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Steven L. Winter

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STEVEN L. WINTER†

One would think that the seventeenth Chief Justice would be seething. It was, after all, Marx, who with an otherworldly prescience warned that "[t]he tradition of all the dead generations weighs like a nightmare on the brain of the living."[1] It is as if he had the Chief Justice's plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*[2] specifically in mind. Not only does Roberts's opinion reenact a Nineteenth Century formalist jurisprudence, but it manifests a more reactionary worldview than even *Plessy v. Ferguson*.[3]

It is conventional to evaluate judicial opinions according to a schema that asks whether the judge is a formalist or a realist, a liberal or a conservative, an activist or one who practices judicial restraint. This schema for categorizing judicial opinions, like all categorization, produces prototype effects.[4] Typically, formalism and judicial restraint are associated with conservative judges and realism and activism with liberal ones. While there is no necessary congruence among these three factors, there are affinities and valences. Formalists are typically conservative; it is hard to think of a socially conservative realist, though Justice Harlan comes to mind. Formalism is often aligned with social conservatism in a Burkean sense ("ours is not to reason why . . ."). More importantly, formalism is conservative of a legal or legislative victory, insisting on adherence to its distillation in a principle or rule. Hence, it is perfectly possible for a judicial decision to be formalist but politically liberal. Justice Black's First Amendment absolutism is a familiar example. From time to time, Justice Brennan's opinions display this same formalist quality.[5]

What do I mean by formalism? Perhaps the most conventional usage of the term formalist is as an epithet to describe a judicial decision

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† Walter S. Gibbs Professor of Constitutional Law, Wayne State University Law School; J.D. Columbia, 1977; B.A. Yeshiva University, 1974. My thanks to Dick Posner for his criticisms and suggestions.

1. KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 15 (C.P. Dutt ed., International Publishers Co., Inc. trans., 2d ed. 1963) (1869).

2. 127 S. Ct. 2738 (2007).

3. 163 U.S. 537 (1896).

4. Prototype effects are a consequence of the non-criterial nature of most human categorization. *See* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE & MIND 70–92 (2001).

5. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86–87 (1982) (plurality opinion); Baker v. Carr, 369 U.S. 186, 226–37 (1962).

that ascribes away responsibility (as in, "it's not me, it's my job . . . or the law, or the text, etc."). Hence, formalism is the frequent refuge of socially and politically conservative judges when faced with the claims of reform movements. In his famous study of how nominally antislavery judges like Story and Shaw responded to abolitionist claims, Robert Cover documents the rather extreme lengths to which they went to assert their helplessness before the law.[6] But this formalist rhetorical mode can also be used to rationalize potentially unpopular liberal decisions (as in, "it's not me, it's the Constitution"). In extending First Amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, for example, the Court rejected the state's claim that advertising would lower professional standards and induce consumers to favor low-cost, low-quality drugstore chains over more professional local pharmacies.[7] "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[8] Formalism, in this sense, operates as a blanket appeal to authority.

A second, closely related meaning of formalism refers to the kind of conceptualism associated with Langdell and decried by Pound as "mechanical jurisprudence."[9] The central idea is that general doctrines can be applied deductively to decide specific cases, thereby assuring the objectivity and neutrality of judicial decisionmaking. This approach is formalist in the sense that the reasoning process is supposed to be guided solely by the formal entailments of the concept (e.g., "freedom of contract").[10] But it is also formalist in the first sense I have identified because the essential claim of this approach is that the judge's decision is the consequence solely of a logical operation independent of human choice or will (as in, "it's not me, it's the rule . . .").

A third, equally conventional usage of formalism is to connote hypertechnicality in judicial decisionmaking. Chief Justice Roberts's second term provides not one, but two examples of the rigid application

6. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 240–41, 265–66 (1975). Shaw was, in fact, the particular object of Melville's critique in *Billy Budd*, though his slavery opinions were only part of what Melville found so profoundly disturbing in his father-in-law. *See* Steven L. Winter, *Melville, Slavery, and the Failure of the Judicial Process*, 26 CARDOZO L. REV. 2471, 2473 (2005).

7. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 769–71 (1976).

8. *Id.* at 770.

9. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908). It was just this method of legal reasoning that Holmes assailed in his famous aphorism in his *Lochner* dissent: "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

10. In this sense, Langdellian doctrinalism is also formalist in the fourth sense identified below. *See infra* text accompanying nn.26–32.

of legal deadlines notwithstanding the presence of strong equitable claims and long-recognized exceptions. In *Bowles v. Russell*, the federal district judge had granted the habeas petitioner a seventeen-day extension in which to file his notice of appeal.[11] The petitioner filed within the allotted time; the Court nevertheless affirmed the dismissal of the appeal on the ground that the relevant statute authorizes extensions of only fourteen days.[12] In doing so, the Court not only ignored several recent unanimous decisions repudiating this technical approach to procedural deadlines,[13] but also overruled earlier decisions which had specifically held that reliance on a district court's erroneous representation as to the time for filing a notice of appeal constituted excusable neglect.[14]

In the second case, *Ledbetter v. Goodyear Tire & Rubber Company*, the Court held that the plaintiff's sex discrimination claim was time-barred.[15] Lilly Ledbetter, who had worked for Goodyear since 1979, claimed that she had received lower annual merit raises because of discriminatory performance evaluations, that those earlier decisions continued to affect the amount of her pay throughout her career, and that by the time of her retirement in 1998 she was earning substantially less than similarly situated male supervisors. Under Title VII, a person who wishes to sue must first file a charge with the EEOC within 180 days of the unlawful employment practice.[16] The Court had previously held that one-time decisions such as the denial of tenure or changes to the seniority system, whose effects are felt only later when they result in termination, must be challenged within 180 days of the decision and not of the termination. But it had also been held that accumulated pay disparities are different because each paycheck perpetuates the earlier discrimination (and, in a case such as this one, each annual raise compounds the

11. Bowles v. Russell, 127 S. Ct. 2360, 2362 (2007).

12. *Id.* at 2363 (citing 28 U.S.C. § 2107(c) (2000); FED. R. APP. P. 4(a)(6)). Not only was the Court's position hypertechnical, its reasoning was formalist in the first sense in that it feigned lack of choice by purporting to rely solely on neutral, deductive reasoning from general premises. *Bowles*, 127 S. Ct. at 2365–66 ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. . . . The resolution of this case follows naturally from this reasoning.").

13. Arbaugh v. Y & H Corp., 546 U.S. 500, 510 (2006); Eberhart v. United States, 546 U. S. 12, 17–18 (2005); Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

14. *Bowles*, 127 S. Ct. at 2366. The earlier cases are *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962), and *Thompson v. INS*, 375 U.S. 384, 387 (1964). *See also* Gibbs v. Town of Frisco City, 626 F.2d 1218, 1221 (5th Cir. 1980) (ruling that, as a matter of law, appellant had a right to rely on the service standards published by the United States Postal Service and that the district court erred when it failed to find excusable neglect when the notice of appeal arrived one day late, but two days after the time specified by Postal standards).

15. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2167–68, 2174 (2007). The holding of *Ledbetter* has since been reversed by Congress. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

16. 42 U.S.C.A. § 2000e et seq. (2000).

earlier disparities).[17] In an opinion by Justice Alito, the Court ruled that Ledbetter could not seek relief at all because the discriminatory raises had not occurred within 180 days of her filing. Her case of sex discrimination, it reasoned, was based on "not a single wrong consisting of a succession of acts," but rather on "a series of discrete discriminatory acts," none of which fell within the statutory deadline.[18]

As in *Ledbetter*, hypertechnicality and conceptualism often work hand-in-hand to provide a cover of necessity for willfully reactionary decisions. One of the more egregious historical examples is Justice Holmes's opinion in *Giles v. Harris*.[19] There, African-American citizens challenged Alabama's constitutional scheme governing qualifications for voting. Amongst other claims, they alleged that the "good character" qualification for voting was administered by state officials to "let in all whites and [keep] out a large part, if not all, of the blacks."[20] Writing for the Court, Justice Holmes accepted the plaintiffs' allegations as true (which they undoubtedly were) but denied their request for an injunction to require local election officials to register them to vote. He reasoned that, because plaintiffs alleged that the state constitutional scheme governing voter registration was "a fraud upon the Constitution" and had asked the Court "to declare it void," it was not possible for the Court to order that they be registered "under the void instrument."[21] Any other conclusion, Holmes argued, would make the Court "a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists."[22] Indeed, he went so far as to argue that even if the injunction were to assure that all qualified African-American citizens were registered, it would not cure the invalidity of a scheme "illegal in [its] inception."[23]

What unites Holmes's reasoning in *Giles* with Justice Alito's in *Ledbetter* is a willful refusal to look beyond a categorization that is itself

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17. *See* Bazemore v. Friday, 478 U.S. 385, 395 (1986) (discussing Title VII, 42 U.S.C.A. § 2000e et seq. (2000)); Fair Labor Standards Act, 29 U.S.C.A. §§ 207(e), 255(a) (2000); BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 477 (2d ed. 1983).

18. *Ledbetter*, 127 S. Ct. at 2175.

19. 189 U.S. 475 (1903).

20. *Id.* at 483.

21. *Id.* at 486.

22. *Id.*

23. *Id.* at 487. Holmes further explained:

> It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. . . . If the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent.

Id.

merely optional. One can characterize the racially discriminatory scheme at issue in *Giles* as a "fraud on the Constitution" and, thus, "void." Or one can characterize it as a discriminatory administration of the law in violation of the Equal Protection Clause.[24] But to pretend it is the former and then deduce judicial incapacity from that particular characterization is to play fast and loose with the law.[25] So, too, whether pay inequity is viewed as "a single wrong consisting of a succession of acts" or "a series of discrete discriminatory acts" is not a fact about the world, but a description of it. One can characterize pay discrimination as an ongoing practice or disaggregate it into its constituent actions. Either characterization is plausible; neither constitutes an argument. To make an argument, one would have to give a reason why one characterization is more appropriate. Thus, as Justice Ginsburg points out in dissent, adverse employment decisions such as promotions, transfers, firings, or changes to the seniority system are public events known to all affected by them. Consequently, it makes some sense to treat them as discrete discriminatory acts subject to the 180-day filing requirement. Pay discrimination, on the other hand, is typically hidden both because salaries are often confidential and because the disparities between employees' raises in any given year are typically small but increase incrementally—and, thus, become more obvious—over time.[26]

A fourth sense of formalism is as a mode of reasoning that treats concepts as meaningful entirely abstracted from their contexts.[27] This is the formalism of *Lochner* and its progeny, in which freedom of contract implies that everyone is free "to make contracts regarding labor upon such terms as they may think best"[28] without regard to real-world differences in bargaining power. This, too, is the sense of formalism at work in the notion of formal equality. In *Plessy*, for example, the Court understood the Fourteenth Amendment as commanding only formal equality—that is, "the absolute equality of the two races before the law. . . ."[29] On this acontextual view, the legal meaning of the segrega-

24. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

25. Holmes's opinion in *Giles* is particularly reprehensible given that he had already staked out his jurisprudential position as an antiformalist. *See, e.g.*, Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899) ("We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.").

26. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2181–83 (2007) (Ginsburg, J., dissenting).

27. In this sense, formalism partakes of the Platonic doctrine of the Forms. Similarly, a formal system is one in which the various parts relate to one another rather than to reality. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 9–11, 53–61 (1990).

28. Lochner v. New York, 198 U.S. 45, 61 (1905).

29. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

tion acts was solely a matter of its formal properties which applied to both races equally. The social meaning of segregation, in contrast, was purely a matter of subjective interpretation: If "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[30] Conversely, it is an appeal to context that is the basis of Justice Stevens' objection both in *Seattle* and in *Adarand Constructors v. Pena*[31] where, respectively, he invokes Anatole France's famous quip that the law in all its majesty forbids the "'rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread'"[32] and complains that the Court's application of strict scrutiny to affirmative action disregards "the difference between a 'No Trespassing' sign and a welcome mat."[33]

Though it is perhaps less obvious, this notion of formalism is profoundly linked to individualism.[34] Thus, in *Lochner*, it is the formal individual—that is, the one endowed with the same legal rights as every other—who is free to contract as he or she sees fit regardless of the economic realities. So, too, in *Plessy*, the meaning of segregation is not a social or cultural fact, but a matter of interpretation which individuals are free to determine for themselves. Indeed, it is only in this formalized world of individuals abstracted from their social contexts that it is possible simultaneously to acknowledge that "the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs"[35] and yet insist that the resulting differences in white and black participation in the relevant market is nevertheless a matter of "entrepreneurial choices."[36]

What unifies these different meanings is the metaphor of form and substance. The basic idea in each case is that the conceptual operation involves the external form of the relevant performance without attention to the substantive dimensions that give it meaning. Thus, the idea of formalism as ascription away of responsibility involves decisionmakers who give every appearance of deciding the case according to law with-

30. *Id.* at 551.

31. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242–65 (1995) (Stevens, J. dissenting).

32. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2798 (2007) (Stevens, J., dissenting) (citation omitted).

33. *Adarand*, 515 U.S. at 245 (Stevens, J., dissenting).

34. *Cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737–51, 1776–78 (1976) (identifying rules with individualism and standards with altruism).

35. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

36. *Id.* at 503 ("There are numerous explanations for this dearth of minority participation, including . . . both black and white career and entrepreneurial choices.").

out ever acknowledging that the law they are "following" is in actuality a product of their own interpretive acts.[37] With conceptualism and hypertechnicality, as with rule-formalism, the operation is to subsume the specifics (say, a fact pattern) under a general concept (or rule) if it fits the category or stated criteria (i.e., its "form") regardless of whether its purpose or spirit (the concept's or rule's "substance") is implicated.[38] Finally, the idea of formalism as abstraction from context entails a focus on abstract entities (rights-bearing individuals equal before the law) and their relations (e.g., freedom of contract) to the exclusion of the contextual social factors (e.g., education, social recognition, mutual respect, economic position) that gives those entities and relations substance and shape.

Seattle, like its predecessors at least since *Adarand*, is formalist in all of the ways previously examined: (1) insisting on adherence to precedent narrowly construed (i.e., an appeal to authority); (2) making no distinction between invidious and potentially benign racial classifications (i.e., treating "discrimination" acontextually according to the logic of a general concept); and (3) insisting on equal protection as a radically individualist right regardless of the social groups to which we belong and the impact and social consequences that flow from that sociological reality.

So far, all of this is familiar enough criticism of the Court's recent affirmative action jurisprudence. What is striking about *Seattle*, however, is the way in which Roberts's formalism deforms his critical capacities.

In making his controversial remarks on *Brown*,[39] the Chief Justice insists that "history will be heard."[40] But he is peculiarly tone-deaf to history. *Brown*, he says, held that "government classification and separation on grounds of race themselves denoted inferiority."[41] The problem is that, under the voluntary plans adopted by the Seattle and Louisville school boards, students were classified by race but not *separated*. Quite the contrary. Classification by race was undertaken solely for the purpose of ameliorating racial isolation. Roberts cites *Brown II* as requiring

37. POSNER, *supra* note 26, at 95–98 ("The point . . . is that in a system of precedent it is the later court that has the whip hand. . . ").

38. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 499 (1988) ("Roscoe Pound called formalism 'mechanical jurisprudence' because the classical lawyers had a tendency to apply their general principles relentlessly—regardless of the underlying policies or the consequences of these policies in specific cases.") (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986)).

39. Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

40. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007).

41. *Id.*

school assignments "*on a nonracial basis.*"[42] But the relevant precedent is not *Brown II* but *Green.*[43] Roberts seems to have forgotten that long and bitter experience forced the Court to repudiate that statement when it later struck down freedom of choice plans.[44]

The reason the Chief Justice misses both this history and his own inner contradiction is that he is not applying *Brown* at all. What guides his reasoning is not *Brown*, but Harlan's dissenting opinion in *Plessy*. For him, equal protection jurisprudence is summed up by principles of individualism and colorblindness. He is tripped up by the presuppositions of his own construction, never noticing that his own statement distinguishes *Seattle* from *Brown*. Thus, when he says that, in *Brown*, "[i]t was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954,"[45] he fails to notice that in Seattle and Louisville no one was being *separated* (legally or otherwise) and, therefore, that no inferiority was implied. So, too, he seems to miss that Harlan's declaration that the Constitution is colorblind was qualified by what immediately follows: that it "neither knows nor tolerates classes among citizens."[46] This, of course, is all the difference between the *Seattle* case and the cases upon which the Chief Justice so disingenuously relies. The racial classification in *Seattle*, unlike the segregation at issue in *Plessy* and *Brown*, created no second-class citizens.

Roberts chides Justice Breyer for relying on "admitted dicta[ ] and other noncontrolling pronouncements. . . ."[47] But when *he* engages *Brown*, he relies not on anything in Chief Justice Warren's opinion for the Court, but rather on statements by Thurgood Marshall in the briefs and oral arguments. It is there, and not in the Court's opinion, that Roberts finds the longed-for claim that race cannot be a factor in school admissions.[48] He is entirely deaf to what *Brown* says, which is that separation based on race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way

42. *Id.* (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955) ("*Brown II*")) (emphasis in original).

43. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

44. *Id.* at 439 ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.") (emphasis in original).

45. *Seattle*, 127 S. Ct. at 2767 (citing *Brown*, 347 U.S. at 494).

46. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Indeed, in the immediately preceding sentences, Harlan makes the same point: "in view of the [C]onstitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here." *Id.*

47. *Seattle*, 127 S. Ct. at 2764.

48. *Id.* at 2782–83.

unlikely ever to be undone."[49] Warren was anything but formalist. Just as Warren insisted in *Loving v. Virginia* that miscegenation laws are "measures designed to maintain White Supremacy,"[50] his opinion in *Brown* had nothing to do with any supposed principle of colorblindness. It was, rather, a frank acknowledgment of the meaning of Jim Crow.

In Philip Roth's words, "exclusion is a primary form of humiliation, and humiliation is crippling—it does terrible injury to people, it twists them, it deforms them, as every American minority can attest and as the best American minority writers make clear . . . ."[51] Nothing like this was going on in the Seattle and Louisville school districts, and only Roberts's own blindness could manage to equate the two.

Roberts's version of *Brown* is, in fact, unrecognizable. If *Brown* was about anything, it was about history and context. Warren emphasized the place that public education had come to occupy in twentieth century American life—that is, as the institution for awakening cultural values and introducing children to the "foundation of good citizenship."[52] *Brown* was all about social context and meaning.[53] It was about the role of acculturation of citizens to live in a multiracial society. Roberts, on the other hand, turned *Brown* into *Plessy* by making it a case about absolute equality before the law,[54] entirely abstracted from the obvious social meaning of contemporary race relations.

In one way, Roberts's opinion in *Seattle* is worse than that in *Plessy*. At least *Plessy* acknowledged that legislative decisionmaking can take local customs and traditions into account.[55] *Plessy*, in other words, at least manifested deference to the democratic political process. The striking thing in *Seattle* is that, for all that it fetishizes the paraphernalia of precedent (distinguishing dicta from holdings, etc.), one suspects it is really the rejection of radical libertarian individualism that

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49. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

50. Loving v. Virginia, 388 US 1, 11 (1967).

51. Philip Roth, *The Story Behind "The Plot Against America,"* N.Y. TIMES, Sept. 19, 2004, at C10.

52. *Brown*, 347 U.S. at 493 ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."). *Id.* at 492–93.

53. Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1527–34 (1990).

54. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2758 n.14 (2007) (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("In respect of civil rights, all citizens are equal before the law.")). *Compare Plessy*, 163 U.S. at 544.

55. *Plessy*, 163 U.S. at 550 ("In determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.").

most bugs the Chief Justice. Thus, in footnote fourteen, he decries the Seattle school board's rejection of individualism as a form of cultural racism.[56] It is just a little bit too "PC" for him. The Seattle school board specifically had refused to hold onto unsuccessful concepts such as a colorblind mentality. And Roberts unwittingly confirms the anachronistic quality of such conceptions by citing in its defense not the Court's recent jurisprudence, but rather Harlan's dissent in *Plessy*.[57]

In the battle of the footnotes, it is Footnote Four that Roberts should be attending to.[58] For what the Chief Justice is rejecting is the political process. The voters of Seattle and Louisville are entitled to a different view than the Court's, at least where (unlike *Plessy* or *Brown*) it is not a politically powerless or excluded group that is being burdened. This points out both the empty formalism and the undemocratic nature of the Court's application of a unitary, strict scrutiny standard to any and every racial classification. Justice Breyer is correct: It is a democratic prerogative to take a different view about how best to achieve a multiracial society,[59] just as it was an educational prerogative—to which the Court in *Grutter* deferred—to seek diversity in higher education.[60] And Breyer, too, is correct that the Seattle plan is narrowly tailored.[61] There may be many colorblind ways to avoid racial isolation—after all, Seattle could have used a lottery to randomly assign students across the district or massive busing to operationalize a colorblind assignment system. But one can see why parents would have preferred the system chosen by Seattle that emphasized neighborhood and proximity within broad racial parameters, using race as a tiebreaker in a mere handful of assignment decisions.

Though it is true that there is no necessary connection between legal formalism and political conservatism, Chief Justice Roberts's opinion in *Seattle* demonstrates the powerful conceptual and rhetorical affinities between them. Formalist legal reasoning engages the decisionmaker in a performance of impersonal decision by appealing to authority. It disclaims the personal responsibility of the decisionmaker and, thus, frustrates accountability.[62] And it operates in abstraction from the social

56. *Seattle*, 127 S. Ct. at 2758 n.14.

57. *Id.*

58. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

59. *Seattle*, 127 S. Ct. at 2824 (Breyer, J., dissenting) ("I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.").

60. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).

61. *Seattle*, 127 S. Ct. at 2824–27 (Breyer, J., dissenting).

62. *Cf.* RICHARD A. POSNER, HOW JUDGES THINK 78–81 (2008) ("Neither [Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply . . . are given to them the way that the rules of baseball are given to umpires. . . . The tension

prerequisites and consequences of law. In all these ways, formalism is anything but democratic. And, as the Chief Justice's *Seattle* opinion so amply demonstrates, it is a distorting methodology that weighs on the law like a nightmare more reminiscent of the injustices of the Nineteenth Century than of a modern society that professes to value equal justice under law.

between what he said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts's reputation for candor and a further debasement . . . of the testimony of nominees. . . .").