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# Universalism and Civil Rights (with Notes on Voting Rights after Shelby)

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SAMUEL R. BAGENSTOS

## Universalism and Civil Rights (with Notes on Voting Rights After *Shelby*)

**ABSTRACT.** After the Supreme Court's decision in *Shelby County v. Holder*, voting rights activists proposed a variety of legislative responses. Some proposals sought to move beyond measures that targeted voting discrimination based on race or ethnicity. They instead sought to eliminate certain problematic practices that place too great a burden on voting generally. Responses like these are universalist, because rather than seeking to protect any particular group against discrimination, they formally provide uniform protections to everyone. As Bruce Ackerman shows, voting rights activists confronted a similar set of questions—and at least some of them opted for a universalist approach—during the campaign to eliminate the poll tax.

Universalist responses have many possible strengths: tactically, in securing political support for and broader judicial implementation of laws that promote civil rights interests; substantively, in aggressively attacking the structures that lead to inequality; and expressively, in emphasizing human commonality across groups. But they have possible drawbacks along all three of these dimensions as well. Although scholars have addressed some of these strengths and drawbacks in the context of specific proposals for civil rights universalism, no work has attempted to examine these issues comprehensively. This essay attempts such an examination.

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## ESSAY CONTENTS

INTRODUCTION	2840
I. EXAMPLES OF UNIVERSALIST APPROACHES TO CIVIL RIGHTS LAW	2842
A. A Working Definition of Universalism	2842
B. Examples of Universalistic Approaches to Civil Rights	2843
II. TACTICAL ADVANTAGES OF UNIVERSALIST APPROACHES	2847
A. The Tactical Argument for Universalism	2848
1. Secure Political Support	2848
2. Ensure Broad Judicial Implementation	2849
B. Problems with the Tactical Argument	2851
1. Undermine Political Support and Dilute Judicial Willingness to Enforce	2852
2. Become Coded as Serving a Particular Group	2854
III. SUBSTANTIVE ADVANTAGES OF UNIVERSALIST APPROACHES	2856
A. The Substantive Argument for Universalism	2856
1. More Effectively Address Discrimination	2856
2. Address Broader but Important Problems of Inequality and Injustice	2858
B. Problems with the Substantive Argument	2859
IV. EXPRESSIVE ADVANTAGES OF UNIVERSALIST APPROACHES	2863
A. The Expressive Argument for Universalism	2863
B. Problems with the Expressive Argument	2864
V. NOTES ON VOTING RIGHTS AFTER <i>SHELBY COUNTY</i>	2866
A. Unpacking the Post- <i>Shelby</i> Universalist Proposals	2866
B. Critiquing the Post- <i>Shelby</i> Universalist Proposals	2870
CONCLUSION	2875

## INTRODUCTION

After the Supreme Court invalidated the core of the Voting Rights Act's preclearance regime in *Shelby County v. Holder*,<sup>1</sup> civil rights activists proposed a variety of legislative responses. One set of responses, which gained quick favor in influential precincts in the legal academy, sought to move beyond measures like the Voting Rights Act that targeted voting *discrimination* based on race or ethnicity. These responses instead sought to eliminate certain problematic practices that place too great a burden on any individual's vote.<sup>2</sup> I will call responses like these *universalist* (or, sometimes, *universalistic*), because rather than seek to protect any particular group against discrimination, they provide uniform protections to everyone (at least as a formal matter). As Bruce Ackerman shows in his latest *We the People* volume, voting rights activists confronted a similar decision regarding whether to pursue a universal approach—and at least some of them opted for universalism—during the campaign to eliminate the poll tax.<sup>3</sup>

The voting rights context is hardly unique. Across an array of different contexts, scholars and activists have proposed universalist responses to address problems that group-oriented civil rights approaches have not fully resolved. These contexts include affirmative action in higher-education admissions, regulation of the employment relationship, disability inequality, and the interpretation of the Fourteenth Amendment generally.<sup>4</sup> My own work has often advocated such universalist responses to civil rights problems.<sup>5</sup>

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1. 133 S. Ct. 2612 (2013).
  2. The most notable set of proposals in this regard came from Samuel Issacharoff's *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013) [hereinafter Issacharoff, *Discrimination Model*], which builds on themes Issacharoff sounded earlier in Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710 (2004). Issacharoff's longtime collaborator, Richard Pildes, provided the first comprehensive defense of a turn to a universalist approach while the 2006 Voting Rights Act reauthorization was pending. See Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOWARD L.J. 741 (2006). For other notable examples, see Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014); and Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. (forthcoming 2014).
  3. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 83-126 (2014).
  4. See *infra* Part I.
  5. See, e.g., SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 51-54, 145 (2009) [hereinafter BAGENSTOS, *DISABILITY RIGHTS*] (advocating

Universalist responses have many possible strengths: tactically, in securing political support for and broader judicial implementation of laws that promote civil rights interests;<sup>6</sup> substantively, in aggressively attacking the structures that lead to inequality;<sup>7</sup> and expressively, in avoiding essentializing identity and emphasizing human commonality across groups.<sup>8</sup> But they have possible drawbacks along all three of these dimensions as well. Scholars who advocate universalist approaches to civil rights problems have too often conflated the tactical, substantive, and expressive arguments for these positions or simply focused on whichever of these dimensions supports a universalistic position without considering the others. These errors, I will argue, have led those scholars to be unduly sanguine about the effectiveness of universalism in the civil rights context.

To assess the effectiveness of universalistic approaches to civil rights—whether in general or in a particular case—requires examination of each of three dimensions: tactics, substance, and expressivism. As I hope to show in this essay, when considered along all of these dimensions, neither universalistic nor particularistic approaches can fully address our civil rights problems. Even in any specific context—whether voting, higher education, employment, disability, or the interpretation of the Fourteenth Amendment—a mix of universalistic and particularistic approaches is likely to offer the most traction in addressing those problems.<sup>9</sup> And determining the proper mix of policies will require a highly context-specific analysis. Nonetheless, there are some common dynamics of universalistic and targeted civil rights policies, and these dynamics offer lessons for policymakers approaching any given civil rights context. In this essay, I aim to draw out some of these general lessons and then sketch how they might apply to the civil rights context in which questions of universalism are most acute at the moment—voting discrimination. I argue, against

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universal health insurance and universal workplace accommodation requirements to address problems of disability inequality); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013) [hereinafter Bagenstos, *Employment Law*] (arguing that universal provisions of employment law can serve equality interests).

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

9. In this regard, my prescription accords with that of Desmond King and Rogers Smith in DESMOND S. KING & ROGERS M. SMITH, *STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA'S AMERICA* (2011). See also Rogers M. Smith, *Ackerman's Civil Rights Revolution and Modern American Racial Politics*, 123 YALE L.J. 2906 (2014).

Professor Issacharoff and others, that the response to *Shelby County* will fail unless it goes well beyond universal protections of voting rights. Rather, the voting rights regime must also provide robust protection against race discrimination specifically.

## I. EXAMPLES OF UNIVERSALIST APPROACHES TO CIVIL RIGHTS LAW

At this point, readers may be wondering exactly what I mean by universalist approaches to civil rights law, and how important the debate over universalism is to civil rights controversies. This Part provides some answers to these questions. I begin, in Section I.A, by offering the working definition of universalism that will guide my analysis in this essay. As I explain, mine is not the only definition of universalism one could employ, and I do not offer it as a way to draw a crisp line between what does and does not come within the category. Rather, I offer it simply as a serviceable device for identifying and assessing an important phenomenon in debates over civil rights law. In Section I.B, I identify a number of contexts in which advocates and scholars have urged universalist solutions to civil rights problems. I begin with an historical example from Professor Ackerman's book—the debate over the poll tax—before turning to present-day examples.

### A. *A Working Definition of Universalism*

As I show throughout this essay, scholars have proposed deemphasizing targeted approaches to civil rights problems and instead emphasizing universalist approaches across a range of contexts. But what do I mean by “universalist”? For purposes of this essay, I define a universalist approach to civil rights law as one that either guarantees a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws. What is crucial for my purposes is not just that members of different identity groups are entitled to be treated the same as each other under a universalistic statute, but that we can determine each individual's entitlement without considering identity groups at all. By this definition, a law that guarantees all workers \$10 per hour would be universalistic. But a law that prohibits race discrimination in wages would not. Under the former law, we can determine whether a worker's rights have been

violated without identifying her race or the race of anyone else. Under the latter law, by contrast, we must identify the race of the worker who asserts a violation of her rights, as well as the race of the workers whom she alleges received better treatment, to make a cross-racial comparison.<sup>10</sup>

Nothing in my argument depends on the category of universalistic approaches having a tight and impermeable boundary. The quality of universalism may be best understood as lying on a spectrum, running from more to less universalist. What I call universalistic strategies are often closely intertwined in practice with strategies targeted to particular groups or axes of discrimination. Indeed, my basic argument is that most civil rights problems are best addressed by a mix of strategies, though the solutions to some should place more emphasis on universalism and the solutions to others should place more emphasis on targeting.

### *B. Examples of Universalistic Approaches to Civil Rights*

As Professor Ackerman's latest *We the People* volume highlights, arguments in favor of universalistic approaches are hardly new. As Ackerman shows, in the decades-long fight to eliminate the poll tax, advocates pursued two different strategies. Many civil rights advocates saw the poll tax as one of several means by which states discriminated against African-American voters. Others, including President Franklin Roosevelt and even politicians such as Senator Spessard Holland who *supported* racial discrimination in voting, saw the problem of the poll tax in more general populist terms.<sup>11</sup> They sought a flat ban on the use of the poll tax as a voting qualification, without any inquiry into

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10. Of course, one could understand laws prohibiting race discrimination as universalist to the extent that they protected members of all races equally. But because laws that specifically call attention to identity status share a set of dynamics that are different from the dynamics of laws that do not require any reference to identity status – and because this difference is an important one to explore – I treat those laws as targeted for purposes of my argument. In that sense, my understanding of universalism is narrower than one some might offer. By contrast, my understanding of a universalist approach is broader than the one employed by Jessica Clarke, who excludes “traditional labor standards (i.e., the minimum wage as opposed to equal pay) that do not find antecedents in antidiscrimination laws” from her definition. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1221 n.11 (2011). As I show in the remainder of this Part, commentators have often proposed labor or welfare standards that do not find antecedents in antidiscrimination laws (such as just-cause termination regimes and universal health insurance) as a means of achieving civil rights goals.

11. See 3 ACKERMAN, *supra* note 3, at 85-86.

whether or when it discriminated on the basis of race. The universalistic approach prevailed in the Twenty-Fourth Amendment, which prohibited using the poll tax as a qualification for voting in elections for federal office.<sup>12</sup> Professor Ackerman shows that section 10 of the Voting Rights Act, which directed the Attorney General to challenge poll taxes in states that still employed them,<sup>13</sup> contained elements of the universalistic and of the targeted approaches.<sup>14</sup>

The Supreme Court ultimately chose the universal path to invalidating the poll tax in *Harper v. Virginia State Board of Elections*.<sup>15</sup> As Professor Joey Fishkin describes the developments in voting rights law in the 1960s and early 1970s: “Rather than simply dismantling race discrimination in voting, American law took a dramatic universalist turn, sweeping away almost all the bases of suffrage restriction that remained in 1960 and establishing a nationwide norm of universal adult suffrage tied closely to individual citizenship.”<sup>16</sup>

In recent years, scholars have argued that voting rights law is increasingly turning (and *should* increasingly turn) toward *Harper’s* universalistic approach. Professors Sam Issacharoff and Rick Pildes have noted that some of the most significant voting legislation in recent years—notably the National Voter Registration Act<sup>17</sup> and the Help America Vote Act<sup>18</sup>—has been universal in scope.<sup>19</sup> Furthermore, as both Issacharoff and Pildes point out, recent waves of constitutional voting litigation—drawing on the Supreme Court’s decision in *Bush v. Gore*<sup>20</sup> and other Supreme Court cases elaborating the right to vote—have similarly applied a “new model” of voting rights, “one grounded on a non-civil rights vision of fundamental guarantees” that accrue to all voters.<sup>21</sup>

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12. See U.S. CONST. amend. XXIV.

13. 42 U.S.C. § 1973h (2006).

14. See 3 ACKERMAN, *supra* note 3, at 107-09.

15. 383 U.S. 663 (1966).

16. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1345 (2011).

17. Pub. L. No. 103-31, 107 Stat. 77 (1993).

18. Pub. L. No. 107-252, 116 Stat. 1665 (2002).

19. See Issacharoff, *Discrimination Model*, *supra* note 2, at 109-110; Pildes, *supra* note 2, at 757.

20. 531 U.S. 98 (2000).

21. Issacharoff, *Discrimination Model*, *supra* note 2, at 104; see also Pildes, *supra* note 2, at 759 (“[O]ne of the vastly underappreciated consequences of *Bush v. Gore* is its recognition that the Constitution protects the right to vote from being arbitrarily infringed, for any reason at all, whether or not race is involved.” (internal citation omitted)). Issacharoff and Pildes set



Pildes argues that the “redefinition of the problem from protection of minority voting rights to protection of voting rights as such”—as reflected in these legal developments—“represents the future of voting rights.”<sup>22</sup> He, and other similarly minded scholars, tout universalistic solutions to civil rights problems. In response to the Supreme Court’s *Shelby County* decision, Issacharoff proposes that Congress adopt a regime of “smart disclosure” that would apply to all voting changes for federal elections, and that would set the stage for challenges to those changes if they violated any voter’s rights.<sup>23</sup> In a piece published while *Shelby County* was pending, Pildes similarly argues that “the more effective approach is to think in terms of solutions, federal or state, that eliminate unnecessary barriers”—such as obstacles to voter registration and practices that cause long polling-place lines—“and protect the right to vote in general, uniform terms.”<sup>24</sup> Professor Hasen similarly argues for reliance on a universalistic constitutional jurisprudence of voting rights.<sup>25</sup>

Calls for universalism have extended to many civil rights contexts beyond voting as well. Indeed, Professor Kenji Yoshino has defended a universalistic approach to the interpretation of the Fourteenth Amendment in general.<sup>26</sup> He argues that the Supreme Court has, as a result of “pluralism anxiety,” shifted its interpretation of that amendment from emphasizing group-oriented equality-based dignity claims to emphasizing more universal liberty-based dignity claims. He contends that this shift is likely a positive development because universalistic claims are more persuasive and inclusive.<sup>27</sup>

In the area of higher-education admissions, for example, commentators have argued for a number of years that schools should abandon race-based affirmative action and replace it with “race-neutral” efforts to achieve diversity,

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forth their understanding of the emerging constitutional jurisprudence enforcing a universal right to vote in Samuel Issacharoff & Richard H. Pildes, *Bush v. Gore and the Constitutional Right to Vote*, in *ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER BUSH V. GORE* (Michael Alvarez & Bernard Grofman eds., forthcoming 2014).

22. Pildes, *supra* note 2, at 760.

23. See Issacharoff, *Discrimination Model*, *supra* note 2, at 121-23.

24. Richard H. Pildes, *We Need a Broader Approach*, N.Y. TIMES: ROOM FOR DEBATE, Feb. 24, 2013, <http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/we-need-a-broader-approach>.

25. See Hasen, *supra* note 2.

26. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

27. *Id.*

whether through something like the Texas Ten Percent Plan<sup>28</sup> or through some sort of class-based affirmative action.<sup>29</sup> Whether these strategies are best understood as “race neutral” is a matter of heated debate<sup>30</sup>—debate that will illuminate my arguments in the remainder of this essay. But advocates of these alternative admissions policies have certainly argued for them in universalistic terms. The Supreme Court’s recent *Fisher* decision, by highlighting the Court’s continued skepticism of explicitly race-based affirmative action, is likely to stoke further interest in these universalistic alternatives.<sup>31</sup>

In the area of employment law as well, numerous commentators have argued that universalistic approaches can best serve civil rights interests. In an important recent article, Professor Katie Eyer argues that advocates should pursue what she calls “extra-discrimination remedies” to attack discriminatory conduct in the workplace.<sup>32</sup> She includes just-cause termination requirements, the Family and Medical Leave Act (FMLA) and other workplace flexibility laws, and general workplace antibullying laws as among the extra-discrimination remedies to which civil rights advocates should look.<sup>33</sup> Along similar lines, Professor Evan Gerstmann argues that state laws protecting all workers against discrimination based on lawful off-duty conduct may be superior to group-based legal protections in protecting gay and lesbian

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28. See, e.g., Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1311-12 & n.100 (2011) (describing conservatives’ advocacy of “percent plans” as an alternative to race-based affirmative action).
  29. See, e.g., Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037 (1996) (arguing for class-based affirmative action on moral, legal, and political grounds).
  30. See, e.g., *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (“[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious.”); Brian D. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 290 (2001) (arguing that “although these novel admissions schemes are facially race-neutral, they are no less unconstitutional than the racial preference policies they replaced”).
  31. *Fisher*, 133 S. Ct. 2411; see John B. Judis, *The Unlikely Triumph of an Affirmative Action Prophet*, NEW REPUBLIC, July 18, 2013, <http://www.newrepublic.com/article/113669/richard-kahlenberg-class-based-affirmative-action-prophet>.
  32. Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1341 (2012).
  33. See *id.* at 1345; see also Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093 (arguing that the FMLA is better suited to eradicating entrenched workplace inequality than are Title VII and the Pregnancy Discrimination Act); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996) (arguing for just-cause termination as a means of achieving civil rights ends).

workers.<sup>34</sup> Professor Michelle Travis cites the medical examination provisions of the Americans with Disabilities Act – which protect *all* workers, regardless of whether they have disabilities, against certain medical inquiries – as an example of a universalistic approach that will help to achieve equality goals.<sup>35</sup> In separate works, Professor Rachel Arnow-Richman and I have advocated universalistic workplace accommodation requirements.<sup>36</sup> And I have argued that universal health insurance would help eliminate “the most significant barrier to employment for people with disabilities.”<sup>37</sup>

As the foregoing discussion suggests, universalistic approaches to civil rights problems have had many influential advocates in recent years. The remainder of this essay examines the arguments for and against those sorts of approaches, before looking closely at how these arguments apply to the post-*Shelby* voting context.

## II. TACTICAL ADVANTAGES OF UNIVERSALIST APPROACHES

Some of the most prominent arguments for universalism have been essentially tactical. The tactical arguments posit that universalistic approaches are more likely to survive legal or political challenges than those that are more targeted. I argue in this Part that these arguments are sometimes, but far from always, true.

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34. EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 180-81 (1999). For a general discussion of off-duty conduct laws as a protection of social equality, see Bagenstos, *Employment Law*, *supra* note 5, at 247-53.
35. Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 552-59 (2012).
36. See BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 53-54 (arguing for a requirement that “would demand that employers design physical and institutional structures (including work schedules and work tasks) in a way that reasonably takes account of the largest possible range of physical and mental abilities, and that they provide reasonable flexibility to all potential employees whose physical or mental abilities still are not taken into account,” but recognizing that such a radical requirement is unlikely to be adopted); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108-12 (2010) (arguing for a right for all employees to request workplace accommodations and receive a written response from their employer).
37. BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 129, 145.

### A. *The Tactical Argument for Universalism*

When arguing in the tactical vein, advocates have urged that universalist approaches are more durable in two realms. One realm is political—universalist approaches, their supporters contend, can retain political support and avoid political backlash where targeted alternatives cannot. The second realm is judicial—judges and juries may read targeted civil rights laws narrowly, the argument goes, but they will read and implement universalistic laws more broadly. There is obviously some overlap between these arguments, as judges and juries are a part of and influenced by broader political trends.<sup>38</sup> Nevertheless, the political and judicial aspects of the tactical arguments raise some slightly different issues, and I will address them separately.

#### 1. *Secure Political Support*

Much of the advocacy of universalism is self-consciously political. Michelle Travis argues, for example, that the “most important[.]” reason for adopting universal workplace protections is that “non-group-conscious regulation of particular employment practices currently enjoys greater political viability than attempts to expand the list of legally protected social identity groups.”<sup>39</sup> Advocates of race-neutral affirmative action have often pressed similar political arguments.<sup>40</sup> In my own work urging universalist approaches to address problems of disability inequality, I have looked to the history of American social welfare policy, in which broader, universalist interventions have often proven to be more politically popular than more narrowly targeted ones.<sup>41</sup>

Years earlier, William Julius Wilson made a similar political argument for policies that did not focus on racial minorities but instead on “the truly

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38. The extensive literature on political, social, and judicial backlash against the Americans with Disabilities Act, for example, highlights the ways in which political and judicial trends interact with and reinforce each other in this context. See, e.g., *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (Linda Hamilton Krieger ed., 2003).

39. Travis, *supra* note 35, at 564.

40. See, e.g., Kahlenberg, *supra* note 29, at 1062-64.

41. See BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 143 (“Looking at the history of the American welfare state in general, there seems to be a great deal of evidence to support the notion that broad social insurance programs fare better politically than do more targeted interventions.”). For a discussion of some of the complexities of the point as applied to the disability context, see Samuel R. Bagenstos, *Disability and the Tension Between Citizenship and Social Rights* (unpublished manuscript) (on file with author).

disadvantaged” of all races.<sup>42</sup> Relying on some of the same work in social welfare policy, Professor Kenji Yoshino argues that a universalistic liberty-based approach to equal protection can help to overcome political resistance born of “equality fatigue” and resistance to identity politics.<sup>43</sup> One reason for this dynamic is that universalist interventions have a broader base of support. Professor Mary Anne Case, for example, argues that advocating for flexible scheduling for *all* workers is likely to be more politically successful than advocating for flexible scheduling for parents alone, because the universalist frame “would broaden the coalition for such change and potentially reduce the possibility for zero-sum games among employees.”<sup>44</sup>

## 2. *Ensure Broad Judicial Implementation*

Sometimes, the tactical arguments for universalist interventions have focused not on the political system generally but on predictions of how the courts will respond. In recent years, courts have often read antidiscrimination laws narrowly.<sup>45</sup> This might be because judges think of them as feel-good laws that legislators can’t publicly oppose.<sup>46</sup> Or it might be because they think of targeted laws as simple interest-group transfers.<sup>47</sup> It might also stem from what Kenji Yoshino calls “pluralism anxiety,” in which judges, like other public

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42. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 118 (1987).

43. See Yoshino, *supra* note 26, at 794-95.

44. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 *CHI.-KENT L. REV.* 1753, 1768 (2001).

45. For an influential discussion, see generally Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 *YALE L.J.* 1141 (2002). I highlighted the problem of courts’ narrow readings of the ADA in BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 46-47.

46. Justice Scalia’s description of Voting Rights Act preclearance as a “racial entitlement” in the *Shelby County* argument seems to rest on this sort of view. See Amy Davidson, *In Voting Rights, Scalia Sees a “Racial Entitlement,”* *NEW YORKER*, Feb. 28, 2013, <http://www.newyorker.com/online/blogs/closerread/2013/02/in-voting-rights-scalia-sees-a-racial-entitlement.html> (quoting Justice Scalia: “Even the name of it is wonderful: the Voting Rights Act. Who is going to vote against that in the future?”).

47. See, e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 *HARV. L. REV.* 4, 14-18 (1984) (arguing that courts should interpret interest-group legislation narrowly); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *HARV. L. REV.* 405, 471 (1989) (arguing “that courts should narrowly construe statutes that embody mere interest-group deals”).

actors, fear that targeted civil rights laws divide us into different group-based “fiefs.”<sup>48</sup> In equal protection cases, this skepticism is reinforced by, or perhaps instantiated in, the constitutional law doctrines that impose strict scrutiny on even “benign” racial discrimination.<sup>49</sup> Influential judges—and Justices—have recently suggested that various antidiscrimination laws, notably those that prohibit practices with unjustified disparate impacts, might trigger, and fail, strict scrutiny, and they have cited that concern as a reason for reading those statutes narrowly.<sup>50</sup> The increasing conservatism of the courts makes all of these responses increasingly likely.<sup>51</sup>

Alternatively, courts’ narrow readings of antidiscrimination laws may stem from their narrow understandings of what constitutes “discrimination.” Extensively reviewing the psychological literature, Professor Katie Eyer shows that people consistently think of discrimination as something that involves individual fault and discriminatory intent on the part of the perpetrator—and that they are often unwilling to attribute negative outcomes to discrimination even in the presence of strong evidence of such fault and intent.<sup>52</sup> She persuasively argues that the restrictive interpretation of civil rights laws reflects judges’ and jurors’ adoption of this narrow psychological frame for understanding discrimination.<sup>53</sup> When a person injured by an employer’s conduct labels that conduct “discrimination,” for example, she may trigger defensiveness on the part of the employer<sup>54</sup>—a defensiveness that judges and jurors, who tend to believe that discrimination is rare, will likely indulge and share. In my own work expressing skepticism about structural approaches to antidiscrimination law, I have similarly argued that judges are hostile to efforts

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48. Yoshino, *supra* note 26, at 747-48.

49. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

50. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 594-97 (2009) (Scalia, J., concurring).

51. See Dahlia Lithwick, *The Courts: The Conservative Takeover Will Be Complete*, WASH. MONTHLY, Jan./Feb. 2012 (“[T]he one legacy of which George W. Bush can be most proud is his fundamental transformation of the lower federal judiciary—a change that happened almost undetected by the left.”).

52. See Eyer, *supra* note 32, at 1292-1318.

53. See *id.* at 1318-1327.

54. See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009).

to expand civil rights law beyond “the paradigm of a fault-based understanding of ‘discrimination.’”<sup>55</sup>

Universalist approaches may avoid these problems. “Because the operative issue” under a universalist workplace protection regime “is not whether a particular individual has been discriminated against—but rather whether the set of facts presented can fulfill a distinct (and typically more straightforward) set of statutory or judicial requirements,” Eyer argues that a judge or jury therefore need not resolve “the difficult and psychologically contingent question of whether discrimination truly took place.”<sup>56</sup> She contends that a move toward universalistic approaches (which she calls “extra-discrimination remedies”) is likely to make a significant, positive difference in the ability of discrimination victims to vindicate their claims in court.<sup>57</sup> In the disability context specifically, I have argued that a universal requirement of workplace accommodation—not limited to people with disabilities—can help prevent judges from “see[ing] their job as vigorously policing the line between those who are in and those who are out of the protected class.”<sup>58</sup>

### *B. Problems with the Tactical Argument*

These tactical arguments are powerful. But there is reason to believe that universalist approaches to civil rights laws will often have the opposite tactical effect—that they will undermine political and judicial support for their enforcement. Moreover, the tactical arguments for universalist approaches rest on a questionable empirical premise—that actors in the political and judicial systems will understand those approaches as protecting everyone instead of as benefitting particular groups. To the extent this premise does not hold, universalist approaches to civil rights problems are unlikely to realize their supposed tactical advantages. This Section addresses those possibilities.<sup>59</sup>

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55. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 45 (2006) [hereinafter Bagenstos, *Structural Turn*].

56. Eyer, *supra* note 32, at 1346.

57. *Id.*

58. BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 46.

59. Of course, not all of these arguments are consistent with each other. Many are in fact in tension. But that underscores my fundamental point in this essay: that the choice between universalism and targeting cannot be made in the abstract but only on the basis of a careful examination of the context at issue.

1. *Undermine Political Support and Dilute Judicial Willingness to Enforce*

Compassion fatigue may limit the utility of a universalist response to civil rights problems. Many tactical critiques of universalism rest on the premise that there is “a small, fixed quantity of goodwill for civil rights causes.”<sup>60</sup> If that premise holds, extending protections beyond the most compelling cases may undermine political support for those protections. Professor Jessica Clarke, for example, argues powerfully that universal workplace bullying laws will trivialize the cause of ending sexual harassment by lumping those who experience sexual harassment with those who are making a federal case out of something that sounds like relatively minor, childish behavior.<sup>61</sup> Clarke similarly argues that laws guaranteeing workplace flexibility for all employees will undermine support for accommodations for workers who take care of family members, because such laws will tie those accommodations to the most trivial reasons an employee might have for wanting to be away from work.<sup>62</sup> The erosion of support might occur in legislatures, where representatives could be less willing to push for broader universalist laws than for narrower targeted ones. Or the erosion might occur in the judiciary, where overworked judges could look for excuses to knock cases brought under these broader laws out of court.

The implicit premise in Clarke’s argument is important—the “civil rights” label has a powerful cachet in American politics.<sup>63</sup> If political and judicial actors believe that an intervention is really a civil rights law, they are willing to accept that it should override their baseline preference against regulation of businesses and state and local governments.<sup>64</sup> But they continue to have a

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60. Julie C. Suk, *Race Without Cards?*, 5 STAN. J. C.R. & C.L. 111, 114 (2009) (reviewing RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008)).

61. Clarke, *supra* note 10, at 1263-66.

62. *Id.* at 1278-79.

63. For a recent effort to harness the political power of the civil rights label to obtain support for collective bargaining rights, see RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT* (2012).

64. This is at least part of the thought behind Justice Scalia’s labeling of Voting Rights Act preclearance as a “racial entitlement.” See Davidson, *supra* note 46. Note also the arguments of many disability rights supporters, in the wake of courts’ initial narrow readings of the ADA, that judges failed to understand that the statute was really a civil rights law. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000).



narrow understanding of what kinds of interventions deserve the civil rights label. And universalist approaches, which extend beyond protecting the particular groups or axes of identity that seem to raise the most pressing claims of justice, will push common understandings of civil rights beyond most people's limits.<sup>65</sup> As a result, those approaches will lose the support that comes with the civil rights label and may be unable to overcome political and judicial resistance to regulating businesses and state and local governments.

Housing and Urban Development Secretary George Romney's efforts to pursue economic integration of the suburbs, discussed in Professor Ackerman's chapter on "The Breakthrough of 1968," provide an excellent example of this dynamic. As Professor Ackerman notes, "Romney wanted to force the suburbs to open their doors to subsidized housing for poor people of all races," because "[e]conomic, not merely racial, integration was his goal."<sup>66</sup> Romney's efforts, which marked a universalizing step beyond prohibiting race discrimination in housing, provoked a massive backlash.<sup>67</sup> When President Nixon gave in to the backlash (one with which he agreed<sup>68</sup>), he retreated to a position that, at least on its face, supported strong enforcement of the Fair Housing Act's prohibitions on race discrimination.<sup>69</sup>

Relatedly, the political process has proven to be particularly responsive to some groups of beneficiaries of civil rights laws. People with disabilities, for example, have often proven able to mobilize targeted legislation on their behalf.<sup>70</sup> And there are more general reasons why targeted laws may draw more political support than universalist approaches do. For one thing, powerful currents in public choice theory generally predict that laws with narrowly targeted beneficiaries and broadly distributed costs are likely to be highly

65. See FORD, *supra* note 60, at 176.

66. 3 ACKERMAN, *supra* note 3, at 218-19.

67. Troublingly for both sides of the universalism debate, they provoked a backlash largely because they were understood as mainly benefiting racial minorities, and indeed as being the most effective means of achieving racial integration in housing. See CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS* 103, 105-07 (2006). I will return to this point.

68. See 3 ACKERMAN, *supra* note 3, at 222-23.

69. See *id.* For some well-taken doubts as to how strong Nixon's support of the anti-discrimination principle was in this context, see BONASTIA, *supra* note 67, at 109-10.

70. See BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 144; see also Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 308 n.259 (1998) (arguing that disability welfare programs have fared well politically because their beneficiaries have "substantial political support among the general public").

politically resilient.<sup>71</sup> For another, targeted laws will often achieve their goals more efficiently than universalist approaches, and the political process may reward this efficiency.<sup>72</sup>

The political case for universalism is therefore more complicated than the advocates suggest. In many circumstances, universalist approaches to civil rights problems are likely to be less politically and judicially resilient than are targeted approaches.

## 2. *Become Coded as Serving a Particular Group*

There is a second major problem with the political argument for universalism. That argument assumes that a universalist approach will avoid the backlash that often accompanies legislation designed to advance the interests of a particular, perhaps stigmatized, group. But it is far from obvious that the social and political understanding of a law will so closely track its legal form. To the contrary, even a universalist law that is motivated by a desire to serve a particular group may soon be understood as essentially targeting that group.

Many of the critiques of class-based affirmative action make a form of this argument. Professor Richard Fallon, for example, suggests that “economically based affirmative action” programs may, “once in operation, . . . generate significant division and resentment, especially if they [a]re broad in scope.”<sup>73</sup> Professor Randy Kennedy argues, even more sharply, that “[t]he day after affirmative action is ended, right-wingers who were previously singing the praises of race-neutral alternatives will all of a sudden begin perceiving that these alternatives also ‘victimize’ whites, deviate from meritocratic standards, and so on and so forth.”<sup>74</sup> George Romney’s efforts to impose economic

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71. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). This notion, too, seems to be part of the inspiration behind Justice Scalia’s “racial entitlement” comment.

72. This is the basic political argument of PETER H. SCHUCK & RICHARD J. ZECKHAUSER, *TARGETING IN SOCIAL PROGRAMS: AVOIDING BAD BETS, REMOVING BAD APPLES* (2006).

73. Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 *UCLA L. REV.* 1913, 1939 (1996). Note also Professor Wilson’s argument that the Great Society’s reliance on means-tested anti-poverty programs associated the Great Society with minorities and made it politically vulnerable. See WILSON, *supra* note 42, at 125-39.

74. Randall Kennedy, *Affirmative Reaction*, *AM. PROSPECT*, Feb. 19, 2003, <http://prospect.org/article/affirmative-reaction>; see also RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 177-79 (2013) (giving examples of prominent affirmative action opponents who have argued that percentage admissions plans are

integration on the suburbs provide an example here—they provoked a backlash precisely because racial minorities were understood as their principal beneficiaries. In a different context, I have argued that even when disability activists pursue universalistic solutions to their civil rights problems, they are likely, “by their very participation,” to lead the public to associate those solutions with people with disabilities particularly.<sup>75</sup>

A number of commentators have identified examples of this dynamic in work/life policies. As Clarke shows, “in many workplaces, even universally available flexible work arrangements and leave policies are regarded as special accommodations for caretakers or ‘mommy tracks.’”<sup>76</sup> As a result, laws requiring universal workplace accommodations—like the FMLA—may encourage discrimination by employers, and may feed public stereotypes that women are and should be the principal caregivers in society.<sup>77</sup>

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As a simple tactical matter, then, the effects of a universalistic approach to civil rights are ambiguous. In some settings at some times—notably where targeted approaches are highly contentious and the universalist alternatives are relatively non-burdensome and are not understood by political and judicial actors as simply replacing targeted measures—universalist approaches are likely to be more tactically effective than targeted ones. But in others—notably where universalist approaches impose significant burdens on regulated entities or are politically understood as *really* being aimed at achieving targeted goals—they will be less so.

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unconstitutional on the same grounds). For a careful if now somewhat dated exploration of this issue from a constitutional perspective, see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000).

75. BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 145.

76. Clarke, *supra* note 10, at 1271.

77. See Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 67 (2004) (arguing that to the extent that the FMLA “has had any effect at all on” gender stereotypes or discrimination against women in the workplace, “the statute has likely exacerbated both, though probably only to a socially insignificant degree”); see also Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 290-300 (2000) (arguing that the FMLA likely has a negative effect on the wages of female workers, because employers can predict that women are more likely to take FMLA leave).

### III. SUBSTANTIVE ADVANTAGES OF UNIVERSALIST APPROACHES

Not all of the arguments for universalist approaches to civil rights are purely tactical. Others are substantive. Defenders of universalism argue that universalist approaches do a better job of promoting equality and dignity—not just because they are more likely to be adopted and enforced than targeted approaches, but also because they are more effective policy tools for solving civil rights problems. But this set of arguments, like the tactical arguments addressed in the previous Part, holds only sometimes. Other times, universalist approaches may actually undermine substantive civil rights goals.

#### A. *The Substantive Argument for Universalism*

Universalist approaches might be substantively superior to targeted ones in two respects: first, they might help to overcome limitations in the reach or enforcement of targeted civil rights laws that would otherwise allow group-based discrimination to escape sanction; second, they might protect interests in citizenship or dignity that are threatened by conduct that is neither group-based nor discriminatory but that nonetheless deserve protection.

##### 1. *More Effectively Address Discrimination*

For a variety of reasons, group-based antidiscrimination laws will predictably fail to eliminate discrimination and group-based inequality. For example, the existence of persistent racially polarized voting makes it difficult as a practical matter to disentangle *racial* motivations for election-law changes from *partisan* or *political* motivations for those changes.<sup>78</sup> As a result, many voting restrictions that are in fact motivated by race will predictably escape liability under a law that prohibits voting discrimination, because it will be difficult for a plaintiff to prove that race, rather than politics, was the true motivation.<sup>79</sup> In the workplace context, the widespread persistence of the

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78. See Hasen, *supra* note 2, at 60; Pildes, *supra* note 2, at 761. For an example of some of the difficulties of disentangling racial and political motivations in this context, see *Easley v. Cromartie*, 532 U.S. 234, 243-58 (2001).

79. Thus, in the litigation challenging voting restrictions implemented in the wake of the Supreme Court's *Shelby County* decision, both Texas and North Carolina have defended their restrictive laws on the ground that they targeted Democrats, not minorities—even though minorities consistently and overwhelmingly support Democrats in those states. See Hasen, *supra* note 2.

baseline rule of employment-at-will similarly hides intentional discrimination by “facilitat[ing] employers’ assertion of pretextual reasons for termination.”<sup>80</sup> Indeed, the difficulty in proving intentional discrimination exists throughout civil rights law. Congress has frequently responded by prohibiting actions that have an unjustified disparate impact on protected groups.<sup>81</sup> But plaintiffs face significant hurdles in proving disparate impact as well.<sup>82</sup>

A universalistic approach could overcome these problems by uniformly prohibiting certain actions that are often discriminatory without requiring proof of discrimination in any individual case. A statute might prohibit changes from district-by-district to at-large elections, for example, or it might prohibit restrictive voter identification laws. In the employment context, a statute might prohibit employers from terminating *any* employee without good cause. Classic examples of prophylaxis, laws like these would sweep more broadly than simply prohibiting discrimination, but they would do so in order to ensure that discrimination did not escape sanction.

Universalist approaches can also help to overcome a distinct limitation of antidiscrimination laws. Antidiscrimination laws focus on identifying unequal treatment by bad actors, but they do so against a taken-for-granted baseline of social and institutional structures. Those structures may themselves limit the opportunities of members of certain groups, whether by limiting access to material goods that are necessary for opportunity or by constructing identities in a way that reinforces limiting stereotypes.<sup>83</sup> Professor Catherine Albiston, for example, argues that the Pregnancy Discrimination Act fails to achieve gender equality because it takes for granted workplace time standards that embody unequal cultural conceptions of gender and work.<sup>84</sup> Universal work-life protections like the FMLA, she argues, can attack these gender inequalities at a deeper, institutional level.<sup>85</sup> Similarly, I have argued that the ADA’s

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80. Bagenstos, *Employment Law*, *supra* note 5, at 245; see Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1995); Joseph E. Slater, *The “American Rule” That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53 (2007).

81. See George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006).

82. See Bagenstos, *Structural Turn*, *supra* note 55, at 13-14, 21-24; Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734-53 (2006).

83. I have emphasized the limits of antidiscrimination law in overcoming deep-rooted structural inequalities in Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) [hereinafter Bagenstos, *Future of Disability*]; and Bagenstos, *Structural Turn*, *supra* note 55.

84. See Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1128-55.

85. See *id.* at 1155-65.

employment title will fail to achieve disability equality because it takes for granted our health insurance system, which represents the largest barrier to workforce participation for a large class of individuals with disabilities.<sup>86</sup> Universal health insurance, by contrast, can attack the problem of disability inequality on a deeper, structural level.<sup>87</sup> And as Professor Ackerman shows in his discussion of George Romney's open housing initiatives, laws prohibiting race discrimination in housing can create opportunities for minority-group members who are rich enough to afford to buy houses in suburban communities, but those laws are of far less utility in combating the economic disadvantage that keeps many minorities from being able to afford such houses in the first place.<sup>88</sup>

## 2. *Address Broader but Important Problems of Inequality and Injustice*

The first set of substantive arguments suggested that universalist approaches can do a better job than targeted ones of identifying and uprooting the group-based discrimination that is the target of most civil rights laws. But advocates have offered a more far-reaching substantive justification for universalist approaches. Those approaches, they argue, can address problems of inequality and injustice that go well beyond the sorts of group-based discrimination that civil rights laws generally target.

Some of these advocates argue that universalist approaches can appropriately focus the law on group-based disadvantages that are broader than, or even orthogonal to, the group-based disadvantages on which civil rights laws tend to focus. Supporters of class-based affirmative action, for example, argue that poverty is a more important barrier to social mobility than race, and that race-based affirmative action provides the most benefit to those racial minorities who already have the most advantages.<sup>89</sup> Before his appointment to the bench, Clarence Thomas thus argued that “[a]ny preferences given should be directly related to the burdens that have been unfairly placed in those individuals’ paths, rather than on the basis of race or

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86. See Bagenstos, *Future of Disability*, *supra* note 83, at 26-34.

87. See *id.* at 74.

88. See 3 ACKERMAN, *supra* note 3, at 326.

89. See Kahlenberg, *supra* note 29, at 1060 (arguing that, for this reason, class-based affirmative action “does a better job of providing equal opportunity than . . . the current system of affirmative action”); see also WILSON, *supra* note 42.

gender, or on other characteristics that are often poor proxies for true disadvantage.”<sup>90</sup>

Other advocates argue that universalist approaches are superior because they vindicate rights or interests that everyone shares. For example, Professor Issacharoff and others argue that universalist protections of the right to vote are preferable to bans on voting discrimination because everyone has an interest in voting—one that is not fully protected by an antidiscrimination law.<sup>91</sup> In the workplace context, I have advocated universalist protections on the ground that they can protect each worker’s interest in being treated as a social equal with his or her boss.<sup>92</sup> Others have advocated particular universalist workplace protections on the ground that they protect each worker’s privacy or dignity.<sup>93</sup> A targeted antidiscrimination law cannot achieve these goals as effectively, because it provides no effective tools to respond to cases in which all workers are denied treatment that vindicates their interests in social equality, privacy, and dignity.

### *B. Problems with the Substantive Argument*

Notwithstanding these potential substantive advantages of universalist approaches to civil rights problems, the breadth of those approaches can undermine civil rights goals as well. Framing the law in broad, universalistic terms can dilute the protections enjoyed by the groups that were the original intended beneficiaries of antidiscrimination laws. Even worse, universalist approaches will often address broader problems of inequality and injustice only by taking for granted, and indeed entrenching, pre-existing group-based inequalities.

For those who believe that a broad, universalist approach to issues of inequality can best address the problems of group-based inequality that are the

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90. Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough*, 5 YALE L. & POL’Y REV. 402, 410-11 (1987).

91. See Issacharoff, *Discrimination Model*, *supra* note 2, at 113 (“Election officials are entrusted with administration of a system fraught with the potential for ends-oriented misbehavior, whether predicated on race, partisanship, personal gain, political favoritism, or outright corruption.”); Jonathan Soros & Mark Schmitt, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY, Spring 2013, at 22 (arguing for a universalist right-to-vote amendment to the Constitution).

92. See Bagenstos, *Employment Law*, *supra* note 5.

93. See, e.g., David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251 (2010).

principal focus of targeted civil rights laws, the New Deal should offer a cautionary lesson. As described in great detail, most recently by Ira Katznelson, the social and economic legislation of the New Deal, while broadly redistributive, was designed in a way that minimized its challenges to the racial caste system that existed in the American South.<sup>94</sup> New Deal programs also took for granted a gendered division of labor, in which men were understood as the primary wage-earners, and women, if they worked at all, were consigned to subordinated jobs.<sup>95</sup> By granting protections to workers in predominantly white and male jobs, while denying them to workers in job classifications dominated by minorities and women, many of these programs entrenched race and gender inequality at the same time as they alleviated economic inequality – even when they did not on their face discriminate based on race or gender.

Current proposals for class-based affirmative action may have similar substantive limitations. They may alleviate economic inequality but do very little to promote racial equality.<sup>96</sup> And, as Professor Deborah Malamud argues, policymakers' understandings of class may fail to appreciate race and sex dynamics in the transmission of wealth. Professor Malamud cites "ample evidence that the interactions among economic factors differ for men and women, that women are less able than men to take personal advantage of inherited and earned economic and social capital, and that occupational schemes developed for men are less accurate for women."<sup>97</sup> She also notes that "the past and present effects of discrimination mean that blacks and whites who appear to have the same occupation, education, or residential situation when a simple metric is used may well not occupy the same status in reality."<sup>98</sup> An admissions program that looks simply to generic socioeconomic data will

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94. See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013); see also ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987). Federal programs supporting homeownership infamously promoted racial segregation in housing during this period. See BONASTIA, *supra* note 67, at 61-65.

95. See ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001); SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998).

96. See Fallon, *supra* note 73, at 1947-49 (noting that most beneficiaries of class-based affirmative action are likely to be white).

97. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1891 (1996).

98. *Id.* at 1892.



categorize many women and minorities as being less “disadvantaged” than they actually are. It may also give preferences to at least some less “disadvantaged” men and whites over more “disadvantaged” women and minorities. As a result, class-based affirmative action may actually further entrench race and sex inequality.<sup>99</sup>

Professor Jessica Clarke makes a similar argument against universalist protections of work/life balance. She contends that because of society’s gendered division of labor, women will often use these protections to take time off work to take care of family, while men will often use them to make themselves better workers (by, for example, taking classes to improve their work-related skills). If so, the protections will reinforce, rather than undermine, pre-existing gender inequalities.<sup>100</sup> Moreover, Clarke argues, pre-existing stereotypes may affect not just the way beneficiaries *use* universalist protections, but also the way regulated entities and courts *apply* those protections. In the work/life context, she contends, employers deciding what accommodations to grant—and courts deciding what accommodations to require—will often fall back on (gendered) stereotypes about what are sufficiently important reasons to miss work.<sup>101</sup> A recent experimental study of managers’ responses to workplace flexibility requests lends additional credence to these concerns. That study found that “managers were most likely to grant flextime to high-status men seeking flexible schedules in order to advance their careers,” while “flexible scheduling requests from women were unlikely to be granted irrespective of their job status or reason.”<sup>102</sup>

More generally, as Professor Yoshino argues, universalism may “paper[] over the subordination in need of . . . correction.”<sup>103</sup> Yoshino gives the example of universalist arguments for reproductive autonomy—an argumentative frame that, in his words, “elides the real biological differences between men and women that make the exercise of this right completely different for the two sexes.”<sup>104</sup> In a different context, Professor Elizabeth Emens suggests that universalist requirements for workplace accommodations might fail to take

99. See *id.* at 1890-94.

100. See Clarke, *supra* note 10, at 1274-78.

101. *Id.* at 1269-70.

102. Victoria L. Brescoll, Jennifer Glass & Alexandra Sedlovskaya, *Ask and Ye Shall Receive? The Dynamics of Employer-Provided Flexible Work Options and the Need for Public Policy*, 69 J. SOC. ISSUES 367, 367 (2013).

103. Yoshino, *supra* note 26, at 798.

104. *Id.*

account of “disabled people and their particular needs.”<sup>105</sup> Professor Catherine MacKinnon similarly argues that universalist protections against workplace harassment fail to take account of the unique harms of sex-based harassment against women.<sup>106</sup> Taking this point a step further, Clarke argues that such protections—often framed these days as prohibitions of workplace “bullying”—may actually harm women. Employers and courts will view the concept through the lens of gender stereotypes, she contends, and they may find aggressive behavior by women to be bullying in circumstances in which they would find equally aggressive behavior by men to be normal and acceptable.<sup>107</sup>

The issue here is not just that universalistic approaches may be poorly designed—a problem that technocratic tinkering would resolve. The issue is a mismatch between universalist solutions and the problem of racial or other group-based subordination. Since universalists argue that their preferred policies will solve problems that are broader than and different from those solved by targeted policies, it should be no surprise that universalist solutions will not always do as well at solving the problems for which targeted policies are designed.

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As with the tactical arguments for universalism, the substantive arguments are ambiguous. In some circumstances, universalist approaches will be substantively better—notably where group-based discrimination is hard to prove, or where the problem is not just discrimination but the deeper, taken-for-granted structural background. But in others—where they dilute protections enjoyed by the beneficiaries of targeted laws, or where they entrench existing group-based inequalities—they will undermine civil rights goals.

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105. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 894 (2008).

106. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 88 (1979).

107. See Clarke, *supra* note 10, at 1253-54.

#### IV. EXPRESSIVE ADVANTAGES OF UNIVERSALIST APPROACHES

A final category of arguments for universalism is expressive. Many advocates defend universalist approaches based on the messages they send.<sup>108</sup> But here, too, the takeaway is ambiguous.

##### A. *The Expressive Argument for Universalism*

Targeted civil rights laws, the expressive argument goes, depend on and feed essentializing stereotypes about the characteristics of members of particular groups. Professor Albiston's case for the superiority of the FMLA provides an example of this sort of argument. As I noted earlier, Albiston contends that Title VII's reach is unduly limited because it takes for granted work practices (regarding the availability of part-time work or sick leave, for example) that may themselves be deeply infused with, and indeed constitutive of, gender roles.<sup>109</sup> Because the statute "tends to focus only on the gender side of the equation without interrogating work practices," she argues, "it invites courts to locate barriers to working in the personal circumstances and choices of women, and not in the structure of work itself."<sup>110</sup> By so doing, it "reinforces institutionalized work practices that push workers, both men and women, to adopt traditional gender roles at home."<sup>111</sup> In the end, the "process of defining what gender and work mean for purposes of legal analysis tends to solidify and naturalize existing conceptions of these categories, and the relationship between them, in ways that undermine social change."<sup>112</sup> She contends that a universal workplace flexibility law, like the FMLA, can help solve these problems:

When the focus shifts away from who is protected by antidiscrimination statutes to what work should look like, the question is not whether women should get special treatment even though they cannot live up to deeply entrenched time norms in the workplace. The

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<sup>108.</sup> For a generally supportive treatment of the expressive value of law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

<sup>109.</sup> See Albiston, *supra* note 84, at 1155.

<sup>110.</sup> *Id.*

<sup>111.</sup> *Id.*

<sup>112.</sup> *Id.* at 1155-56.

question becomes whether the institution of work itself should be restructured by law, and along with it both the workplace *and* the non-workplace ways of organizing social life around traditional gendered roles.<sup>113</sup>

Relatedly, I have argued that targeted disability protections may entrench the public view that “people with disabilities are not capable of providing for themselves.”<sup>114</sup> And Yoshino has defended a universal liberty-based approach to the Fourteenth Amendment on the basis that “it is less likely to essentialize identity” than is a targeted equality-based approach.<sup>115</sup>

Advocates of universalist approaches also make a distinct expressive argument. They contend that targeted approaches to civil rights problems are divisive. Targeted approaches, they argue, send a Balkanizing message that we should think of ourselves as defined by our membership in particular, socially salient groups. Universalist approaches, by contrast, “stress[] the interests we have in common as human beings rather than the demographic differences that drive us apart.”<sup>116</sup> They can, advocates contend, help to build social solidarity across group lines.<sup>117</sup>

### *B. Problems with the Expressive Argument*

The essential problem with the expressive argument for universalism is that it rests on the premise that the message expressed by a law turns on its legal form. The argument seems to run that if a law specifically treats people differently based on their group status, or requires judges, administrators, or regulated entities applying the law to consider individuals’ group status, then it will send the message that group status matters, but if a law is not specifically framed in group-based or targeted terms, then it will not send such a message.<sup>118</sup> That argument is plausible, but it is just as plausible that many

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113. *Id.* at 1156-57.

114. BAGENSTOS, *DISABILITY RIGHTS*, *supra* note 5, at 144.

115. Yoshino, *supra* note 26, at 795.

116. *Id.* at 793.

117. See Kahlenberg, *supra* note 29, at 1063-64 (arguing that class-based affirmative action can bring people together across racial lines).

118. Justice Kennedy’s recent race jurisprudence seems to rest on such a premise. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment); Siegel, *supra* note 28.

laws will have a social meaning that does not turn on such formalities. Indeed, the basic argument of the leading scholarly work on race and the social meaning of law is that social meaning does not turn on legal form – or even the intent of those who enacted the law at issue.<sup>119</sup>

**Table 1.**  
**SUMMARY OF ARGUMENTS**

	<i>Arguments for Universalism</i>	<i>Arguments Against Universalism</i>
<i>Tactical</i>	<ul style="list-style-type: none"> <li>• Secure political support</li> <li>• Ensure broad judicial implementation</li> </ul>	<ul style="list-style-type: none"> <li>• Undermine political support</li> <li>• Dilute judicial willingness to enforce</li> <li>• Become coded as serving a particular group</li> </ul>
<i>Substantive</i>	<ul style="list-style-type: none"> <li>• More effectively address discrimination</li> <li>• Address broader problems of injustice</li> </ul>	<ul style="list-style-type: none"> <li>• Dilute protections enjoyed by original beneficiaries</li> <li>• Take for granted/entrench pre-existing group-based inequalities</li> </ul>
<i>Expressive</i>	<ul style="list-style-type: none"> <li>• Undermine essentializing stereotypes</li> <li>• Send a message of community unity</li> </ul>	<ul style="list-style-type: none"> <li>• Still reflect and transmit group-oriented stereotypes</li> </ul>

As I have noted in the previous two Parts, even universalist civil rights laws are likely to reflect and transmit pervasive group-oriented stereotypes. This might happen because the public understands universalist approaches as really focusing their benefits on particular groups (I argued, for example, that the public may well understand class-based affirmative action as another

119. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323-26 (1987) (arguing that a test focused on intent fails to capture important elements of racism and racial impact).

program that protects racial minorities, albeit one that does so through indirect means). Alternatively, it might happen because the application and enforcement of a universalist law reflects essentializing stereotypes. Consider, in this regard, Jessica Clarke's argument that universalist workplace flexibility laws will merely become a vehicle through which workers, employers, and courts implement their views of proper gender roles. If dynamics like this exist, universalist approaches are as likely as targeted ones to send divisive and essentializing messages.

## V. NOTES ON VOTING RIGHTS AFTER *SHELBY COUNTY*

The preceding analysis has operated at a very high level of generality. Is it helpful in analyzing the actual problems of civil rights law? I believe it is. Advocates of universalist approaches to civil rights law often conflate the tactical, substantive, and expressive arguments for universalism. It is only by disentangling these threads and carefully examining how they apply to a particular context that we can determine whether a universalist approach in that context makes sense. In this Part, I illustrate the point by discussing the recent proposals for a universalist approach to voting rights. I argue that such an approach will not address key problems to which voting rights policy should respond.

### A. *Unpacking the Post-Shelby Universalist Proposals*

After the Supreme Court's decision to strike down a key part of the Voting Rights Act preclearance regime in *Shelby County v. Holder*,<sup>120</sup> a number of prominent commentators urged that Congress and civil rights advocates respond with a universalist approach. Professor Samuel Issacharoff, for example, argues for a regime of "smart disclosure," in which states that change procedures relating to federal elections must file "voting impact statements," signed by the chief election official and available on the internet.<sup>121</sup> He frames

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120. 133 S. Ct. 2612 (2013).

121. See Issacharoff, *Discrimination Model*, *supra* note 2, at 121-22. Spencer Overton argues that increased disclosure is necessary but not sufficient as a response to *Shelby County*. See Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19 (2013). Before the Court's decision in *Shelby County*, Guy Charles and Luis Fuentes-Rohwer argued for a "contingency strategy" that relies on institutional intermediaries to obtain and disseminate information

his proposal as one “designed to facilitate” litigation under what he calls the “new Equal Protection Jurisprudence”<sup>122</sup> stemming from *Bush v. Gore*.<sup>123</sup> Issacharoff describes that jurisprudence, which is not focused on race, as “responding to the more overt manipulations of the ballot for partisan ends, and based on a novel form of intermediate scrutiny that tests in a serious way a legislature’s actual justifications for new regulations of the voting process.”<sup>124</sup> Richard Hasen similarly argues that courts assessing voting restrictions should adopt a “strict scrutiny light” standard:

When a legislature passes an election-administration law . . . discriminating against a party’s voters or otherwise burdening voters, . . . courts should read the Fourteenth Amendment’s Equal Protection Clause to require the legislature to produce substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends.<sup>125</sup>

Even before the *Shelby County* decision (though plainly anticipating it), Richard Pildes argued that federal voting legislation, rather than aiming primarily at race discrimination, should focus “on defining the appropriate baseline of proper election practices—precisely as [the Help America Vote Act] does with respect to provisional ballots and the [National Voter Registration Act] does with respect to voter registration.”<sup>126</sup>

How should we assess these calls for universalist approaches to voting rights? The first thing to do is to unpack the arguments that their proponents offer in support of them. These arguments have blended together tactical and substantive considerations. To be sure, their major rhetorical thrust has been substantive. Thus, Professor Issacharoff argues that the Voting Rights Act

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about voting changes. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013), <http://yalelawjournal.org/forum/mapping-a-post-shelby-county-contingency-strategy>. For an influential pre-*Shelby County* argument for disclosure, see Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 724 (2006).

122. Issacharoff, *Discrimination Model*, *supra* note 2, at 103, 123.

123. 531 U.S. 98 (2000) (per curiam).

124. Issacharoff, *Discrimination Model*, *supra* note 2, at 107.

125. Hasen, *supra* note 2, at 62.

126. Pildes, *supra* note 2, at 756.

model is a poor fit with what he calls “the voting problems of today.”<sup>127</sup> In this, he echoes Professor Pildes’s argument that a universalist model “better fits the voting-rights problems of today.”<sup>128</sup> So what are the voting problems of today? To Professor Issacharoff, they are largely questions of access to the ballot, implicated by state laws imposing voter identification requirements and restrictions on early voting.<sup>129</sup> He acknowledges that such restrictions likely have “a disparate racial impact,” but argues that the *racial* impact is “likely the means rather than the end”—the end being partisan or incumbent entrenchment.<sup>130</sup> The fundamental substantive issue in the voting context, he suggests, is not race but the “conflict of interest” that exists when elections are run by partisan officials who are the co-partisans of, or at times the very same individuals as, “those who stand to benefit from the rules they create or enforce.”<sup>131</sup> Professor Issacharoff’s call to move “beyond the discrimination model” aims at this general problem of conflict of interest, whether instantiated in race discrimination or other forms of entrenchment. Thus, Professor Issacharoff relies on the “address-broader-problems-of-injustice” variant of the substantive argument for universalism.

Professor Hasen takes much the same position, though he also emphasizes the “more-effectively-address-discrimination” variant of the substantive argument. He pitches his proposal for “strict scrutiny light” in all cases involving election restrictions as one that will attack race discrimination as part of combatting a broader problem. “[T]his new rule,” he argues, “will inhibit discrimination on the basis of both race and party, and protect all voters from unnecessary burdens on the right to vote.”<sup>132</sup>

But there is an undeniable tactical undercurrent to these proposals as well. Thus, Professor Issacharoff notes that “[o]ne reading” of *Shelby County* is “that the race discrimination structure of section 5 could not be justified in light of

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127. Issacharoff, *Discrimination Model*, *supra* note 2, at 96; *see also id.* at 104 (“In terms of crafting a post-*Shelby County* regime of legal protection of the right to vote, the question for today is how much of the terrain the civil rights model still captures.”); *id.* at 120 (asserting an “increasing mismatch between the narrow civil rights model and the nature of contemporary threats to the right to vote”).

128. Pildes, *supra* note 2, at 744.

129. *See* Issacharoff, *Discrimination Model*, *supra* note 2, at 103; *see also* Pildes, *supra* note 2, at 750-52 (discussing contemporary obstacles to voting).

130. Issacharoff, *supra* note 2, at 103.

131. *Id.* at 113-14.

132. Hasen, *supra* note 2, at 62.



the increasing distance between the prohibitions and the distinct practices of racial exclusion that lie at the heart of the Voting Rights Act.”<sup>133</sup> He contrasts the Court’s skepticism of the civil rights model with its expansive interpretation of Congress’s Elections Clause authority in *Arizona v. Inter-Tribal Council of Arizona, Inc.*,<sup>134</sup> as well as with the Sixth Circuit’s creation of “a new constitutional jurisprudence” of voting protections derived from *Bush v. Gore*.<sup>135</sup> It is not hard to detect the suggestion that the more universalistic approaches represented by Elections Clause legislation and *Bush v. Gore* litigation are more likely to gain traction with the courts than beefing up the civil rights model is.

For his part, Professor Hasen is explicit that he believes that challenges to voting restrictions under antidiscrimination laws are unlikely to be successful with the current federal courts.<sup>136</sup> Although he recognizes that some may believe his universalist approach “does not give race enough of an explicit role,” Professor Hasen defends it on tactical grounds: “[I]t is unrealistic,” he says “to expect the current Supreme Court to endorse laws policing subtle discrimination in voting. The stronger claim before this Supreme Court is to protect the voting process from partisan manipulation.”<sup>137</sup> Professor Issacharoff and Professor Hasen thus both rely on the “ensure-judicial-willingness-to-enforce” variant of the tactical argument for universalism.

I may be reading too much into these arguments, but I also perceive an important expressive undertone to them. Because the right to vote is at the core of modern notions of citizenship, perhaps universalist rules governing voting are especially important because they express a notion of equal citizenship in a way that more particularized rules as applied to other spheres (education, employment, and so forth) might not.<sup>138</sup> The promotion of universalism in voting might therefore connect with a broader skepticism about the expressive effects of certain particularistic approaches to voting rights – notably the use of

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133. Issacharoff, *supra* note 2, at 117.

134. 133 S. Ct. 2247 (2013).

135. Issacharoff, *supra* note 2, at 107.

136. See Hasen, *supra* note 2, at 66-67.

137. *Id.* at 73.

138. For the classic argument that different principles of distribution might apply to different spheres of social activity, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

the Voting Rights Act to encourage the creation of majority-minority districts that subordinated other redistricting principles to race.<sup>139</sup>

*B. Critiquing the Post-Shelby Universalist Proposals*

Let's examine each of these arguments in turn. First, do universal approaches effectively attack the voting problems of today? As I argued above, a major critique of the substantive argument for universalism is that universalist approaches may divert attention from persistent problems of discrimination and thereby leave those problems in place. That critique seems fully applicable to the post-*Shelby* proposals for voting rights universalism. Those proposals focus on the problem of vote *denial*—restrictions on the opportunity to register to vote or cast a ballot.<sup>140</sup> There is no doubt that vote denial is a major problem, and a number of formerly covered states adopted laws restricting registration and voting in the immediate aftermath of *Shelby* that raised serious concerns about discrimination.<sup>141</sup> A universalistic approach that effectively attacked burdensome identification laws and limits on early voting would serve civil rights interests.<sup>142</sup>

But such a law would also leave a lot of significant discrimination against black and Latino voters unremedied. That is because a great deal of that discrimination involves vote dilution, not vote denial, and it takes place at the county and local, not state, level.<sup>143</sup> Indeed, the overwhelming majority of section 5 objections since 2000—86.4%—involved localities rather than states.<sup>144</sup> In the wake of *Shelby County*, a number of formerly covered localities have acted quickly to take actions (altering electoral districts, moving from

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139. For a discussion of the expressive harms of such redistricting, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

140. See generally Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

141. For a good roundup of laws passed in the immediate aftermath of *Shelby County*, see Kara Brandeisky & Mike Tigas, *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA, Nov. 1, 2013, <http://www.propublica.org/article/voting-rights-by-state-map>.

142. In a few paragraphs, I'll turn to the question whether a universalist law would be effective in achieving that goal.

143. See Overton, *supra* note 121, at 24.

144. See Justin Levitt, *VRA Preclearance (A Response to Pildes/Tokaji, pt. 2)*, ELECTION L. BLOG (Aug. 19, 2013, 5:16 PM), <http://electionlawblog.org/?p=54569>.

district-based to at-large elections, changing election dates, and so forth) that dilute the voting strength of growing black and Latino communities.<sup>145</sup> And the actions taken by Kansas and Arizona to adopt separate registration systems for state and federal elections<sup>146</sup>—which, in Arizona’s case, would likely have drawn an objection under section 5 of the Voting Rights Act<sup>147</sup>—highlight the limits of the Elections Clause in protecting voters in state and local elections.

All of this suggests that the universalist proposals offered by scholars like Professors Issacharoff and Hasen—and Professor Pildes before them—rely on a very partial understanding of what are “the voting problems of today.” By focusing on voting-access rules, usually statewide, that are likely to be consequential in national elections,<sup>148</sup> those proposals do not address the suppression of the effective power of minority voters on the local level. The proposals also fail to address the way *race* discrimination can instantiate differently in different times and places. A voter identification law may not be especially burdensome for most voters in most places, but in some communities the same law may be quite burdensome for an identifiable and disproportionately minority-heavy group of voters. There may be no universalistic reason why we should require states to hold early voting on Sunday afternoons. But if the African American churches in a given state have

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145. See, e.g., Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC, Oct. 29, 2013, <http://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days> (describing “a series of audacious political and legal maneuvers” used by “a group of white conservatives” to “try to seize control” of the Beaumont, Texas, school board “from its black majority”); Zachary Roth, *Georgia GOP Dusts off Jim Crow Tactic: Changing Election Date*, MSNBC, Nov. 22, 2013, <http://www.msnbc.com/msnbc/gop-revives-jim-crow-tactic> (describing a post-*Shelby County* move to change the municipal election date in Augusta, Georgia, to a date “when far fewer blacks make it to the polls”); Robert Stein, *An Analysis of Voter Support for City of Pasadena Proposition 1: November 2013*, HOUS. CHRON.: BAKER INST. BLOG (Nov. 27, 2013), <http://blog.chron.com/bakerblog/2013/11/an-analysis-of-voter-support-for-city-of-pasadena-proposition-1-november-2013> (discussing the replacement of two single-member city council districts with at-large seats in a Texas city in the first election following *Shelby County*).
146. See Ari Berman, *Separate and Unequal Voting in Arizona and Kansas*, NATION BLOG (Oct. 15, 2013, 11:07 AM), <http://www.thenation.com/blog/176650/separate-and-unequal-voting-arizona-and-kansas>.
147. See *Young v. Fordice*, 520 U.S. 273 (1997); Brenda Wright, *Young v. Fordice*, *Challenging Dual Registration Under Section 5 of the Voting Rights Act*, 18 MISS. C. L. REV. 67 (1997).
148. Professors Issacharoff and Pildes are explicit in their focus on those decisions that are likely to be consequential in national elections, perhaps because they believe that in cases where the stakes are highest, manipulation of the electoral process is most likely. See Issacharoff, *Discrimination Model*, *supra* note 2, at 104; Pildes, *supra* note 2, at 748-49.

used early voting on Sunday afternoons to mobilize their parishioners to bring their “souls to the polls,”<sup>149</sup> we may legitimately fear that discrimination is afoot when the state seeks to eliminate that early-voting opportunity.

And of course when we move from issues of vote denial to those of vote dilution, universalistic approaches offer even less traction against race discrimination (and Issacharoff, Pildes, and Hasen do not argue to the contrary). In the abstract, at-large and district-based elections could *both* be consistent with democratic theory or principles of good government. But if a municipality changes from one to the other form of representation in response to changing racial demographics, we may legitimately fear discrimination. A universalist approach provides no basis to attack this sort of change—which is an extremely common means by which minority voters are deprived of full and equal participation in local democracy.

To be sure, this disagreement might simply be a normative one. Perhaps those who urge a universalistic approach to voting rights after *Shelby* simply are skeptical that vote dilution is a significant harm—or a harm as significant as vote denial. Space constraints prevent me from offering a normative defense of the importance of vote dilution here. For my purposes, the crucial point is to highlight this normative disagreement. Those who believe that dilution causes an important harm will be unable to agree that a law targeted at vote denial best responds to “the voting problems of today.”

The fundamental insight of section 5 of the Voting Rights Act was that those who engage in race discrimination in elections are clever, so any attempt to identify a set of forbidden voting practices will fail to combat discrimination effectively.<sup>150</sup> Professor Issacharoff recognizes that a “static regulatory structure” will not address the problems in this context, because “electoral politics is nothing if not dynamic.”<sup>151</sup> But the principal *substantive* tool he and Professor Hasen propose is a universalistic constitutional jurisprudence that focuses on obstacles to registering and casting votes. That jurisprudence cannot effectively respond to discrimination that (a) involves denying voting opportunities that the courts are not prepared to guarantee universally;<sup>152</sup> or

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149. See, e.g., Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331 (2012).

150. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

151. Issacharoff, *Discrimination Model*, *supra* note 2, at 117 (quoting Charles & Fuentes-Rohwer, *supra* note 121, at 132).

152. Professor Issacharoff argues that the new equal protection jurisprudence avoids this problem by “limit[ing] the prospects for strategic manipulation of access to the franchise by

(b) involves vote dilution, not vote denial. This is a major substantive limitation of the universalistic proposals.

Both Professor Issacharoff and Professor Hasen acknowledge that their proposals will not fully address specifically racial discrimination in voting—and, of course, both authors write against a backdrop in which section 2 of the Voting Rights Act continues to provide nationwide protection against voting discrimination. I think they do not face up to just how important a phenomenon specifically racial discrimination continues to be, nor to the limits of section 2 as a regulatory tool, though.<sup>153</sup> In evaluating their proposals, then, much rests on the viability of their tactical arguments. If a universalistic approach would attack a meaningful slice of discriminatory conduct, and is the most effective way to achieve that goal given current political and judicial realities, it is worth supporting. But I believe the tactical arguments for the universalist position are likely overblown.

In this regard, it is notable that the universalistic constitutional jurisprudence that both Professor Issacharoff and Professor Hasen promote has had only limited success—and no record of success in attacking the sorts of vote-denial practices (felon disenfranchisement, voter identification laws) that raise the most significant race discrimination concerns. The successful cases were all decided by the Sixth Circuit, a court whose decisions are frequently reversed by the Supreme Court,<sup>154</sup> and the vitality of these cases outside of that circuit has yet to be tested. For the most part, the cases have addressed questions of statewide uniformity (such as the allocation of voting machines out of proportion to the number of voters in different areas of the state<sup>155</sup>) or relatively small-bore questions of election administration (involving such matters as the rules for counting provisional ballots miscast due to poll-worker error<sup>156</sup>). The most expansive of these cases, *Obama for America v. Husted*, did address a limitation on early voting, but it merely affirmed a preliminary

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state officials” instead of “carv[ing] out new categories of specific entitlements.” Issacharoff, *Discrimination Model*, *supra* note 2, at 105. But, as I argue in the next few paragraphs, the limits that this jurisprudence places on strategic manipulation are not likely to be great.

153. For a critique of Professor Issacharoff’s position along these lines, see Overton, *supra* note 121.
154. See, e.g., Mark Walsh, *A Sixth Sense: 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, A.B.A. J., Dec. 1, 2012, [http://www.abajournal.com/magazine/article/a\\_sixth\\_sense\\_6th\\_circuit\\_has\\_surpassed\\_the\\_9th\\_as\\_the\\_most\\_reversed\\_appeal](http://www.abajournal.com/magazine/article/a_sixth_sense_6th_circuit_has_surpassed_the_9th_as_the_most_reversed_appeal).
155. See *League of Women Voters v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008).
156. See *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 591-97 (6th Cir. 2012); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234-43 (6th Cir. 2011).

injunction, not a final judgment on the merits, and its holding may be limited to the context of eleventh-hour changes in early voting for some but not all voters.<sup>157</sup>

These Sixth Circuit cases are no doubt important for the voters and candidates affected. And they do, to be sure, rely on important threads in the extant Supreme Court cases.<sup>158</sup> But their holdings are a long way from requiring all voting restrictions to satisfy “a novel form of intermediate scrutiny”<sup>159</sup>—much less “strict scrutiny light” (a standard Professor Hasen draws from the *dissent* in an important voting case).<sup>160</sup> Courts have tended to resist imposing such heightened scrutiny on voting restrictions generally—precisely because such a standard would seem to require judges to intervene in a wide range of day-to-day voting decisions with no apparent discriminatory intent or effect.<sup>161</sup> This is a form of the dilution critique of universalism I discussed above. If a universalistic approach to voting rights threatens to require serious scrutiny of too broad a range of election-administration decisions, courts are likely to ratchet down the effective level of scrutiny for those decisions across the board.

And if judges and other actors will resist voting rights measures that target race discrimination, it is doubtful that universalist approaches will avoid the same fate. Judges may, indeed, be more likely to enforce a voting provision targeted to race-based abuse, precisely because it is less destabilizing of the electoral system.<sup>162</sup> In any event, it is likely that universalist protections of the right to vote will quickly become politically coded as being minority-targeted, thus undermining the political benefits of the universal frame. Indeed, opposition to voter identification laws already seems to have been politically

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157. See *Obama for Am. v. Husted*, 697 F.3d 423, 428-32 (6th Cir. 2012).

158. See Issacharoff & Pildes, *supra* note 21.

159. Issacharoff, *Discrimination Model*, *supra* note 2, at 107.

160. Hasen, *supra* note 2, at 71 (citing *Crawford v. Marion Cnty. Elections Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 553 U.S. 181 (2008)).

161. See, e.g., *Crawford*, 553 U.S. at 189-91 (2008); *id.* at 204-08 (Scalia, J., concurring in the judgment).

162. Consider, in this regard, how even the Roberts Court did not shrink from enforcing section 2 of the Voting Rights Act when it was convinced that the boundaries of Texas Congressional District 23 reflected race discrimination. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006).

coded in this way.<sup>163</sup> And that same coding is likely to undermine the expressivist effort to send a message of unity. The expressive harms or benefits of a legal rule are, I have argued, likely to turn less on its form than on the social and political context in which the rule is adopted.

In my view, although universalistic efforts to promote access to the ballot are worthy, voting rights activists should not put most of their energies into those sorts of efforts post-*Shelby*. Professor Issacharoff's "smart disclosure" regime makes sense—and is perhaps needed more at the local level than at the state level. But the disclosure regime should be accompanied by rules that are specifically directed at the problems of race discrimination in voting. Professor Spencer Overton offers a number of good suggestions along these lines, including: expanding the Voting Rights Act's bail-in provision to subject jurisdictions with a recent voting rights violation (even one that did not reflect intentional discrimination) to preclearance; quicker procedures in Voting Rights Act cases (perhaps including looser standards for obtaining preliminary injunctions preserving the status quo); and adopting presumptions that require states and localities that adopt voting rules that pose a special risk of discrimination to "show in court that a change is fair and that less harmful alternatives do not exist."<sup>164</sup> The proposed Voting Rights Act Amendments, introduced in response to *Shelby County*, combine universalistic rules (such as requiring disclosure of voting changes) with a continued use of a race-targeted preclearance regime.<sup>165</sup> Race-targeted approaches like these remain essential to address the continuing problems of race discrimination in elections.

## CONCLUSION

The major goal of this essay has been to make a point about universalism and civil rights. Many scholars and activists—including me—have urged universalist responses to various civil rights problems. But universalism cannot be a universal approach to civil rights. To decide whether it makes sense requires careful attention to the strengths and weaknesses of the tactical,

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163. See, e.g., Jose Delreal, *North Carolina GOP Official Resigns After Interview*, POLITICO, Oct. 24, 2013, <http://www.politico.com/story/2013/10/nc-gop-official-resigns-after-interview-98822.html>.

164. Overton, *supra* note 121, at 30-31.

165. See Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, NATION BLOG (Jan. 16, 2014, 12:53 PM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act>.

substantive, and expressive arguments for universalism in each particular context in which universalist solutions are proposed. I have illustrated this point with a discussion of the most prominent recent iteration of the universalism debate in civil rights—the response to the Supreme Court’s *Shelby County* decision. Although many prominent scholars have urged a universalist response to that decision, I have argued, on substantive and tactical grounds, that an effective response to the problems of voting discrimination continues to require laws that target race discrimination directly.