLINDNESS DOCTRINE TARGET EXPRESSIVE SUBORDINATION? .....	123
CONCLUSION .....	126

## INTRODUCTION

Where, exactly, does the harm lie in treating people differently because of their race? The question seems at first too obvious to consider, because there are too many places to look: From the concrete disadvantages that flow from discrimination, to the symbolic assault on communities, to the disrespect shown to each individual as an equal, to the way these various indignities reinforce each other, the harm is ever present. Yet equal protection jurisprudence has historically converged on a few central features of unequal treatment.<sup>1</sup> One of them was subordination—disadvantaging certain people or treating them as inferior because of their membership in a distinct community.<sup>2</sup> Race-based subordination was historically one of the threads binding the dozens of suspect firings, demotions, and educational policies that drew equal protection scrutiny.

Yet, as William Carter, Jr., captures in his subtle analysis of recent equal protection jurisprudence, the U.S. Supreme Court has all but replaced subordination theory with the well-known colorblindness doctrine.<sup>3</sup> The doctrine stands for the view that any race-conscious government action is by definition unconstitutional. Affirmative action would be a classic example of race-conscious action, but so would policies that confer no advantage or disadvantage. Under the colorblindness doctrine, if a mayor of a racially diverse but white-led city set up a new position—Commissioner of African American Equality—to *counteract* any de facto subordination, the position would be unconstitutional in its racially motivated design (even if anyone could hold it).

Carter argues forcefully against the shift to colorblindness. His novel and innovative thesis has three points at its core: First, race-conscious action, in itself, need not disadvantage anyone; nobody loses out if a Commissioner of African American Equality is appointed. Second, where no disadvantage results from a policy, its only plausible injury lies in the message it sends, such as the claim that race matters in society. Indeed, posits Carter, that message is the true target of the Supreme Court's colorblindness doctrine.<sup>4</sup> The third point is normative: Government messages should not be challenged by courts when they are produced and correctible by the ordinary democratic process. According to

1. See, e.g., Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (citing “antisubordination,” “anticlassification,” and “antibalkanization” as the three primary targets of equal protection scrutiny).
2. *Id.* at 1281; see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (interpreting equal protection jurisprudence in part as targeting policies that disadvantage a group by preserving or exacerbating its subordinate status).
3. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2 (2011).
4. *Id.* at 6, 29–31.

Carter, if we disagree with the government's stance on the impact of race then we should talk with our votes, ideally after a fruitful and informative public debate.<sup>5</sup>

The point I want to challenge, and where I will focus most of my discussion, is the second one. Carter assumes that race-conscious action can harm in only two ways: imposing a concrete disadvantage (such as denying promotion) based on race, or else broadcasting a racially loaded message (such as denying post-racialism). What follows are two replies: First, this dichotomy excludes a crucial third category, which I will call "expressive subordination." To subordinate someone *expressively* is to treat her as inferior or subordinate, even when doing so sends no particular message and inflicts no material harm. For example, a law enforcement policy tacitly targeting members of only one race, searching their cars alone for evidence of theft, would treat people of that race as more suspect than others—even if it yielded no arrests, stigma, or inconvenience to anyone. A policy like this would inflict expressive subordination. Second, as with all acts of subordination, racially expressive subordination is not well regulated by majoritarian democracy, as its victims tend to have insufficient voting strength to overturn popularly sanctioned policies.

This Article proceeds in four parts. First, Part I sets out the dichotomy that Carter posits between policies that disadvantage people, on the one hand, and those that merely send messages, on the other, and explains his reasoning for restricting equal protection scrutiny to the former. Next, Part II introduces the harm that his analysis excludes—that of expressive subordination. Part III shows why, despite its lack of material impact, expressive subordination does not fit Carter's rationale for relaxing strict scrutiny. Finally, returning to Carter's critique of colorblindness, Part IV shows why race-conscious action need not amount to expressive subordination, in any event. Consequently, this Article shares Carter's disagreement with the colorblindness doctrine but rejects part of his reasoning for it.

### I. MISTREATING OR MESSAGE-SENDING?

The Supreme Court's colorblindness doctrine is reflected in several cases that draw Carter's attention. In *Shaw v. Reno*,<sup>6</sup> for example, the North Carolina legislature voted to create a district where, unlike most others in the state, African Americans would be a majority. The policy aimed to redress the legislative underrepresentation of black group interests in North Carolina, arguably traceable to minority voting status in nearly every electoral district. Yet whites as a group would still outnumber blacks in most of the state's districts and,

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5. *Id.* at 54–55.

6. 509 U.S. 630 (1993).

needless to say, the new lines would preserve for each resident exactly the same rights and privileges as before. Nevertheless, the Supreme Court found that the redistricting merited strict scrutiny because it was “unexplainable on grounds other than race.”<sup>7</sup> In other words, the policy’s race-consciousness alone rendered it constitutionally suspect.

Similarly, in *Parents Involved v. Seattle School District*,<sup>8</sup> a school district assigned students to various public schools based on considerations of racial diversity, though—again—at nobody’s expense: Each student got his or her school assignment, which was as good as the next student’s as far as the complaints formally alleged. However, the Supreme Court found the overall assignment policy impermissibly race-conscious.

Carter emphasizes that these and similar cases<sup>9</sup> involved no tangible harms: “[T]hese situations all differ from traditional affirmative action in that they do not distribute a limited resource in a race-conscious manner. The objection to such programs therefore cannot be that one person received something that another did not because of race.”<sup>10</sup> That leaves only one other ground for objection, Carter argues, namely “government race consciousness itself and the message sent thereby.”<sup>11</sup>

The dichotomy at work in Carter’s argument is one between policies that disadvantage people by race, on the one hand, and those that merely send a message about race, on the other. Carter does not deny that messages can be harmful—for example, they may cause psychological and reputational injury. Indeed, Carter notes that the *Shaw* and *Parents Involved* opinions do cite the risk of harm wrought by the “appearance”<sup>12</sup> or “perception”<sup>13</sup> that race-conscious policies would reinforce. Nevertheless, Carter contends that the acceptance or rejection of some government message is still better left to the democratic process.

The reason to relax scrutiny of policies that merely communicate messages comes, in Carter’s view, from First Amendment principles, in particular the newly evolving government speech doctrine. Put roughly, popular governments, too, need to promote ideas and viewpoints on behalf of the electorate, and they should have the right to do so, as long as their expressed viewpoints can be

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7. *Id.* at 643 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

8. 551 U.S. 701 (2007).

9. Carter also extensively discusses *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (concerning a policy to stop all promotions in a city fire department whose promotion record disproportionately favored whites), but I exclude it here because it does not as obviously involve a complete absence of disadvantage to one group—though I agree with Carter that the plaintiffs’ claims to have been harmed by the city policy do not survive close scrutiny. See Carter, *supra* note 3, at 16–19.

10. Carter, *supra* note 3, at 7.

11. *Id.*

12. *Shaw*, 509 U.S. at 647.

13. *Parents Involved*, 551 U.S. at 746.

revised by ordinary democratic means.<sup>14</sup> That proviso is important, as it is meant to explain why some policies that “speak” for the political majority *do*, nevertheless, merit constitutional scrutiny. For example, policies that suppress minority views or interests serve to undermine the democratic process and reflect defects in the process that yielded such policies in the first place. Those defects justify according less than the usual deference to the results of that process. Carter quotes *United States v. Carolene Products Co.*<sup>15</sup> on this point, to wit: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>16</sup>

In contrast, policies that merely express the government’s view that race matters, or that postracialism is false, reflect no defect in the fairness or inclusiveness of the democratic process and can be corrected by it. If the voting public comes to embrace postracialism after all, they can presumably vote to have the new view better reflected in government messages. Carter expresses the point as follows: “Because such messages regarding the continued salience of race are both generated by and subject to correction through the political process, government speech principles counsel against allowing individuals [such as Supreme Court justices] to transform their disagreements with those messages into constitutional claims.”<sup>17</sup>

According to Carter, this analysis ought to apply to all cases of alleged equal protection violation that impose no tangible benefit or burden on anyone. These policies—such as those challenged in *Shaw* and *Parents Involved*—do “not result in unequal distribution of limited resources, disparate treatment, subordination, or other racialized concrete harm.”<sup>18</sup> For that reason, he argues, they can be harmful—if at all—only in the message they convey, one that endorses race-consciousness.

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14. See, e.g., *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468–69 (2009) (“If the citizenry objects [to a governmental message], newly elected officials later could espouse some different or contrary position” (internal quotation marks omitted)); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”), quoted in Carter, *supra* note 3, at 56 n.274.

15. 304 U.S. 144, 153 n.4 (1938), quoted in Carter, *supra* note 3, at 32 n.158.

16. *Id.*

17. Carter, *supra* note 3, at 43.

18. *Id.*

## II. EXPRESSIVE SUBORDINATION

According to Carter's characterization, a race-conscious policy that imposes no disadvantage can harm only by spreading a harmful point of view. That is the claim I aim to refute. The burden of this Article is to show that policies can harm even when they impose no disadvantage or spread no message: Specifically, they can inflict *expressive subordination*, a species of expressive harm.<sup>19</sup> As coined in an influential article by Elizabeth Anderson and Richard Pildes, the phrase "expressive harm" refers to harm suffered by someone who is treated "according to principles that express negative or inappropriate attitudes toward her."<sup>20</sup> Put differently, to harm someone expressively is to treat her as one would if one harbored insulting attitudes towards her. It is, in other words, to treat her in an objectively insulting way. For example, routinely neglecting to introduce only one person, from among a handful of companions, amounts to treating her as one would if one thought her insignificant. Notice that the behavior constitutes an insult even if it results in no further harm. The victim may not stand to benefit from the lost introductions or may encounter only people polite enough to solicit one directly from her. Moreover, she may not *feel* insulted by the discourtesy. What makes it an insult, nevertheless, is that she would be warranted in finding the behavior insulting, as an expression of an insulting attitude. The behavior, then, amounts to an expressive harm.

Importantly, some expressive harms also subordinate. Cutting ahead of someone in line treats him as inferior, as though neither his time nor his need to get to where he's going is as worthy as one's own. The behavior expresses the insulting claim that this person is subordinate. Similarly, a corporation that unofficially requires that its CEOs be a certain height treats shorter people as somehow inferior, less worthy of leadership. The company's actions expressively subordinate certain employees and would do so even if no otherwise eligible candidates were affected by it. The policy's harm, in such cases, would be purely expressive.

Against this conceptual backdrop, it emerges that a government action can subordinate people because of their race or ethnic community without inflicting any tangible harm—or resulting in any *further* subordination. One need only treat people of a distinct ethnic background as inferior. Consider a zoning ordinance that required that all practicing Jews identify themselves to their

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19. Carter does at times use the phrase "expressive harms," but only to refer to communicative harms, a narrow subspecies of expressive harms discussed later in this Part.

20. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000).

neighbors by some sort of sign or marking on their doorposts.<sup>21</sup> As a practical matter, such an edict would impose no actual harm, because practicing Jews place identifying signs on their doorposts as a rule. It is, perhaps, their most universal practice. Nevertheless, the edict would be objectively insulting, suggesting that people should be warned of the presence of affiliated Jews in their midst. Another case of expressive subordination would be a free remedial education program to help minorities in a district behave and appear more like the local white Protestant majority. The availability of this option clearly inflicts no material harm. Nevertheless, the policy is expressively subordinating, treating a racial minority as better off resembling the majority.

Indeed, *Palmer v. Thompson*,<sup>22</sup> which Carter discusses in depth,<sup>23</sup> involved such an instance of expressive subordination. The decision to close, rather than desegregate, a neighborhood swimming facility—even as every other previously separate facility in the area was to become integrated—expressed the insulting suggestion that blacks are unclean, or for some other reason unfit for sharing a pool. In other words, the policy objectively insulted black people by expressively subordinating them. Notice that it would be just as insulting if a policy conferred complimentary shower facilities to one group alone, even though it would involve no tangible harm. Moreover, the insult would be subordinating, inasmuch as it treats one group as inferior to another.

Not only can expressive harms subordinate without tangibly harming anyone, but they can also do so without conveying any messages. As already noted, one is harmed expressively when one is treated according to principles that express an insulting attitude, rather than necessarily by someone using the treatment to express his own insulting attitudes, in particular. Notice, then, that the characterization is objective—the behavior amounts to an insult regardless of whether any insult is intended or perceived. Actions, in other words, can be objectively insulting or inappropriate and thereby inflict expressive harm, regardless of the subjective state of the agent or victim.

A plausible test for whether some action is objectively insulting is to see if the action *would* be a means to insult someone if that were its purpose. Anderson and Pildes provide a useful hypothetical that illustrates this test: The tossing of trash onto the neighbors' lawn would be a way to insult them, a way to treat them or their property as unworthy of respect.<sup>24</sup> If one set out to insult someone else, this behavior would be one means of doing so. As a result, performing the same action *without* intending to insult—for example, tossing trash thoughtlessly

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21. See, e.g., *Leblanc-Stenberg v. Fletcher*, 763 F. Supp. 1246 (1991) (banning the use of homes as a place of worship).

22. 403 U.S. 217 (1971).

23. Carter, *supra* note 3, at 21–24.

24. Anderson & Pildes, *supra* note 20, at 1527.

to get rid of it before the guests arrive—or without causing any psychological insult (suppose it goes unnoticed) remains objectively insulting, arguably warranting an apology.<sup>25</sup>

That is a significant conclusion in the present context, because it means—contrary to Carter’s dichotomy—that a government policy can harm someone expressively not only when it fails to disadvantage her but also when it fails to convey anyone’s negative message or viewpoint about her. A policy that targeted openly devout Muslims for suitcase searches would inflict expressive harm on Muslims as a group, even if it was known not to be based on the view that Muslims were likely to be terrorists but, instead, on the justified suspicion that one terrorist at large happened to be Muslim. Despite its benign motivation and likely interpretation, it would amount to an objective insult—inflicting expressive harm on Muslims by treating them as inferior to others.

Anderson and Pildes contrast expressive harms of this type with what they call “communicative harm,” a sub-class of the former.<sup>26</sup> A communicative harm is one that both constitutes an expressive harm and intentionally conveys an insulting message. If one litters on her neighbor’s lawn and then taunts him or shrugs defiantly in front of him, one is inflicting both expressive harm—because what one did is objectively insulting—and communicative harm—because the insult is conveyed intentionally. In fact, under the test proposed in this Part, *all* cases of communicative harm would also count as expressive harms. That is because an intentional insult constitutes objectively insulting behavior as well. Unlike other forms of expressive harm, however, a communicative harm could be seen as a form of speech, whether the speaker be an individual or a government.

The purpose here of distinguishing expressive harm from communicative harm is to show that, despite Carter’s reading, message-sending is not a necessary part of an expressive harm. While the indignity of having one’s lawn trashed can convey the message that the owner is unworthy of respect, the same treatment would amount to an objective insult even if that message was never intended or thought of by the litterer, and both parties knew it. Slapping someone, for example, is obviously insulting even before it becomes clear precisely what expressive content the insult communicates and who, in fact, believes it. The primary harm of these behaviors lies in the way they treat people, which

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25. I argue elsewhere that even accidentally and blamelessly injuring someone contributes to insulting her if nothing is done to make up for it, even when no insult was intended or perceived. See Jeffrey S. Helmreich, *Does ‘Sorry’ Incriminate? Evidence, Harm and the Meaning of Apologies*, 23 CORNELL J.L. & PUB. POLY (forthcoming 2012).

26. Anderson & Pildes, *supra* note 20, at 1528 (stating that a “communicative harm” occurs “when people treat [someone] in ways that express these attitudes, with the intention of ‘sending a message’ to her regarding their attitudes”).

is enough to make them cases of expressive harm. Similarly, a harm can be expressively subordinating without sending a harmful message of any kind.

It follows from the foregoing that a policy can subordinate racial minorities without disadvantaging them or necessarily communicating any distinct message. The expressive harm of closing the swimming pool in *Palmer* is objectively insulting and would be so even if everyone involved had other, equally desirable places to swim and none of the policymakers thought or meant to convey anything in particular about blacks. Indeed, the policy would be considered insulting even before its precise purpose or motive was discovered, or its message precise and discernible. Moreover, the insult is subordinating, inasmuch as it treats some people as inferior to others. The possibility of expressive subordination, then, challenges any putative dichotomy between tangibly disadvantaging people based on race, on the one hand, and merely communicating a racially charged message, on the other. Expressive subordination marks an important third category.

### III. MAJORITARIAN DEMOCRACY

Suppose it is granted that expressive subordination of racial minorities need not confer any disadvantage or communicate any message. Instead, expressive subordination can simply amount to treating blacks as less than whites, for example, or Jews as less than gentiles. Granting all that, one may still plausibly describe expressive subordination as a distinct category, different from other types of subordination typically scrutinized in equal protection cases. After all, it need not harm people in anything more than an expressive way. Just as Carter distinguished certain harms as “merely expressive,” one may refine his point slightly to say that some *subordination* is merely expressive. If so, then perhaps such practices merit less scrutiny than more material forms of subordination and ought to be permitted as a product of the majoritarian democratic process. Here, I want to refute that suggestion.

Carter cites two types of considerations, familiar in legal and political theory, that could justify blocking certain interests from majority vote. In his discussion of government speech, Carter concedes that some messages—despite their democratic pedigree—can corrupt the majoritarian process that might otherwise revise them. Government hate speech, for example, could “have the effect of excluding a group from the very political processes that could change the message.”<sup>27</sup> As a result, such speech is arguably not a permissible result of those processes.

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27. Carter, *supra* note 3, at 49.

A second reason Carter cites for discounting some democratically established policies would be that they are not, in his words, “subject to correction” by majoritarian politics.<sup>28</sup> For example, a policy that required residents to demonstrate fluency in English in order to obtain driver’s licenses would arguably be unfair and worthy of repeal. But the people it excludes would have little democratic recourse for two reasons: First, the majority would have already backed whichever legislators passed the requirement and would thus be less than fully reliable as a check on their abuse; and second, the interest in outvoting the policy would be concentrated in a minority with insufficient numbers. For that reason, the oppressive policy is not likely to be, as Carter puts it, “subject to correction” by the ordinary political process and should arguably be blocked despite its majoritarian source.

Expressive subordination, even when it is only expressive, fits both justifications for overriding majoritarian politics. First, policies and actions that subordinate a distinct group, even if only expressively or symbolically, help exclude that group from full and equal participation in the political process by reinforcing a sense that the group is subordinate both within the group and among those participating in its subordination. That exclusion, in turn, decreases the group’s political influence, thereby denying it an equal share in the political process. As a result, the process becomes corrupt. Second, and perhaps more compellingly, majoritarian politics is an unreliable protector of the interest in being free from concrete or expressive subordination. That is because, as already noted, such interests usually reside with minorities who cannot rely on their votes to protect them, and because subordination would not have been implemented if the majority had adequate checks on oppression. For both these reasons, the interest in preventing expressive subordination is not reliably left to majoritarian politics.

One might object that these arguments are insensitive to matters of degree. True, expressive subordination may share the same structural features of subordination in general that merit countermajoritarian judicial scrutiny. But in its expressive form, perhaps, subordination is so insubstantial as to render any damage negligible and not worth the high political cost of judicial intervention. Carter notes that traditional equal protection jurisprudence seems to have adopted this view: Cases of blatant expressive subordination, such as the pool closure in *Palmer*, have been treated as unworthy of scrutiny.<sup>29</sup> Perhaps, as such rulings suggest, the interest in being free from expressive subordination is less compelling than resistance to more concrete forms of subordination. As a

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28. *Id.* at 43.

29. *Id.* at 19–29.

result, there may be no reason to protect it with such extraordinary measures as countermajoritarian judicial review.

That suggestion rests on the assumption that expressive subordination is significantly less severe or harmful than concrete, material subordination. Granting that assumption, however, would render some of the landmark equal protection cases decidedly odd. For example, *Loving v. Virginia*<sup>30</sup> involved an antimiscegenation law that, as a practical matter, would affect only those few citizens who sought interracial marriages in a state that would criminalize them. Importantly, the practical impact of the law would reside equally with blacks and whites. But the expressive component had a clearly disparate impact: As the Court noted, the fact that whites passed the law—to prevent only their own from intermarrying (members of two nonwhite groups could marry across color lines)—betrayed its expressive subordination, or, in the Court’s words, its “endorsement of white supremacy.”<sup>31</sup> Thus, the subordinating impact of the law lay with its expressive element, not the tangible harm or disadvantage it inflicted. Nevertheless, the Court found this law worthy of strict scrutiny.

This Article shares the view reflected in *Loving*—that expressive subordination is worth correcting in its own right, regardless of any further harm it inflicts. However, such correction cannot be reliably trusted to majoritarian politics. For that reason, it does not meet the criteria used by government speech principles, in Carter’s sense, to release a policy from strict constitutional scrutiny.

#### IV. DOES THE COLORBLINDNESS DOCTRINE TARGET EXPRESSIVE SUBORDINATION?

It follows from the preceding Parts that certain government action can subordinate and corrupt the political process even when it inflicts no tangible harm. It need only involve expressive subordination. If that is right, then perhaps Carter is too quick to dismiss the colorblindness doctrine as targeting messages alone, rather than subordination per se. Perhaps the doctrine’s target is, among other things, expressive subordination.

Based on this reading, one might ask whether race-conscious policies, in fact, expressively subordinate people. Justice Kennedy’s concurrence in *Parents Involved* lays out such a theory.<sup>32</sup> To Justice Kennedy, being singled out because of one’s race is inherently demeaning, an insult over and above its consequences. He describes the school diversity plan as an assignment “that tells each

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30. 388 U.S. 1 (1966).

31. *Id.* at 1, 7.

32. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

student that he or she is to be defined by race . . . .”<sup>33</sup> Justice Kennedy rejects such expressive treatment, mainly for the following simple reason: “To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”<sup>34</sup> Even here, Justice Kennedy does not use the term “subordination.” But his rhetoric comes closest to alleging an expressive harm in the sense of Anderson and Pildes—a harm expressed by the objective nature of the treatment itself, regardless of its consequences or intent. In Justice Kennedy’s view, there is something objectively insulting in being assigned to one school rather than another because of one’s race, regardless of the assignment’s purpose or the assignee’s reaction.

How is such a claim to be evaluated? As noted, an expressive harm can occur even if the one who inflicts it did not intend to express the objective insult involved. Always arriving late, for example, treats the punctual party a certain way even when (as is often the case) no such treatment was intended. Thus, even a purely objective evaluation of an action cannot completely ignore its context, if only because the context is part of how we understand the action, or how we interpret what Anderson and Pildes call its “public meaning.”<sup>35</sup> For example, failing to salute a superior officer is disrespectful (whatever the intent), but the officer’s failure to initiate the same to her subordinates would be no affront to them. Who is performing an action to whom, in other words, is instructive as to the expressive nature of the action.

The antimiscegenation laws struck down in *Loving v. Virginia* provide a useful illustration. Banning interracial marriage formally affects both blacks and whites (as does the closing of the swimming pool in *Palmer*). Yet the fact that the ban was adopted by a white majority and prohibited only the intermarriages of whites and nonwhites (rather than, say, blacks and Native Americans) suggested to the Court that the legislation furthered and endorsed “white supremacy.”<sup>36</sup> As Carter notes: “[T]he context of *Loving* rendered the message of antimiscegenation laws unmistakably one of white supremacy, not merely race consciousness.”<sup>37</sup> Importantly, treating people in a way consistent with white supremacy is not merely insulting to nonwhites, it constitutes their expressive subordination.

The meaning of expressive subordination bears repeating in this context: To expressively subordinate someone is to act in a way that, understood objectively, treats her as subordinate, as inferior. Justice Kennedy’s interpretation of the diversity programs in *Parents Involved* does not qualify. Although Justice

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33. *Id.* at 789.

34. *Id.* at 797.

35. Anderson & Pildes, *supra* note 20, at 1512–13, 1524.

36. *Loving*, 388 U.S. at 7, 11.

37. Carter, *supra* note 3, at 27.

Kennedy alleges that it is insulting or undignified to be singled out by race, he provides no reason that such an insult is, in particular, one that expresses *subordination*. While the students are arguably treated as though their race is *relevant*, none of them allege being treated as though their race is *inferior*.

In short, the subordinating nature of a race-conscious policy depends in part on contextual factors, such as who is directing it at whom. Thus, race-consciousness by itself is not obviously subordinating, notwithstanding Justice Kennedy's suggestion. Adjusting a congressional apportionment scheme so as to be more inclusive of blacks, for example, does not treat them as inferior; it merely treats them as *people who were previously treated as inferior*. This is one interpretation of the legislation proposed in *Shaw*; there are obviously many others. But the point for present purposes is that the objectively subordinating nature of some action, like the objective meaning of terms, is a matter of interpretation, and that interpretation appeals to context. To claim boldly that race-conscious action is necessarily subordinating, regardless of context, is therefore premature. The colorblindness doctrine owes at least some explanation of why, for example, a policy aimed at redressing racial inequality constitutes expressive subordination simply because it is guided by race.

Alternatively, proponents of colorblindness in equal protection scrutiny might claim that race-consciousness constitutes *concrete, material* subordination. Indeed, that is the Court's primary claim in the cases Carter discusses at length. This is ultimately an instrumentalist argument: Racial classification causes racism—either by calling attention to race or by provoking racial envy or competition—and that ultimately leads to concrete racial subordination. As Justice O'Connor's opinion in *Shaw* put it, race-conscious policies “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.”<sup>38</sup> The Court quoted Justice Brennan's concurrence in *United Jewish Organizations v. Carey*<sup>39</sup> when it noted that “even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bear no relationship to an individual's worth or needs.”<sup>40</sup> So race-conscious policies, it is feared, will ultimately enforce racial hierarchies in much the same way more concrete race-based discrimination does, and that is of course a tangible harm to at least one racial group. The reasoning is premised not on an interpretation of the social or public meaning of the policies in question, but on an empirical view about the more practical harm that certain messages will ultimately cause (a view that, as

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38. *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

39. 430 U.S. 144 (1977).

40. *Shaw*, 509 U.S. at 643 (quoting *Carey*, 430 U.S. at 173 (Brennan, J., concurring in part)).

far as I can tell, the justices seem to accept on faith, or at least without citing any empirical support).

Carter, of course, is aware of this line in the Court's opinions. His primary response is to distinguish between such politically correct rhetoric and what he takes to be the true motivation of the opinions, namely, per se opposition to race-consciousness. But his reasoning does hint at an additional response to the Court's rhetoric. Suppose, for example, we take Justice O'Connor at her word: The Court in *Shaw* targeted race-conscious redistricting because—despite its benevolent purpose—it would perpetuate racially motivated thinking and that ultimately has the same pernicious effects as outright racial discrimination. Is that, then, an argument for strict scrutiny? One answer, implicit in Carter's reasoning, is no: Such scrutiny simply substitutes the Court's empirical judgment about the likely impact of a policy for the public's. Notice that on the Court's judgment, the policy aimed at redressing inequality would, as a matter of practical consequence, backfire. Yet both the legislation and the opinion, read this way, are aimed at racial equality, differing only on the empirical question of how the policy will play out. It could be argued that the Court's trumping role in this arena lacks rationale. Justices O'Connor and Kennedy, on this argument, are no better judges of the practical consequences of policy than the democratic majority.

The same, however, cannot be said about policies that directly subordinate people based on race, with no purpose of accomplishing the opposite. Here, strict scrutiny does not substitute for the public's judgment about the effects of its policy so much as it introduces a consideration, or an interest, entirely absent in the political process. In cases of outright educational or employment discrimination, for example, the policies are not designed to redress the disadvantages of racial minorities; at best, they are advanced with utter disregard for such concerns. Thus, the Court's intervention in those cases amounts to speaking for an interest, and a group, that was defectively absent in the democratic deliberation. That judicial role—remedying defects in majoritarian politics—has a well-established rationale, more so than that of empirically assessing whether a policy will achieve its purpose.

#### CONCLUSION

Three points have been argued here: First, policies can subordinate even when they inflict no tangible harm and send no discernible message; second, such "expressive subordination" is no more amenable to the political process than more concrete subordination; and third, race-conscious policies do not necessarily subordinate expressively.

That still leaves room for agreement with much of Carter's main argument. The new colorblindness doctrine, after all, treats even race-conscious policies that do not subordinate at all, expressively or otherwise, as presumptively unconstitutional. Carter forcefully challenges this conclusion, and I have given no reason here to disagree with him in doing so. My arguments here also support Carter's suggestion that policies that do amount to material subordination ought to be strictly scrutinized despite their majoritarian political support.

Our area of disagreement applies only to a subset of subordinating policies that impose no material harm or disadvantage. This may invite the question: Why raise the challenge that animates this Article? In response, it is worth recalling that on Carter's proposal, race-conscious policies that do not impose material harm should be evaluated only for the government messages, or speech, they convey. This result would have the practical effect of raising the standards of strict equal protection scrutiny unduly high. For one, the practical consequences of policies—such as whether, in the long run, they inflict tangible harm—can be difficult to assess. A law that renames a state, say Vermont, as “The Great White State of Vermont,” may have no clear impact on nonwhite residents. Indeed, it is not even clear that the outrageously racist antimiscegenation laws in *Loving* stood to affect many Virginians in practice. But the insult in both cases is substantial. They both amount to egregious cases of expressive subordination. In other words, the category of expressive subordination helps show that these laws do, in fact, subordinate nonwhites. In contrast, the empirical test of whether they inflict tangible harm may hide the subordinating nature of such policies or at least render it less central or important than it should be.

Further, a hallmark of government speech analysis, as Carter reminds us, is that a message be intentionally conveyed and understandable. To escape scrutiny, then, a government policy need only be shown not to convey a distinct message—either because none was intended or none could be discerned. Recall the case of the profiling policy targeting Muslims for suitcase searches: If the policy is not practiced in public view and openly not motivated to convey any particular view of Muslims, it would escape scrutiny under government speech analysis. That, however, may not be the ideal result. Indeed, as cases like *Loving* illustrate, sometimes the worst harm in a race-conscious policy lies less in a lost opportunity, for marriage or employment, or in the insulting *subjective* intention of its legislators, than in the *objective* insult of being treated as though one is inferior, solely because of one's membership in a certain community. For that reason, expressive subordination is an essential feature of the policies that merit equal protection scrutiny.