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Correspondence

Affirmative Action and Legislative Purpose

Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997).

Larry Alexander[†]

Jed Rubinfeld argues that the Supreme Court misunderstands the meaning of the Equal Protection Clause when it subjects minority preferences to strict (and almost always fatal) judicial scrutiny.¹ His argument is quite simple: Strict scrutiny's function is "smoking out" constitutionally illicit legislative purposes, not asking whether admitted violations of constitutional rights are justified by countervailing social benefits.² Racial preferences for minorities are usually instituted for quite legitimate purposes. Therefore, his argument continues, even if the benefits of such preferences do not exceed their costs, much less by the margin strict scrutiny demands, the preferences are constitutionally permissible.³ The legislative enactment of terrible ideas is violative of equal protection only when motivated by an illicit legislative purpose, and affirmative action is not so motivated.⁴ There are four problems with this argument, however, that Rubinfeld does not address.

I. WHEN DOES STRICT SCRUTINY APPLY?

How do we know that affirmative action programs are not illicitly motivated if we do not apply strict scrutiny to them? After all, the problem that provoked Rubinfeld to write his Essay is that affirmative action programs failed the strict scrutiny tests in *City of Richmond v. J.A. Croson Co.*⁵ and

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1. See Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997)

2. See *id.* at 428-29, 432-33, 442-43.

3. See *id.* at 439.

4. See *id.* at 428-29, 432-33, 449.

5. 488 U.S. 469 (1989) (plurality opinion).

Adarand Constructors, Inc. v. Peña,⁶ even though Rubinfeld believes they were constitutional. If these programs failed strict scrutiny, however, does that not demonstrate that they *were* unconstitutionally motivated? For Rubinfeld, the answer is apparently “no.” For Rubinfeld infers the purposes behind affirmative action programs from evidence other than whether the programs pass the purpose-smoking-out strict scrutiny test.

If, in the case of affirmative action, failing the strict scrutiny test does not “smoke out” an illicit purpose—because we can resort to other evidence to show proper legislative purposes—why don’t we look to the same circumstantial evidence of legislative purpose in *all* cases? The best I can surmise is that Rubinfeld is employing some sort of threshold of “suspectness of purpose.” If the threshold is reached, as might be the case with racial classifications that adversely impact blacks, then strict scrutiny is applied to determine whether the government can rebut the inference of improper purpose. If the threshold is not reached, as is the case with most affirmative action programs, then the legislative purpose is presumptively proper and strict scrutiny is not applied.

Thus, Rubinfeld argues that when an affirmative action program is instituted in favor of blacks by a black-dominated legislative body, strict scrutiny might be appropriate because the presumption of an improper purpose would be strong.⁷ But what would Rubinfeld say about a pro-black affirmative action program adopted by a white legislature that represented a predominantly black constituency, or a pro-black affirmative action program that excluded Hispanics or Asians as beneficiaries of racial preferences? There are not just two racial or ethnic groups that can win or lose in affirmative action programs, and there are not just two types of legislative configurations in the background of such programs. Once we start down the road of nuanced assessments of the likely legislative motivations for affirmative action programs, why should we not go all the way? Why should we resort to artificial evidentiary tests like strict scrutiny in some instances but not in others? If legislative purpose is our quarry, and we are willing to look at circumstantial evidence of purpose to get us to the triggering threshold, why not rely on all circumstantial evidence in *all* cases?

II. WHAT LEGISLATIVE PURPOSES ARE UNCONSTITUTIONAL?

Rubinfeld is particularly vague in defining which legislative purposes are, in fact, unconstitutional. At one point he refers to “racist purposes,”⁸ but he does not elaborate on what precisely a racist purpose is, although singling out

6. 515 U.S. 200 (1995).

7. See Rubinfeld, *supra* note 1, at 466.

8. *Id.* at 441-42.

a race for preferences is obviously not one. At another point, Rubinfeld refers to an “anticaste principle,”⁹ and at still another to “invidiousness” of purpose,¹⁰ again without elaboration. Perhaps Rubinfeld thinks the line between permissible and impermissible legislative purposes regarding race is clear and needs no fleshing out. I would suggest otherwise.

Rubinfeld might argue that an impermissible legislative purpose regarding race is one that reflects lack of equal concern and respect for members of a particular race. But what purposes reflect a lack of equal concern and respect? For example, an “unrefined” utilitarian legislator would count the pleasures and pains (or welfare, or preference satisfaction) of each individual affected by a legislative policy equally, but she would not care about the sources of such pleasures and pains.¹¹ Thus, if enough whites were pained sufficiently by seeing blacks in high social positions, and the pains suffered by blacks at being denied such positions were insufficiently severe or numerous, she would legislate against blacks occupying such positions.¹² Is my hypothetical utilitarian legislator acting with unconstitutional purposes in this scenario?¹³

It is thus not enough for Rubinfeld to say equal protection jurisprudence is about smoking out improper purposes. He must also tell us which legislative purposes are improper and why. Until he delivers, his argument that affirmative action programs typically reflect constitutionally proper purposes, whereas racial classifications that disadvantage blacks typically reflect improper ones, is incomplete.

III. UNRULY CASE LAW

Rubinfeld would have us believe that most equal protection jurisprudence can be reconciled with his position, and that only *Croson*, *Adarand*, and perhaps a few other cases are outliers. But this is just not so. Take, for

9. *Id.* at 460.

10. *Id.* at 466.

11. In Ronald Dworkin's terms, she would count external as well as internal preferences. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 234-38 (1977).

12. Indeed, even if she were a “refined” utilitarian and did not consider in making her utility calculations the pleasures and pains derived from how others were faring, she might nevertheless in some circumstances find that the balance of refined pleasures and pains dictated racial classifications that adversely affected a particular race.

13. Most segregationists probably justified their policies of racial segregation by reference to a more ultimate and quite legitimate purpose, social harmony. If that ultimate purpose did not render their more immediate purpose of racial separation legitimate, why should the “benign” ultimate purposes of those who institute affirmative action programs legitimate their more immediate purpose of creating racial entitlements? I am grateful to my colleague Chris Wonnell for this point.

In addition, Rubinfeld clearly does not believe that rewarding well-organized interest groups by imposing costs on a more diffuse public represents an unconstitutional purpose or else he would not be so sanguine about affirmative action programs. Yet some regard such a purpose as paradigmatically unconstitutional. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

instance, *Palmore v. Sidoti*,¹⁴ in which the Supreme Court held a policy of racial matching in custody awards violative of equal protection. Was there an improper legislative purpose at work here, as opposed to a misguided one? The legislative purpose was to promote the best interests of the child, which surely looks proper to me.¹⁵ Therefore, *Palmore* is a case that does not fit Rubinfeld's theory of equal protection.

The same may be said of many of the gender cases, which I assume Rubinfeld would analyze in roughly the same manner. *Craig v. Boren*,¹⁶ the progenitor case of modern gender-based equal protection, does not fit.¹⁷ Does anyone believe Oklahoma's purpose in requiring men to be twenty-one to drink although women could drink at eighteen was to subordinate a sex? (If so, which one?) It is surely more plausible that Oklahoma was interested in traffic safety.¹⁸

Additionally, there are many hypothetical cases that the Supreme Court would decide differently from what Rubinfeld's equal protection model prescribes. For instance, suppose a state university law school conducts a study and concludes that the LSAT overpredicts the performance of blacks by roughly ten points. Moreover, the law school concludes that although the factor that explains the difference is not race per se, but rather some other variable that correlates highly with race, this more performance-related factor is either unknown or extremely expensive to screen for. The law school therefore decides to reduce the LSAT scores of all black applicants by ten points in determining whom to admit. The Supreme Court would strike down this use of race in law school admissions, but not because of any invidious purpose that the Court might smoke out. The purpose in this case is no more invidious than

14. 466 U.S. 429 (1984).

15. Of course, the policy promotes that purpose, at least in the eyes of the legislature, by taking account of private biases. If Rubinfeld had told us which legislative purposes are improper and why, we could assess whether this fact should vitiate the policy. There is some support for the proposition that a government purpose that would otherwise be proper is vitiated if it involves taking account of private biases and irrational stereotypes. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (striking down a city's refusal to allow a group home for the mentally retarded). On the other hand, there is also support for the contrary position. See, e.g., *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (approving racial segregation of prisoners to avert interracial prison violence). Because Rubinfeld does not link taking account of private biases in promoting children's best interests with subjugating racial groups, however, I must assume that the legislative purpose in *Palmore* is not a constitutionally improper one.

16. 429 U.S. 190 (1976).

17. Indeed, Rubinfeld implicitly acknowledges this. See Rubinfeld, *supra* note 1, at 434.

18. Similarly, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), and *Reed v. Reed*, 404 U.S. 71 (1971), as well as most other sexual equality cases decided under the Equal Protection Clause, cannot be explained as the result of smoking out a subordinating legislative purpose. The legislatures in all those cases were guilty of using sex as a proxy for some other trait when there existed either more accurate proxies or proxies with fewer secondary negative effects. The legislatures, however, were not guilty of having as their purpose subordinating women or men. How do I know this without subjecting those sex classifications to the intermediate scrutiny test, which the Supreme Court said they failed? I "know" this the same way Rubinfeld "knows" that the purpose behind most affirmative action programs is benign, that is, by means of an educated guess.

any other meritocratic purpose. If the hypothetical law school's action is unconstitutional, this can only be because of its anticipated *effects*.

Rubinfeld's theory of equal protection, therefore, does not square with lots of—I dare say most of—Supreme Court jurisprudence, both actual and likely. *Croson* and *Adarand*, not Rubinfeld, are in the mainstream.

IV. THE JUSTIFICATION FOR THE CENTRALITY OF PURPOSE

I have saved the most important criticism of Rubinfeld's theory for last. Rubinfeld nowhere tells us why equal protection law—or constitutional law in general—should ever be concerned with legislative purposes. Why should the constitutionality of a law—as opposed, say, to its interpretation—ever turn on the purposes for which it is enacted? Why should identical laws enacted in two different states that are predicted to have identical social effects in both states be constitutional in one state but not the other, because the laws are enacted for different legislative purposes? If a law has good effects, why should we care about why those who enacted it did so? And if it has bad effects, why should benign motivation save it? These are extremely difficult questions and no answer given to date, including my own,¹⁹ is fully satisfying.

One common answer that I regard as a nonstarter is what I call the social meaning answer, captured pithily in the adage that even a dog can tell the difference between being stepped on and being kicked. We feel differently about being injured accidentally than we feel about being injured intentionally, even if the injuries are physically the same. The reasons that we do are that our relations with our injurers depend on their revealed attitudes toward us.

This social meaning analysis is, however, out of place in a constitutional jurisprudence in which the response to an unconstitutional law is to strike it down rather than leave it on the books and separately punish the enacting legislature. Suppose a legislature, acting on the vilest of motives, passes the very law that you, the reader, would most like to see passed because that law will be the most socially beneficial law you can imagine. Even though your knowledge of the legislature's vile motives might upset you and strain your relations with others, you would *not* want the law that was produced this way thrown out. That would be adding injury to insult. Indeed, because invalidating a good law does not itself change the attitudes of the enacting legislature, doing so would be absolutely perverse.

The point is this: Every conception of the equality of respect that is violated by impermissible legislative purposes itself implies a general moral theory regarding what governments should strive to bring about and avoid, that

19. See Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENTARY 287 (1994).

is, a blueprint for government action.²⁰ If government follows such a blueprint, we really do not care what its purposes are. And if it does not, then that is what we care about, not its purposes.²¹

In casting doubt on legislative purpose as the touchstone of equal protection, I do not wish to be understood as denying its relevance. In many contexts, as I have pointed out in other writings, one cannot tell what the legislative rule *is* without knowing the legislature's purpose.²² Nor should I be understood to be criticizing *Washington v. Davis*²³ and its rejection of disparate racial impact as a highly suspect effect. Effects may be all that matter without it also being the case that disparate racial impact is a constitutionally significant effect.

Even if a purpose-driven jurisprudence can overcome the conceptual difficulty of attributing a purpose to a multi-member body, the question of why we should care about legislative purpose rather than social effects would remain unanswered. And until this question is answered persuasively, the social effects of racial preferences are a plausible concern of constitutional analysis, Rubenfeld notwithstanding.²⁴

20. For example, Ronald Dworkin's notion of equality of respect entails, he believes, equality of resources, a social insurance scheme, certain liberties, and a free market. See Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987).

21. In substantive criminal law, where an actor's culpability matters, we care about purposes, not merely results. Nevertheless, constitutional law is not criminal law, nor should it be. Moreover, logically, if the legislative purpose behind a law can render the law unconstitutional, then so too can the legislative purpose behind refusals to enact or repeal laws render the entire corpus juris unconstitutional for failure to contain the law not enacted. See Alexander, *supra* note 19, at 305. And to top off these embarrassments, if both sides in a legislature—those for law A and those against it—are acting for improper purposes, then depending on how one deals with the conceptual problem of what should be deemed *the* purpose of a multi-member body, one might conclude that both the existence of law A and its absence would be unconstitutional states of affairs. See *id.*; see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 628 (3d ed. 1996).

22. For example, a legislature that enacts the rule "Swimming Allowed" when whites show up at the beach and then enacts the rule "Swimming Forbidden" when blacks show up may be consistently employing the constitutionally improper rule "Blacks May Not Swim," or it may merely be changing its mind about two constitutionally permissible rules. Without knowing its purpose, we cannot tell what it is really doing. Merely because legislative purpose is relevant to what the legislature's true rule is, however, does not mean that legislative purpose is relevant to the constitutionality of that rule, once ascertained. "Blacks May Not Swim" could be unconstitutional solely due to its effects. See Alexander, *supra* note 19, at 300-04; Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 21-23 (1981). *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), are consistent with this point.

23. 426 U.S. 229 (1976).

24. I take no comfort in pointing out that Rubenfeld will have difficulty justifying purpose inquiry in equal protection jurisprudence. I have written that large areas of constitutional law—and freedom of speech in particular—are incoherent except as proscriptions of particular legislative purposes. See Alexander, *supra* note 19, at 287-88, 291-92. With respect to freedom of speech, I have argued that, at its core, it must be a mandate of government neutrality regarding points of view and their value. See Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENTARY 21 (1995); Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989). What follows is that courts must base free speech jurisprudence solely on legislative purpose because an effects-based free speech jurisprudence would be internally contradictory. For a variety of reasons, that is an unhappy conclusion. See generally Larry Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993).

The Purpose of Purpose Analysis

Jed Rubinfeld

To get right to the point:¹

(1) Professor Alexander first wonders how I can urge a smoking-out conception of strict scrutiny while still supporting affirmative action programs that would fail strict scrutiny. “If [such programs] failed strict scrutiny, . . . does that not demonstrate that they *were* unconstitutionally motivated?”² The answer is no—no more than a speed limit’s inability to survive strict scrutiny proves that it was unconstitutionally motivated. Nearly all laws would fail strict scrutiny. That is why strict scrutiny must be an exceptional test, triggered only when there are powerful grounds for suspecting an impermissible purpose.³

(2) Professor Alexander’s second question is, “What legislative purposes are unconstitutional?”⁴ He seems to want a complete list; if so, I cannot satisfy his request. My aim was to show that equal protection jurisprudence must confront this difficult question. I do say, on the basis of the Fourteenth Amendment’s paradigm cases, that state action is unconstitutional if it purposefully imposes an inferior caste status on any group. Professor Alexander suggests that this principle would be confounded by a statute banning blacks from “high social positions” if the lawmakers had been sincere utilitarians, motivated solely by concern over white pain at black success.⁵ This objection mistakenly supposes that an illegitimate purpose is somehow

1. As the *Journal* has limited this reply to two pages, I will not be able to give Professor Alexander’s characteristically incisive remarks the full consideration they merit.

2. Larry Alexander, *Affirmative Action and Legislative Purpose*, 107 *YALE L.J.* 2679 (1998) (correspondence).

3. This triggering function was supposed to be the point of suspect class doctrine, according to which a law singling out (say) blacks for adverse treatment raised so powerful a suspicion of improper purpose that only the most exacting showing of necessity could dispel that suspicion. Today, the Court has in effect made *whites* a suspect class, without ever acknowledging that this result contradicts everything the Court used to say about the criteria for suspect class status. But Professor Alexander asks why, if a suspicion of improper purpose can arise from “circumstantial evidence,” we should ever “resort to artificial evidentiary tests” like strict scrutiny. *Id.* at 2680. The answer is that the “artificial” test is a sensible judicial means of resolving the suspicion. If a prosecutor has used peremptories to eliminate all black veniremen, a court might demand a special demonstration of necessity as to each strike, setting a standard of review so high that most peremptories could not meet it. The point of this strict scrutiny would not be to permit the state to *justify* purposeful race-based exclusion. It would be to give the judiciary a practical means to *smoke out* purposeful race-based exclusion, precisely where the “circumstantial evidence” had raised a sufficiently high degree of suspicion that such purposeful exclusion had taken place.

4. *Id.* at 2680.

5. *Id.* at 2681.

erased or washed clean by the presence of a putatively legitimate further motive (or "ultimate" purpose). A law deliberately barring blacks from "high positions" is quintessentially a law purposefully inflicting an inferior caste status on blacks. It is hence unconstitutional—period. The lawmakers' motives are irrelevant.⁶

(3) Professor Alexander "save[s]" his "most important" question for last: "Why should the constitutionality of a law . . . ever turn on the purposes for which it is enacted?"⁷ This is indeed an interesting question, but happily not of an intricacy proportioned to its interest. The answer is: because the Fourteenth Amendment at its core concerns invidious discrimination, and such discrimination at its core involves purpose. Would we find invidious discrimination if a particular ethnic group had not a single member on any professional basketball team? I think not—unless this group were shown to have been *purposefully* excluded.⁸

Finally, Professor Alexander hypothesizes a situation in which "both sides in a legislature—those for law *A* and those against it—are acting for improper purposes."⁹ Might not this lead, he asks, to the absurd conclusion "that both the existence of law *A* and its absence would be unconstitutional"?¹⁰ As Professor Alexander well knows, this conundrum raises difficult problems in figuring out how to understand a law's purpose. He may think these problems are insuperable; I do not. One solution might be for courts to ask what purpose or purposes a reasonable citizen would impute to the law. Another might be for courts to presume a constitutional purpose in almost all cases, except when certain potent criteria of suspect purpose are present, in which case heightened means-ends scrutiny would apply. Sound familiar? Having begun by dismissing strict scrutiny as "artificial," Professor Alexander concludes by despairing at precisely the kind of problem to which strict scrutiny is an answer.

6. According to Professor Alexander, my basic position on purpose in equal protection law (i.e., that the unconstitutionality of a law charged with discrimination must turn on the existence of an invidious purpose) does "not square with lots of—I dare say most of—Supreme Court jurisprudence." *Id.* at 2683. This conclusion would be very surprising if true, given that my position is virtually a quotation from that jurisprudence. Professor Alexander neglects to mention what the Court has repeatedly affirmed: the "basic equal protection principle," *Washington v. Davis*, 426 U.S. 229, 240 (1976), that "an invidious purpose must be adduced to support a claim of unconstitutionality," *City of Mobile v. Bolden*, 446 U.S. 55, 63 n.10 (1980) (plurality opinion). The Court cannot abandon this principle without jeopardizing the entire line of disparate impact cases. Yet, as Alexander agrees, the Court *has* dishonored this principle in its affirmative action opinions.

7. Alexander, *supra* note 2, at 2683.

8. To be sure, if all "we care about" is the effectuation of free-market-social-welfare liberalism, *see* Alexander, *supra* note 2, at 2684 & n.20, then we will not "care about" invidious racial purposes as such. The Fourteenth Amendment, however, did not enact Dworkin's *Empire* or Rawls's *Theory*. *See* RONALD DWORKIN, *LAW'S EMPIRE* (1986); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). It laid down a commitment whose central meaning is that the nation never again will tolerate any state action deliberately imposing on one race a degraded status or second-class citizenship. Such racial discrimination requires at a minimum a distinction made *on account of* race, and this *on account of* is a matter of purpose.

9. Alexander, *supra* note 2, at 2684 n.21.

10. *Id.*