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# Race Against the Court: The Supreme Court and Minorities in Contemporary America

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RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA. By *Girardeau A. Spann.* New York: New York University Press. 1993. Pp. vii, 266. $40.

> To engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society — flaws rooted in historic inequalities and longstanding cultural stereotypes.[1]

Professor Girardeau Spann of the Georgetown University Law Center would probably characterize the Supreme Court's perpetual subordination of minority interests as one of American society's key "flaws." Spann raises serious and thoughtful questions about the present legal system's ability to achieve racial equality in the United States, tracing the current lack of racial equality to the inherently majoritarian Supreme Court.

Part One, entitled "Veiled Majoritarianism," describes the Supreme Court's counterminoritarian propensity. In Chapters One and Two, Spann debunks the Supreme Court's ability to behave according to the traditional model of judicial review, which postulates that the Court can perform in a countermajoritarian manner (pp. 9-26). Here, Spann lays the historical framework for the notion of a countermajoritarian Court. He concludes that the Court is in fact counterminoritarian despite the traditional model and the safeguards designed to check majoritarian tendencies (pp. 19-26). He reasons, first, that the formal safeguards the Constitution articulates are ineffective. For example, Supreme Court Justices' life tenure and salary protection, designed to isolate the Court from political pressure, are inadequate for the task. Spann resolves that these formal safeguards have only symbolic value because they have failed to shield the Court from political pressure in the past and continue to perpetuate the judiciary's majoritarian disposition (pp. 23-25). Second, Spann challenges the legal system's operational safeguards, including its dependence on principled adjudication. This dependence fails to arrest the Court's counterminoritarian tendencies because the judicial discretion inherent in the process of principled adjudication does not prevent the permeation of majoritarian values (p. 26).

Furthermore, Spann contends that Supreme Court Justices cannot protect minority interests because they are indoctrinated with majoritarian ideologies throughout the confirmation process. He argues that this indoctrination penetrates the Justices' ideologies in such a way and to such an extent that they are unable to avoid complete conversion to a majoritarian mentality (pp. 20-23). Moreover, these

1. CORNEL WEST, RACE MATTERS 3 (1993).

Justices invoke majoritarian ideologies both consciously and unconsciously. Neither the formal nor the operational safeguards can counteract the infiltration of internalized majoritarian values. First, the formal safeguards cannot subvert the *unconscious* reliance upon majoritarian ideologies (p. 25). Second, the procedural safeguards necessarily involve a certain degree of judicial discretion; the Justices' majoritarian inclinations affect their use of this discretion (p. 26). Justices use their discretion to derive legal principles, to decide which legal principles to use, and to select among the outcomes various legal principles will produce (p. 27). This discretion results in the influx of majoritarian preferences.

Chapters Three, Four, and Five explore how judicial discretion enables the infiltration of majoritarian values into legal principles and how this discretion continues to manifest those values through the selection and application of legal principles (pp. 27-82). Spann claims that this discretion permits Justices to invoke majoritarian preferences. Chapter Three argues that the Supreme Court both expressly and implicitly relies upon majoritarian preferences in applying its legal principles (p. 27). Expressly, the Court interprets legal principles to comport with prevailing majoritarian philosophy (p. 27). When courts interpret legal principles in a majoritarian manner, they cannot preserve minority considerations in judicial decisionmaking (p. 31). Implicitly, the Court gives effect to majoritarian preferences through deferential standards of review (p. 31). To support his claim, Spann discusses three methods the Court may employ to defer to majoritarian values and cites several examples of the Court's approach under each method. First, the Court may decline to apply heightened scrutiny to specific cases even though they appear to be race cases (p. 32). Second, the Court may determine that challenged government entities have in fact made the difficult showing that a heightened standard of review requires (p. 32). Third, the Court may decline to protect racial minorities from a classification that adversely affects their interests by invoking justiciability problems to avoid reaching the merits of an equal protection claim (p. 33).

Even if the Court defines a legal principle in a manner favorable to minorities, majoritarian preferences can become manifest when the Court *selects* the appropriate principle. In Chapter Four, Spann argues that majoritarian preferences affect the selection of legal principles to resolve a disputed minority issue: "Selecting applicable principles is an act of loosely constrained discretion that once again creates opportunities for a judge's personal attitudes to enter into the decisionmaking process" (p. 36). Judicial discretion is inevitable in many instances, especially in cases of first impression, cases to which more than one statute or principle may apply, and cases in which characterization is necessary (pp. 36-57).

Then, even if a legal principle is defined and selected appropriately, the Court can *apply* it in a counterminoritarian manner. Spann's Chapter Five suggests that the Court applies legal principles so generally that majoritarian-influenced judicial discretion reigns (pp. 58-60). The Court often derives legal principles by sifting through the conflicting policies associated with implementing various principles. Thus, Spann argues that the majoritarian Court selects the policy that best accords with its majoritarian preferences to the detriment of minority interests. Part One concludes by maintaining that the Supreme Court, charged with protecting minority interests, is unable to do so (p. 81). Moreover, the safeguards designed to dissuade majoritarian tendencies actually perpetuate them in certain instances (p. 81).

Part Two, "Perpetuating Subordination," describes the "subtle" ways the Supreme Court subordinates minority interests (p. 82). Chapter Six posits that racial minorities can best achieve equality through the political process; however, minorities tend to neglect politics because of their dependence on the Court (pp. 85-86). This dependence, Spann asserts, stems from the Court's "centralization" of the means minorities can use to seek equal treatment and its "legitimization" of assumptions about minority legal status. First, although the political process is clearly the mechanism for manufacturing majoritarian ideology, Spann maintains that minorities achieve their greatest successes in the political arena (pp. 85-86). Minorities participate more successfully in the political process because politics has no rules and no right or wrong results (pp. 86-89). "The value of politics . . . is that it escapes the need to depend upon principle for its proper operation" (p. 87). Second, minorities have attained political clout in part through majoritarian support that, according to Spann, stems from minority voting strength, minority participation in voting coalitions, and the majority's need for self-confirmation of its sensitivity to minority issues (pp. 91-93).

Still, the Supreme Court inevitably imposes majoritarian constructs on the political process (pp. 99-103). Although minority issues can advance more purposefully in the political arena than elsewhere, the Supreme Court responds slowly to these advancements, to the advantage of competing majoritarian interests (p. 103). In favoring political advancements *against* minority interests, the Court has established a harmful relationship between itself and minority groups. This harm is perpetrated through minority groups' dependence on the Supreme Court for social and political gains, the centralization of race-relations law in a manner that limits political gains, and the legitimization of self-perpetuating assumptions in the field of race-relations law that discourage the pursuit of racial equality.

In Chapter Seven, Spann argues that through *Brown v. Board of*

*Education*[2] and similar allegedly countermajoritarian decisions, the Supreme Court has lulled minorities into a sense of dependency on the Court for racial equality: "[*Brown*] is better understood as a veiled majoritarian effort to perpetuate minority subordination" (p. 104). *Brown* supporters represented many ideological factions who desired an end to segregation for personal gain but were not seeking minority advancement (pp. 108-09). Although the Court relied primarily on majoritarian interests in deciding *Brown,* its decision was perceived as a victory for minority rights. As a result, *Brown* seduced minorities into complacency by invalidating the separate-but-equal doctrine and purportedly solving the inadequacies in black schools. According to Spann, *Brown*'s result — desegregation — has proven unworkable because most desegregated schools are predominately black and remain inferior to white private and suburban schools.[3] Furthermore, *Brown*'s doctrine — separate-but-equal is unconstitutional — hurts minority efforts for equality, especially in the educational arena, where desegregation efforts have in many cases superseded the importance of gaining a quality education, and in the affirmative action arena, where the Court has used its prohibition of race-based classifications to eliminate many affirmative action programs created through the political process.[4] Finally, *Brown*'s effect — minority dependency on the Supreme Court for protection — is detrimental to minority interests as a whole. Dependence on the Supreme Court distracts minorities from the gains that they can achieve politically and reinforces minority subordination (p. 110).

The standards that the Supreme Court — as the centralized arbiter of equal protection doctrine — imposes on affirmative action programs have perpetuated majoritarian values aimed at stifling minority achievement. Spann argues in Chapter Eight that modern racial discrimination is statistical and can be defeated only by allocating resources statistically (pp. 120-24). The Supreme Court, however, defines the criteria according to which it judges discrimination in such a way as to defeat enactments that allocate resources on a statistical basis (p. 133-34). By applying a nondeferential standard — strict scru-

2. 347 U.S. 483 (1954).

3. Pp. 111-14. Spann's argument is a compelling one. Indeed, desegregation probably was not the most effective means to transform the facilities of separate black schools into their white counterparts. However, *Brown* still retains some vitality in sparking countermajoritarian efforts. Even though *Brown,* in practice, placed black children educationally worse off in a desegregated system than in the previous segregated one, it arguably still served as one significant advance against the perpetual inequality to which blacks were subject. For an insightful discussion of *Brown*'s effects, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102-22 (1987).

4. P. 109. "[NAACP General Counsel Nathaniel R. Jones] argued that segregation was itself the most important educational harm to be remedied because of its connection to institutional racism [and that] . . . there was no constitutional right to a quality education but only to an education that was not officially segregated." P. 114 (citing Nathaniel R. Jones, *Correspondence: School Desegregation,* 86 YALE L.J. 378 (1976)).

tiny — to affirmative action on the local government level, the Supreme Court has effectively held that only federal affirmative action plans are constitutional (p. 127). Minorities, however, can implement affirmative action plans more easily on the local level, where there is a concentration of minority interests (p. 134). The Court, in effect, has limited minority affirmative action advancements. First, minorities must secure increased political power to ensure the adoption of affirmative action legislation. Second, affirmative action, under the Supreme Court's conception, relies upon the belief in a color-blind, neutral society when, in fact, all decisions must confront the race factor (pp. 136-49).

Finally, the Supreme Court has legitimated three majoritarian assumptions about the legal nature of racial equality. Chapter Nine describes the traditional model of judicial review, which assumes that an unassailable set of individual or substantive rights exist and are legitimate; that the Court can legitimately explain ambiguities inherent in defining these rights; and that minorities cannot legitimately disturb this rights structure (pp. 152-54). Through the technique of "distraction,"[5] these assumptions repress minorities' perceptions of the achievement of racial equality as well as inhibit the vigorous pursuit of legitimate claims (p. 157). Minorities' adherence to the Court's legitimization of these assumptions continues to jeopardize their pursuit of racial justice in America.

Spann's critique of the Supreme Court is both cogent and provocative, yet it suffers from several deficiencies that spoil his thesis's validity. First, Spann assumes a unitary majoritarian populace with distinct preferences that are wholly counter to those espoused by minorities. Second, Spann develops his critique of the Court's *judicial* conservatism by using notions of *political* conservatism. Third, Spann fails to analyze critically the options minorities may face in the future, and the options he does provide may be disastrous in operation.

Spann never fully constructs his notion of majoritarian philosophy. His argument is only convincing to the extent that there exists a single majority with one set of preferences that contradict minority gains. But such a group does not exist.[6] The majority actually consists of people from various cultural backgrounds.[7] Though these people may unite to fend off threats of minority gains, internal inconsistencies exist

5. Spann asserts that the legitimization process escapes detection through distraction. According to Spann, "[a]rguments always rest upon underlying assumptions. When one's analytical attention is focused on the intricacies of an argument, however, the underlying assumptions on which the argument rests may completely escape scrutiny .... [Especially with controversial topics, the] controversy itself serves to increase the level of distraction." P. 152.

6. Some theorists, however, do argue in favor of the existence of a *silent* majority. *See, e.g.*, ALFRED W. HORTON, THE SILENT MAJORITY (1970).

7. I do not mean to suggest here that cultural heritages are the only distinguishing factor among the majority. Other factors — including political, economic, and social interests — also create divisions within the majority.

within the group.[8] Many preferences differ from member to member; moreover, some interests displayed by certain members of the majority may parallel those of the minority group.[9] If no single set of majoritarian values exists, then the Supreme Court cannot effectuate a particular set of counterminoritarian principles that it attributes to and assimilates from the majority. Although the Court may indeed perpetuate minority subjugation, as Spann suggests, Spann's assumption of veiled majoritarianism cannot account for this phenomenon.

Another difficulty with Spann's argument is that he appears often to view judicial conservatism and political conservatism as interchangeable ideas. Spann seems to narrow the type of majoritarianism ideology the Court imposes to conservative majoritarianism: "The Supreme Court can best be understood as a representative branch that is politically sensitive to *conservative majorities*" (p. 103; emphasis added). The Court's inherent judicial conservatism, however, does not necessarily reflect political conservatism, as Spann seems to suggest. The conservative ideology that Spann wants to attribute to majoritarianism, and inevitably to the Supreme Court, may not be inherent to either. Majoritarianism may actually reflect some of the concepts of liberalism, and traditionally, liberals have strongly advocated racial justice. Although Spann does not necessarily espouse politically liberal views, he clearly despises politically conservative beliefs.[10] But if Spann cannot define majoritarianism in terms of political conservatism, his argument against majoritarianism as perpetuating the subjugation of minorities remains questionable.

Spann closes his discussion with little hope and fewer solutions.[11] He asserts that the Court is replete with majoritarian preferences and Congress is, by definition, majoritarian. Minorities can obtain only a limited number of successes in Congress and even fewer in Court. Although Spann gets us over some of the hurdles to understanding the perpetuation of racial inequality — knowing who the competition is and understanding its tactics — his analysis leaves only three possibili-

8. Indeed, even the individual members' perceptions of *who* constitutes a minority may differ; for instance, whether people of Asian descent fit into the minority category is questionable to some. Spann does concede that some may perceive his notion of the racial majority as monolithic. P. 5. He does little, however, to dispel that impression. Later, when Spann discusses the dangers that the emerging minority neoconservatives present, he explicitly contradicts his idea of a singular minority preference by recognizing the neoconservative threat within the black populace. Pp. 158-59. Other scholars have encouraged such diverse political views within the black community. *See, e.g.*, WEST, *supra* note 1, at 59.

9. Spann would probably dismiss divergent interests within the majoritarian group by stating simply that the relevant preferences here are those the majority share that disadvantage the minority quest for racial equality. However, Spann's argument that antiminority interests exist is weakened by his failure to articulate the scope of those interests.

10. For a glimpse of Spann's views of conservatives, see pp. 158-59. *See also supra* note 8.

11. "The terrifying truth that is legitimated by the Supreme Court's guarantee of countermajoritarian judicial review is that the Court's protection of racial minority interests appears to be perpetual. What an ingenious constitutional scheme." P. 160.

ties for the fate of minorities, none of which seem promising.[12] Minorities can perish within the system, revolt, or continually struggle for racial justice.[13] The first possibility has clearly dire consequences, not only for minorities but also for the United States as a whole. The second possibility — revolution — is also not promising. Given the persistent mistrust many Americans display toward minorities, any minority revolt is likely to be bloody and futile. Spann's majoritarian government would guarantee this result: a government that perpetuates majoritarian values to subordinate minorities would of necessity fear insurrection and prepare for it. With Spann's understanding of majoritarianism, the third option — struggling for racial justice — appears doomed to failure. Minorities will have little incentive for any struggle for racial justice unless they create some incentive fueled from within their own communities.

Although Spann offers no tidy solution to the problem of a majoritarian Supreme Court, by revealing dangers underlying the doctrine of the Court regarding minority gains he may stimulate thoughtful discussion of these issues.[14] Race relations in the United States are definitely in need of a major overhaul. Theoretically, minorities have by now learned some of the rules of the race, but something, no doubt, is impeding their quest for equality. Spann's effort to deconstruct in a meaningful way the majoritarianism of the Supreme Court aims and succeeds respectably at uncovering some of the major hurdles to achieving racial equality.

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12. Spann's insights into resolution of the problems he presents reflect, to some extent, his status as a critical legal studies scholar. Those who criticize critical legal studies describe it as a quest for purpose with little result-based analysis. "Critical legal studies [does not contain] . . . a comprehensive announcement of what a credible and realizable new society and legal system would look like." CORNEL WEST, KEEPING FAITH 196 (1993).

13. Another possibility Spann implicitly suggests is the "cultural commitment to independence and self-sufficiency" exemplified in the black nationalism and black power movements of the late 1960s and early 1970s. Spann attributes these movements' decline to the rise of a majoritarian "rhetoric of integrationism." P. 145.

14. Indeed, Spann does not stand alone in his skepticism of the Supreme Court's commitment to the protection of individual rights. *See, e.g.*, DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT (1993).

> [T]here must be safeguards: mechanisms and institutions that vigorously protect human integrity, dignity, freedom, and equality, as well as a citizenry that is informed and conscious of history and the potential for tyranny among the best nations and peoples. This is the inherent message of the Bill of Rights as well as the best social vision.
>
> If we value and wish to guarantee these protections, the next question is the mechanism for their implementation. . . . [I]t is important to recognize that conservatives have tended to reject judicial protection while simultaneously rejecting protection implemented by any alternative mechanism. We have adopted, in a fundamental sense, the worst of combinations: the courts now reject the role of protector of personal freedom, and the legislatures and people still defer such matters to the courts.

*Id.* at 36-37.