The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 16 | Number 4 Article 2

1-1-2014

A Critical Race Theorist Account of Corporate Racial Standing.

Jonathan Bailyn

A CRITICAL RACE THEORIST ACCOUNT OF CORPORATE RACIAL STANDING

JONATHAN BAILYN*

I. INTRODUCTION

The current doctrine of corporate racial standing implicitly assumes the answer to two difficult questions: "*What is race?*" and "*What are corporations?*" Courts presently lack the language to answer these questions explicitly, as they struggle behind evolving conceptions of race and corporate identity. For courts to progress, they must recognize the assumptions underlying their answers—to make explicit what has been implicit. Full and more honest discussions will expose the courts' hidden ideology and sociology.

* B.A., Amherst College; J.D., Georgetown University Law Center.

The Supreme Court should determine when a corporation has standing to sue for racial discrimination.[1] When it does, it should base its decision upon the ruling and reasoning of the District of Columbia Circuit in *Gersman v. Group Health Association, Inc.*[2] and the First Circuit in *Des Vergnes v. Seekonk Water District*.[3] The *Gersman* court properly responds to the epistemological conundrum of race; the *Des Vergnes* court properly responds to the ontological conundrum of corporate identity. A conceptual framework for this proposed decision follows.

II. History: Limited Supreme Court Guidance

In 1977, the Supreme Court addressed, for its first and last time, the question of corporate standing for racial discrimination.[4] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[5] the Metropolitan Housing Development Corporation (MHDC), a nonprofit corporation, sought to purchase land in the Village of Arlington Heights (Village).[6] The MHDC intended to build federally subsidized housing for low-income tenants,[7] but when the MHDC applied for zoning, the Village denied its application.[8] The MHDC, along with other plaintiffs, claimed the Village violated their Fourteenth Amendment rights by denying their application for racially discriminatory reasons.[9]

The Supreme Court addressed whether the plaintiffs, now respondents, had standing.[10] Although the Court looked to the MHDC as the locus of the complaint, it found that "[a]s a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination."[11] Instead, to find standing the Court looked to the other respondents and successfully located one, a black prospective tenant.[12] "Because of the presence of this plaintiff," the court noted, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."[13]

---

1. This Article focuses on discrimination claims arising under 42 U.S.C. §§ 1981, 1982, & 1983.

2. 931 F.2d 1565 (D.C. Cir. 1991), *vacated*, 502 U.S. 1068 (1992).

3. 601 F.2d 9 (1st Cir. 1979).

4. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 260–64 (1977) (exploring a defendant's attack on a plaintiff's standing to sue as a corporate entity).

5. 429 U.S. 252 (1977).

6. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 256–57.

7. *Id.* at 254.

8. *Id.* at 258.

9. *Id.* at 254.

10. *Id.* at 260.

11. *Id.* at 263.

12. *Arlington Heights*, 429 U.S. at 263.

13. *Id.* at 264 n.9.

Because the Supreme Court heard the case without deciding the issue, *Arlington Heights* did not abrogate corporate racial standing. Although the Court explicitly found that the MHDC could have no racial identity, that finding was not necessary to its holding. Accordingly, the Second Circuit declared it "of only academic importance . . . ."[14] The Ninth Circuit dismissed it as "clearly dictum."[15]

III. CORPORATE RACIAL STANDING DOCTRINE

Given over two decades without instruction from the Supreme Court, the federal circuits have developed their own theories of corporate standing for racial discrimination. Sometimes these theories have cross-fertilized, leaving a variegated doctrine. However, upon review, there exist a few major strands.

First, a corporation that is "established for the very purpose of advancing minority interests" has standing in bringing a discrimination claim.[16] Second, a corporation has such standing when it "acquire[s] an 'imputed' racial identity."[17] Third, a corporation has standing if its officers or directors, acting in their corporate capacity, suffer discrimination.[18] Fourth, a corporation has standing when it suffers discriminatory harm.[19] Finally, a corporation has standing against a defendant who, with a racially discriminatory intent, interferes with the corporation's right to contract with members of a protected class.[20]

None of these rulings are objectively wrong. Each court simply applies a different theory of corporate and racial identity and, from a different

---

14. Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 704 (2d Cir. 1982).

15. Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1058 n.1 (9th Cir. 2004).

16. *Hudson Valley*, 671 F.2d at 706.

17. Bains LLC v. Arco Prods. Co., 405 F.3d 764, 770 (9th Cir. 2005).

18. Marshall v. Kleppe, 637 F.2d 1217, 1220–21 (9th Cir. 1980) ("A corporation may suffer injury, actionable under the Fifth Amendment, from unlawful discrimination against its officers and directors in their corporate capacities, or against it because its officers or directors are members of minority groups.").

19. *See* Gersman v. Group Health Ass'n, Inc., 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated*, 502 U.S. 1068 (1992) ("In our view, however, the determination whether a corporation has a racial identity is not determinative of whether that corporation has standing to bring a discrimination claim. Rather than assume that racial identity is a predicate to discriminatory harm, we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm.").

20. *See* Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 14 (1st Cir. 1979) ("[I]n order to effectuate the public policy embodied in [Section] 1981, and in order to protect the Legal rights of non-whites expressly created by [Section] 1981, a person has an implied Right of action against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites.").

premise, reaches a different conclusion. Therefore, what appears as legally determinate is, in fact, a political choice. Hopefully, by formally identifying these choices, courts will be forced to confront previously eschewed paradigms of race and corporate identity. Out in the open, a more honest discussion can occur.

IV. RACE

Social sciences consider race a "*social* concept."[21] More specifically, it is a "*sociohistorical* concept."[22] As Michael Omi and Howard Winant explain, "Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded."[23]

A. *Paradigms*

There are four paradigms from which to view race.[24] Only one, "*racial constructionism*," is appropriate for present purposes.[25] According to racial constructionists, society—not biology—creates races.[26] Specifically, "races have come into existence and continue to exist through 'human

---

21. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980S, at 60 (1986) (emphasis in original).

22. *Id.*

23. *Id.* For example, the United States has historically subscribed to hypodescent, wherein white is pure and any non-white makes a person impure. *Id.* But, in Brazil, for instance, biological brothers can be of different races. *Id.* at 61.

24. One paradigm is *racialism*. Ron Mallon, *'Race': Normative, Not Metaphysical or Semantic*, 116 ETHICS 525, 528 (2006). Racialism "divide[s] human beings into a small number of groups, called 'races,' in such a way that the members of these groups share[ ] certain fundamental, heritable, physical, moral, intellectual, and cultural characteristics with one another that they d[o] not share with members of any other race." *Id.* (internal quotation marks omitted). This paradigm has few proponents and is useless for describing the fictitious entity of a corporation. Another paradigm is *racial naturalism*. *Id.* at 538. According to racial naturalism, "races may be biological populations characterized by at least some important degree of reproductive isolation." *Id.* Racial naturalists "express reservations about whether races (as ordinarily identified) are biological populations of the appropriate sort . . . these reservations stem from a concern about whether contemporary populations exhibit the appropriate reproductive isolation." *Id.* Still another paradigm is *racial skepticism*. *Id.* at 529. According to racial skepticism, race does not exist because nothing in this word satisfies the linguistic extension of the word race. *Id.* at 529–30.

25. *See id.* at 534 (recognizing the unifying vein of racial constructionism—race is not biological but a social construction).

26. *Id.*

culture and human decisions.'"[27] Ron Mallon describes three types of racial constructionism, two of which are relevant here.[28]

Mallon labels the first type "*thin constructionism.*"[29] Thin constructionism analyzes race under the "criteria ordinary people use to ascribe racial membership" such as "bodily appearance, ancestry, self-awareness of ancestry, public awareness of ancestry, culture, experience, and self-identification . . . ."[30] The listed criteria are relevant only in a preexisting social context.[31] Racial membership exhibits objectivity "by appeal to such criteria implicit in the application of the ordinary concept."[32]

Mallon labels the second type of racial constructionism "*interactive kind constructionism.*"[33] Interactive kind constructionism analyzes race according to "particular sort of causal interaction between a person and the racial labels and concepts they fall under."[34] Consider the following heuristic: "people are members of a race R insofar as they have R-typical experiences caused by racial labeling."[35]

Within thin constructionism, people assume races by others—"'other-ascribed' identity" approach.[36] Within interactive kind constructionism, people assume races either by themselves—"self-reported identity" approach—or by others.[37] Under the other-ascribed identity approach, a third-party determines a person's race.[38] That third party can determine

---

27. Michael James, *Race*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/archives/win2012/entries/race (last updated Oct. 19, 2011).

28. *See* Mallon, *supra* note 24, at 534–35 (addressing thin constructionism, interactive kind constructionism, and institutional constructionism). Mallon labels the third type of racial constructionism "*institutional constructionism.*" *Id.* at 536. Institutional constructionism analyzes race as "a variety of social fact or institution." *Id.* Consider the following heuristic: "'Where R is a race, a person is R at a site only if R is used there to divide people.'" *Id.* Since, for example, "the ancient Greeks did not divide people by race," race in Athens did not exist. *Id.*

29. *Id.* at 534–35.

30. *Id.* at 535.

31. *See id.* (emphasizing criteria is important only because the community's practice of conceptualizing these features).

32. *Id.*

33. Mallon, *supra* note 24, at 535.

34. *Id.*

35. *Id.*

36. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1239 (1994) (edifying "'other-ascribed' identity" approach to classify races as categorizing based on a third-party's perception). Thin constructionism incorporates this approach because it employs criteria everyday people use to classify racial membership.

37. *See id.* (linking "self-reported identity" approach to the individual's self-view). Interactive kind constructionism necessarily exploits both approaches as the individual and society's perceptions matter.

38. *Id.*

the person's race through "member reference" or "nonmember reference."[39] In member reference, a third person determines whether members of person's putative group consider the person a member.[40] In nonmember reference, the third party determines whether nonmembers of the person's putative group consider the person a member.[41] Under the self-reported identity approach, a person assigns him or herself a racial identity with which he or she identifies.[42]

B. *Classification Schemes*

The salience of the different identification types depends upon the predominant racial ideology and sociology. The institution of race in a given environment, contingent upon social context, historical development, and geographic location, determines the type of socially permissible and legally recognized racial identifications.

Historically, U.S. law assigned racial classifications through "hypodescent."[43] Under hypodescent, "[a]ny racial intermixture makes one 'nonwhite.'"[44] Hypodescent is also known as the "one drop of blood rule."[45] White is a pure race; minorities are contaminants.[46]

Notwithstanding the two racial classifications of white and black, four other documented schemes have existed either inside or outside the United States.[47] First, there are schemes recognizing mulattoes.[48] A mulatto is a mixed offspring regardless of their ancestral percentage of black or white.[49]

Second, there are schemes using "named fractions."[50] A "named fraction" scheme labels a person according to the fractional composition of

---

39. *Id.*

40. *Id.*

41. *Id.*

42. Ford, *supra* note 36, at 1239.

43. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 24 (1991).

44. OMI & WINANT, *s*upra note 21.

45. Gotanda, *supra* note 43.

46. OMI & WINANT, *s*upra note 21; *see* Gotanda, *supra* note 43, at 6 ("The 'one drop of blood' rule typifies this stigma: Any trace of African ancestry makes one Black. In contrast, the classification white signifies 'uncontaminated' European ancestry and corresponding racial purity.").

47. Gotanda, *supra* note 43, at 25.

48. *Id.*

49. *Id.*

50. *Id.*

his racial ancestry.[51] For example, a person could be a quarter or an eighth black.[52]

Third, there are "majoritarian" schemes.[53] A majoritarian scheme assigns a person one race based upon the percentage of his black or white ancestry, whichever is higher.[54] For example, this scheme considers quarter–black person "white."

Finally, there are "social continuum" schemes.[55] A social continuum scheme follows the named fraction system but also considers a person's social status when assigning racial identity.[56]

V. CORPORATIONS

Questions abound about who controls a corporation and to whom that corporation belongs. These questions are particularly poignant in public corporations. This section surveys some mainstream answers, providing a framework as to how courts do, and may, determine who *is* a corporation.

A. *Shareholder Theory*

Adolf Berle observed that corporate law has upended traditional notions of enterprise, ownership, and control.[57] Traditionally, a business owner either managed the business or hired someone to manage the business, with the owner or manager always acting in the owner's interest.[58] Today, however, corporate law has separated ownership from control.[59] Currently an owner has "a set of legal and factual interests *in* the enterprise," while the controller has "legal and factual powers *over* it."[60] Berle defines owners as those who hold "major interests and, before the law, only those who hold legal title."[61] Berle then defines the control group as

---

51. *Id.*

52. *See id.* ("[A] mulatto is one-half white and one-half Black. A quadroon is one-fourth Black and three-fourths white, a sambo one-fourth white and three-fourths Black, etc.").

53. Gotanda, *supra* note 43, at 25.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) (exploring the rise of corporations and the effect they have on property ownership and control).

58. *Id.* at 119.

59. *Id.* at 120.

60. *Id.* (emphasis added).

61. *Id.* Berle recognizes the indeterminacy inherent in defining ownership and that bondholders, stockholders, laborers, employees, and customers all "have interests in the enterprise," but for "practical purposes," have limited the definition. *Id.*

"those who hold the major elements of power."[62] Generally, the control group comprises those who "actually have the power to select the directors."[63] Unless an owner has sufficient shares to select the board of directors, a minority owner—or even the management itself—will control the enterprise.[64]

Berle created a taxonomy of control types: "(1) control through almost complete ownership, (2) majority control, (3) control through a legal device without majority ownership, (4) minority control, and (5) management control."[65] Berle argues that, regardless of who controls the

---

62. *Id.*

63. BERLE & MEANS, *supra* note 57, at 70.

64. *See id.* at 80 ("As in the case of legal control, factual control apart from legal control may involve varying degrees of ownership, though never more than [fifty percent] of the voting stock. It may rest to a very considerable extent on the ownership of a large minority stock interest, or, when stock ownership is widely distributed, it may lie in the hands of the management.") (footnote omitted).

65. *See id.* at 70. In the first type, control through almost complete ownership, a single individual or a small group of individuals own nearly all outstanding stock. *Id.* Through this position, he or they can elect or dominate management. *Id.* "[O]wnership and control are combined in the same hands." *Id.*

In the second type, majority control, a single individual or group of individuals owns a majority of the outstanding stock. *Id.* Through this position, the individual or group can select the board of directors. *Id.* at 70–71. They may not have absolute control because certain powers may require more than a majority. *Id.* at 71. Also, a unified, compact minority may be posed to challenge them. *Id.* But, if the stock is widely dispersed, then transaction costs on the part of the minority transform majority control to absolute control. *Id.*

In the third type, control through a legal device, legal arrangements allocate power to one or more groups. *Id.* at 72. Those devices include "pyramiding," when one corporation owns the majority of the stock of another corporation, an infinitely repeatable setup. *Id.* Although the ownership interest at the top of the pyramid may constitute a small percentage of the entire corporate arrangement, that small ownership interest has control over the entire arrangement. *Id.* at 72–73. Control through a legal device also includes the disbursement of non-voting stock, the allocation of a class of stock with disproportional voting power, or the creation of a voting trust. *Id.* at 75–77.

In the fourth type, minority control, an individual or group dominates the corporation through their stock interest. *Id.* at 80. They maintain "working control" of the company because they can attract enough proxies to, when combined with their minority interest, permit them to control the majority of votes at annual elections. *Id.* "[N]o other stockholding is sufficiently large to act as a nucleus around which to gather a majority of the votes." *Id.*

Finally, in the fifth type, management control, "ownership is so widely distributed that no individual or small group has even a minority interest large enough to dominate the affairs of the company." *Id.* at 84. In this type, management appoints a subservient proxy committee. *Id.* at 86. No large enough shareholder exists to attract other voters: "[T]he stockholder is practically reduced to the alternative of not voting at all or else of handing over his vote to individuals over whom he has no control and in whose selection he did not

corporation, the corporation exists to benefit its shareholders,[66] a view called "shareholder primacy."[67] A standard argument for shareholder primacy is that the corporation "'belongs' to its shareholders."[68] While other arguments for shareholder primacy exist,[69] the idea shareholders own the corporation persists.[70] Although standard incidents of ownership may exist in control types (1) and (2), as well as in closely held corporations, shareholders hardly maintain functional ownership of a corporation.[71]

B. *Contractarian Theory*

"The prevailing contractarian theory of the corporation views the firm not as an entity but as a nexus of contracts among various stakeholders."[72] That nexus may comprise the board of directors,[73] a node at which contracts overlap or intersect,[74] or a "common signatory to a group of contracts."[75] Without a positive theory of the location of the nexus,

---

participate." *Id.* at 87. This leaves the management to become a self-perpetuating body. *Id.* at 87–88.

66. *See id.* at 121 ("[I]t is still expected that enterprise will be operated in the interests of the owners.").

67. Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002).

68. *Id.* at 1190.

69. See, for example, Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (1991) (examining criticisms of "non[-]shareholder constituency statutes").

70. *See* Stout, *supra* note 67, at 1190 (asserting corporate ownership belonging to shareholders "is frequently employed by commentators in the popular media and business press to justify shareholder primacy").

71. *See* BERLE & MEANS, *supra* note 57, at 70–88 (revealing the intricacies of each type of corporate control).

72. Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1744 n.50 (2006); *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) ("It is important to recognize that most organizations are simply *legal fictions which serve as a nexus for a set of contracting relationships among individuals.* This includes firms, non-profit institutions such as universities, hospitals and foundations, mutual organizations such as mutual savings banks and insurance companies and co-operatives, some private clubs, and even governmental bodies such as cities, states and the Federal government, government enterprises such as TVA, the Post Office, transit systems, etc.") (emphasis in original).

73. Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 25 (2002).

74. *See generally* Jean-Jacque Laffont & David Martimore, *The Firm as a Multicontract Organization*, 6 J. ECON. MGMT. STRATEGY 201 (1997) (surveying differing contract theories to uncover contract and corporate structure).

75. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISES 18 (1996).

the boundaries of a corporation become indeterminate.[76] Exponents of the nexus of contracts theory admit:

> [I]t makes little or no sense to try to distinguish those things which are "inside" the firm (or any other organization) from those things that are "outside" of it. There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labor, material and capital inputs and consumers of output.[77]

Without a hierarchy of corporate constituencies, the indeterminacy of corporate boundaries may justify radical departure from the standard focus on shareholders.[78]

In explaining how multiple constituencies may influence a corporation, Gulati, Klein, and Zolt employ the concept of "connected contracts," a description of the corporation "emphasiz[ing] the complex interactions among all of the participants in an economic venture."[79] Gulati and his colleagues use the term "contract" metaphorically "to evoke a sense of rights and obligations that are like contracts but are not necessarily embodied in legally enforceable claims."[80] Connected contracts are a "fluid, nonlinear, nonhierarchical set of interactions and interrelationships" referring to the "cooperation, conflict, competition, and compromise among equity investors, lenders, managers, workers, suppliers, customers, and all others who contribute to an economic endeavor—all those people or groups of people who acquire rights and obligations and who affect and are affected by the rights and obligations of all other participants."[81]

---

76. *See* Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 832 (1999) (arguing the nexus of contracts conception minimizes the boundary between what is inside and outside the corporation, implying there actually is no corporation).

77. Jensen & Meckling, *supra* note 72.

78. *See* Stephen M. Bainbridge, *Directory Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 551 (2003) ("Indeed, some stakeholderists contend that the ends of stakeholderism could be achieved through 'contractarian discourse.'").

79. G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 894 (2000).

80. *Id.*

81. *Id.* at 894–95. For Gulati and his peers, corporate capital structures are bargains over the control of corporate variance, and that no constituency, a priori, has an absolute claim to that control. *Id.* at 887. To give body to the connected contract framework, they describe the various "control bargains" corporate shareholders and stakeholders may make. *Id.* at 920. First, employees bargain for control when they make nonfinancial investments such as their "reputational capital, firm-specific capital, client-specific capital, and intellectual capital." *Id.* at 923. Second, creditors may exert control over variance "through the terms of their loan agreements." *Id.* at 926. Third, suppliers may seek to prevent the firm from engaging other suppliers. *Id.* at 927. Fourth, customers may depend on the continuing output of the firm and seek assurances that suppliers will continue their

In summary, "it becomes futile to try to map out of the boundaries of the firm or to apply traditional corporate law labels or concepts."[82]

VI. APPLICATION

Because of the availability of different concepts of racial and corporate identity, the racialization of corporations by courts is inconsistent. Each theory of racialization has its own internal logic, but each ignores something a different court may find important. For example, focusing on shareholders' race in determining corporate racial identity ignores the race of the corporation's customers. Or, focusing on the corporation's self-identification ignores how society perceives the corporation. But, focusing on *all* of these aspects destroys any corporate boundaries and racial determinacy. The following seminal cases show how different concepts of racial and corporate identity have created an unstable doctrine of corporate racialization.

A. *Shareholder Identity*

In *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*[83] the court ruled the Thinket corporation had standing to assert a discrimination claim because it had acquired a racial identity.[84] Once a corporation acquires a racial identity, "*then* it can be the direct target of discrimination and has standing to pursue a claim under [Section] 1981."[85] According to the court, a corporation can acquire a racial identity "either as a matter of law or by imputation."[86] The court described Thinket as "minority-owned" because "[e]ach of Thinket's shareholders [was] an African-American, including plaintiff Ralph Jackson, who [was] the corporation's majority shareholder."[87] Additionally, the United States Small Business Administration (SBA) certified Thinket "as a firm owned and operated by socially and economically disadvantaged individ-

course. *Id.* at 927. Finally, beyond its general police power, government provides direct and indirect investment in firms and, in return, has a say in their operation. *Id.* at 928–29.

82. *Id.* at 897.

83. 368 F.3d 1053 (9th Cir. 2004).

84. Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1055 (9th Cir. 2004). Standing requires a suffering of actual injury that is linked to actions of the defendant and can be corrected by a favorable decision by the court. *Id.* at 1057.

85. *Id.* at 1059 (emphasis added). The court specifically stated that if the corporation is harmed under the terms of Section 1981, it is "within the statutory zone of interest" to have standing to bring the claim. *Id.* at 1060.

86. *Id.* at 1059.

87. *Id.* at 1055.

uals."[88] To be certified, a business "must be at least [fifty-one] percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals."[89]

Unlike the MHDC in *Arlington Heights*, the *Thinket* court found that "Thinket was required to be certified as a corporation with a racial identity; further, it alleges that it suffered discrimination because all of its shareholders were African-American."[90] Thinket acquired a racial identity through imputation or law, or both: "The corporate plaintiff here alleges direct racial discrimination based on its status as an SBA-certified minority-owned business and the race of its shareholders."[91] Because the SBA certification derived from the race of the shareholders, the primary consideration was the shareholders' race.[92]

The hidden analytic of the court is as follows. First, the court subscribes to a theory of corporations equating the corporation with its shareholders.[93] Not only do shareholders own the corporation, but they *are* the corporation. The shareholders' racial identity determined the racial identity of the corporation. The court did not consider various stakeholders, directors, or management. Although Thinket was a small business, the court could have considered its president. The court's concept of shareholder identity is not analytically necessary, but only one of various competing theories from which to choose. The court, as it must, makes it a choice, but in doing so masks its political and discretionary inquiries.

---

88. *Id.* This certification allowed Thinket to receive federal contracts under the SBA's Minority Small Business and Capital Ownership Development program. *Id.*

89. 13 C.F.R. § 124.105 (2013); *see* 15 U.S.C. § 637(a)(4)(A)(i)(I) (2006) (defining qualifying applicants as "socially and economically disadvantaged small business concern[s]"). When the business is a corporation, "at least [fifty-one] percent of each class of voting stock outstanding and [fifty-one] percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged." 13 C.F.R. § 124.105 (2013). Furthermore,

> [o]ne or more disadvantaged individuals must be entitled to receive:
>
> (1) At least [fifty-one] percent of the annual distribution of dividends paid on the stock of a corporate applicant concern; (2) [One hundred] percent of the value of each share of stock owned by them in the event that the stock is sold; and (3) At least [one hundred] percent of the retained earnings of the concern and the [one hundred] percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.

Id.

90. *Thinket*, 368 F.3d at 1059.

91. *Id.* at 1060.

92. *See id.* at 1059–60 (highlighting the difference between Thinket and MHDC in *Arlington Heights* was evident in the racial composition of the corporations' shareholders).

93. *See id.* (focusing on the corporation's shareholders' racial identities).

Next, the *Thinket* court makes a choice regarding the corporation's racial identity. First, it uses an "other-ascribed" form of thin constructionism. Because the government determined the corporation was minority-owned, the court decided the corporation had a minority identity.[94] The court's application of the federal government's test uses the nonmember reference heuristic. The court determines the shareholders are black; it does not ask whether the shareholders consider themselves black or whether other blacks consider the shareholders black. Finally, the court assumes a majoritarian approach to racial identity. Instead of determining the corporation was of mixed race, or fifty-one percent black as a named fraction, the court considered the corporation to be the majority shareholders' race.[95]

Although *Thinket's* rule is cited for different propositions, a critical race theorist would cite it for the following: when determining corporate racial identity, a court replaces ancestry with shareholders and follows an "other-ascribed" approach, relying upon a majoritarian formula.

B. *The Problem of Heterogeneity*

Richard Brooks criticizes the *Thinket* court for conflating minority-ownership with minority status or racial identity.[96] For example, he argues Thinket could have received minority-certification with one percent black ownership and fifty percent other-minority ownership.[97] Brooks poses the following question: If the corporation's shareholders were one percent black and fifty percent other-minority, then "[w]hat racial identity would the court assign to the corporation?"[98] Although Brook's question was literally academic, another court had the opportunity to turn this academic question into a very real decision.

In *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York*,[99] the Stevensville Country Club, a kosher resort facility in New York, contracted to provide public accommodations for Jews for Jesus (JFJ).[100] The district court described Jews for Jesus as "an evangelical missionary society whose followers, Jews and non-Jews alike, believe that

94. *Id.* at 1060.

95. *See id.* at 1055 (noting Thinket's majority shareholder's racial identity as African-American).

96. *See* Richard R. W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2077 (2006) (distinguishing between ownership and identity).

97. *Id.*

98. *Id.*

99. 968 F.2d 286 (2d Cir. 1992).

100. *See* Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc., 968 F.2d 286, 289 (2d Cir. 1992) (describing background for Jews for Jesus' relationship with the Stevensville Country Club and other Jewish organizations).

Jesus was the Messiah, a belief that conflicts with traditional Jewish doctrine."[101] When Jewish groups learned about this contract, they threatened a boycott of Stevensville, a threat to which Stevensville eventually succumbed.[102] In response, Jews for Jesus sued the defendant Jewish groups.[103] Preliminarily, the court agreed that under Section 1981, to discriminate against Jews is to discriminate based on race.[104] However, although Jews could claim discrimination, Jews for Jesus could not.[105] According to the court, Jews for Jesus' heterogeneity precluded suit: "Despite its name, the record indicates that JFJ's members include both Jews and non-Jews. Because JFJ is a racially diverse society, it cannot, by definition, constitute a racial class or, consequently, maintain a claim as 'Jews' of racial discrimination."[106]

The court held a racially diverse society, *by definition*, cannot maintain a discrimination claim.[107] In finding no standing, the court did not decide whether the members of Jews for Jesus were *actually* Jewish.[108] Instead, the court rested its holding on diversity.[109] Although Jews for Jesus' constituents could individually maintain a claim, the corporation or society, as an amalgamation, could not. By so ruling, the *Jews for Jesus* court inverted typical hypodescent.[110] That inversion, of course, contradicts *Thinket*, in which the corporation acquired a racial identity through the imputed racial identity of *some* of its shareholders.

C. *Stakeholder Identity*

Admittedly, the *Jews for Jesus* court did not analyze Jews for Jesus as a corporation per se.[111] Regardless, the court found that heterogeneity was

---

101. *Id.*

102. *Id.*

103. *Id.* at 290.

104. *See id.* at 291 (stating Jews can make a claim for racial discrimination because such discrimination is based upon their "ancestry or ethnic characteristics").

105. *Id.*at 292.

106. *Jews for Jesus, Inc.*, 968 F.2d at 292.

107. *Id.* Despite its incorporation, the court declined analyzing Jews for Jesus as a corporation. *See id.* at 291–92 (focusing on group composition instead of corporate composition).

108. The question of what constitutes "Jewish identity" is a frequent debate both inside and outside Judaism. *See generally* 11 ARTHUR HERTZBERG & FRED SKOLNIK, ENCYCLOPAEDIA JUDAICA 292–99 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007) (tracing Jewish identity throughout history).

109. *Jews for Jesus, Inc.*, 968 F.2d at 292.

110. *See* OMI & WINANT, *supra* note 21 (detailing hyopdecent).

111. *See Jews for Jesus, Inc.*, 968 F.2d at 291–92 (commenting on JFJ as a group not a corporation); *c.f.* Chicago Miracle Temple Church, Inc. v. Fox, 1994 WL 176189, at *2 (N.D. Ill. May 6, 1994) (holding a church whose members were all black had standing as a corporation to bring a discrimination claim).

the factor precluding standing.[112] This result is peculiar, considering heterogeneity, within individual racial classifications, has never precluded minority identification.[113] By writing off heterogeneous racial bodies, the court dismissed the concept of mixed race as well as *intersectionality*.[114]

Another court, more congenial to those concerns, could reach a different conclusion. *Hudson Valley Freedom Theater, Inc. v. Heimbach*[115] provides an example.[116] Importantly, *Hudson Valley* did so while also broadening the concept of a corporation to include its stakeholders.[117] There, the plaintiff, Hudson Valley Freedom Theatre, Inc. (HVFT), "produce[d] theatrical and artistic productions in Orange County and the mid-Hudson area" in New York where it "particularly [sought to] reach and involve the Black and Hispanic communities" to "reflect the[ir] cultural needs, aspirations[,] and creativity."[118] HVFT applied to the local administration to receive an allotment of federal subsidies, but was denied for

112. *Jews for Jesus, Inc.*, 968 F.2d at 292.

113. *See* OMI & WINANT, *supra* note 21 (tracing the notion of hypodescent). President Obama, for instance, has a black father and a white mother but identifies as a minority. *See President Barack Obama*, WHITE HOUSE.GOV, http://www.whitehouse.gov/administration/president-obama (last visited Mar. 9, 2014) (indicating the President's father originated from Kenya and his mother from Kansas).

114. Critical race theorists define intersectionality as "the examination of race, sex, class, national origin and sexual orientation, and how their combination plays out in various settings." RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 57 (2nd ed. 2012). Intersectionality theory examines unique, convergent occurrences of subordination. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L REV. 1241, 1244 (1991) ("[E]xploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color."). This "[i]ntersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment." *Id.* at 1249.
Intersectionality can occur on a political, as well as individual, level. Richard Delgado provides an anecdotal example of a black, single, working mother. DELGADO & STEFANCIC, *supra*, at 58–60 (2nd ed. 2012). She works for an employer who socializes with black men and employs many white women. *Id.* at 58–59. Her employer does not promote her because he believes black women to be lazy and unreliable. *Id.* at 58. If the woman decides to sue, intersectional subordination will prevent her suit's success. *Id.* at 58–59. The supervisor "does not discriminate against blacks per se—just against black women." *Id.* at 59. Nor does he discriminate against women per se, just black women. *Id.* Because she suffers discrimination because of her black womanhood, theories of discrimination on either race or sex will fail. *Id.*

115. 671 F.2d 702 (2d Cir. 1982).

116. However, the holding is too oblique to say the court directly answered the corporate racial standing question.

117. Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 706 (2d Cir. 1982).

118. *Id.* at 703. HVFT self-reported as an organization promoting minority interests.

allegedly discriminatory reasons.[119] On appeal, the court held HVFT had standing to pursue its claim.[120] The court distinguished HVFT from the MHDC, the plaintiff in *Arlington Heights*,[121] explaining that HVFT "was established for the very purpose of advancing minority interests, whereas for MHDC this was simply an incidental, although important, by-product."[122] Supporting its holding, the court admitted it could not understand "why a corporation, although entitled to advance equal protection challenges based on inequality of taxation or regulation, should lack standing to complain of discrimination because of its activities or stock ownership based on racial grounds—the *core* of the equal protection clause."[123]

Multiple analytical angles are available from which to view this result. First, the court may have subscribed to a shareholder concept of corporate identity.[124] Although the holding did not require this subscription, the court did recognize shareholder composition as one way that corporations pursue equal protection claims.[125] But, if the corporation had standing because of harm to itself, as opposed to standing to assert harm incurred by a third-party, then the court more accurately subscribed to a contractarian-stakeholder theory of corporate identity.[126] The black and Hispanic communities with whom HVFT sought to contract become stakeholders in the corporation. As customers they would have sought to, quite literally, contract with HVFT. As members of HVFT's targeted community, the black and Hispanic communities formed one of multiple connected contracts affecting HVFT.

From a racial perspective, the court tacitly recognized thin constructionism and interactive kind constructionism.[127] As to thin constructionism, through contractarian-stakeholder theory putative clients become part of the corporation. So assimilated, the corporation assumes those

---

119. *Id.*

120. *Id.* at 707.

121. *Id.* at 706.

122. *Id.*

123. *Hudson Valley*, 671 F.2d at 706 (emphasis added) (footnote omitted). Furthermore, it "agree[d] in finding it hard to believe that the Supreme Court would deny standing to the corporation because it 'has no racial identity and cannot be the direct target' of the discrimination, while at the same time it would be obliged to deny standing to the stockholders on the sound ground that the injury was suffered by the corporation and not by them." *Id.*

124. *See infra* Part V.A.

125. *Hudson Valley*, 671 F.2d at 706 (referencing taxation, regulation, corporate activities, and stock ownership as foundations for equal protection claims).

126. *See infra* Part V.B.

127. *See* Mallon, *supra* note 24, at 535 (describing both paradigms through which to analyze race).

clients' race. Even if a corporation, excluding its clientele, were entirely white, under the court's jurisprudence the corporation would still be black. Further, by looking to potential clientele, the court adopts a hypodescent form of stakeholder identity. The court also adopts a prescriptive member reference approach by assuming the black and Hispanic communities would identify with the HVFT. As for interactive kind constructionism, the court relied upon self-reported identity by accepting HVFT's claim that it promoted black and Hispanic interests.

i. Between Stakeholders and Shareholders

Because the HFVT's potential clientele might have viewed the HFVT as advancing their respective interests, the *Hudson Valley* court decided HFVT had standing to claim discrimination.[128] This holding is doctrinally acceptable, but as a theory of racial or corporate identity, some analytic device is required to connect advancing minority interests with becoming a minority. There must be a method by which a court could equate a corporation's association with a minority with the imputation of a minority identity or, at least, the provision of standing.[129]

In *Bains LLC v. Arco Products Co.*,[130] the court attempted to construct such an analytic device. There, Flying B, a corporation owned by three East Indian Sikh Brothers, alleged Arco had discriminated against it by terminating their contractual relationship in violation of Section 1981.[131] Flying B had contracted with Arco to haul fuel between Arco's Washington oil refinery and facilities.[132] The three brothers also drove trucks for Flying B, although they had hired additional drivers, some of whom were

128. *See Hudson Valley*, 671 F.2d at 706 ("When a corporation meets the constitutional test of standing, as HVFT admittedly does, prudential considerations should not prohibit its asserting that defendants, on racial grounds, are frustrating specific acts of the sort which the corporation was founded to accomplish."); *see also* Robert N. Strassfeld, Note, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 VA. L. REV. 1153, 1162 (1983) ("[The court] suggested that a corporation can derive the requisite racial element of its claim from its stockholders or the class of people whose interest its chartered purpose it is to advance.").

129. An example of a corporation's association with a minority granting it racial identity, in its most extreme case, would be a corporation who associates with its minority sole-proprietor. Legally, the corporation and the proprietor are different entities, but the association of the corporation with the sole-proprietor is strong enough for the corporation to assume a racial identity. *See, e.g.*, Howard Sec. Servs., Inc. v. Johns Hopkins Hospital, 516 F. Supp. 508, 513 (D. Mar. 1981) (holding a corporation wholly owned by Blanheim, a minority, had standing because "[t]o deal with [the corporation] is, practically speaking, to deal with Blanheim").

130. 405 F.3d 764 (9th Cir. 2005).

131. Bains LLC v. Arco Prods. Co., 220 F. Supp. 2d 1193, 1195–96 (W.D. Wash. 2002), *rev'd*, 405 F.3d 764 (9th Cir. 2005).

132. *Id.* at 1196.

white.[133] Flying B alleged that Bill Davis, Arco's manager at the Washington facility, deliberately mistreated and inconvenienced Flying B, subjecting its owners and driver to various epithets.[134] In fact, "[e]ven the non-Sikh Flying B drivers felt degraded by Davis's attitude toward their association with their company."[135] Citing *Thinket*, the *Bains* court held that Flying B had standing to assert a Section 1981 claim against ARCO, reasoning that "Flying B undoubtedly acquired an imputed racial identity" because "the corporation is owned entirely by Sikh shareholders, and while not all of its drivers were Sikhs, even the non-Sikh drivers testified they were treated poorly by Davis based on their association with what Davis saw as a Sikh company."[136]

Richard Brooks finds *Bains* to be the apogee of the intellectual departure from racial essentialism.[137] According to Brooks, the *Bains* court "attributed race to the corporate entity based on the conduct of third parties, not their racial essence," so that the court's "judgment relied on how race was signaled and received in the interaction between the plaintiff and the defendant, and not on whether the entity or any other person possessed some essential racial content."[138] To Brooks, "*Bains* differs starkly from other corporate race cases insofar as the court employed a notion of corporate racial identity not determined by the state, or the preferences of shareholder, or agents of the corporation."[139]

ii. The Limits of Stakeholder Identity

Some courts refuse to follow stakeholder identity's rationale to logical end. For example, where employees, but not the owners, are minorities, courts have not permitted standing. In *Contemporary Personnel, Inc. v.*

133. Bains LLC v. Arco Prods. Co., 405 F.3d 764, 767 (9th Cir. 2005).

134. *See id.* at 767–68 (recounting Davis' abuses).

135. *Id.* at 767.

136. *Id.* at 770.

137. *See* Brooks, *supra* note 96, at 2078 (criticizing the *Bains* court for relying on the acts of a third party to determine the corporations racial composition).

138. *Id.* at 2072.

139. *Id.* at 2078. Brooks reads too much into *Bains*. The court mentioned Sikh shareholders ran the corporation, and the employees were discriminated against. The court did not state the sufficiency of either one of those factors. Insufficient information prevents accurate prediction, but the court may have required an implicit finding of the preexisting "racial essence" of the shareholders before it was willing to extend standing to the corporation. Moreover, the court may have allowed the discrimination faced by the employees to be a factor promoting standing only when there was a person with a preexisting "racial essence" into whose identity the employees could be absorbed. The court subscribes to a property theory that gives importance to the owners of a corporation as they relate to corporation's identity. The court does not, as Brooks says, hold that third party actions and reactions, *solely*, can create the conditions for standing.

Godiva Chocolatier, Inc.,[140] Contemporary, a staffing services agency, contracted with Godiva to provide it temporary employees.[141] Throughout their eleven-year relationship, "over [sixty-five percent] of the temporary employees provided by Contemporary to Godiva were 'minorities, specifically African-American and Hispanic individuals.'"[142] According to the complaint, the Manager of Employee Relations at Godiva made "'numerous derogatory comments to Contemporary Personnel relative to the providing of Black and Hispanic employees.'"[143] After Godiva canceled the service contract for allegedly discriminatory reasons, Contemporary sued under Section 1981, claiming Godiva ended its contract with Contemporary because of "'Contemporary's imputed racial identity resulting from its strong association with Hispanic and African-American employees'" and Godiva "'treated Contemporary differently than a similarly situated company with a different imputed racial identity.'"[144]

The court dismissed the claim for lack of standing.[145] According to the court, a corporation could not claim standing "based on simply a 'strong association with Hispanic or African-American employees.'"[146] It also faulted the plaintiff for its incomplete complaint: "Plaintiff does not even allege the race of Contemporary's owner, president or shareholders much less the racial make-up of its workforce."[147]

Unlike *Bains*, in which the court considered the employees to be part of the corporation, the *Godiva* court would not so consider Contemporary's independent contractors. The distinction between employees and independent contractors is, from a contractual perspective, irrelevant. Even strict contractarians would see them as equivalent.[148] Taking the complaint as true, if Godiva did discriminate against Contemporary because its personnel's race, then the corporation faced discrimination without recourse. The court did not require any theory of racial identity,

---

140. No. 09-00187, 2009 WL 2431461 (E.D. Pa. Aug. 6, 2009) (Mem.).

141. Contemporary Personnel, Inc. v. Godiva Chocolatier, Inc., No. 09–00187, 2009 WL 2431461, at *1 (E.D. Pa. Aug. 6, 2009) (Mem.).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at *2.

147. Contemporary Pers., Inc. v. Godiva Chocolatier, Inc., No. 09–00187, 2009 WL 2431461, at *2 (E.D. Pa. Aug. 6, 2009) (Mem.).

148. Gulati et al., *supra* note 79, at 905 ("The initial series of contracts or customs describes the firm. The directors, managers, and employees are the agents of the shareholders, and they run the firm for the benefit of the shareholders. These agents, in turn, enter into contracts with independent contractors, suppliers, and distributors, who are third parties outside the firm.").

never progressing to that question.[149] According to the court, discrimination against a corporation because of those with whom it contracts is not discrimination as a matter of law.[150] Compare *Godiva's* holding to *Hudson Valley*, in which the plaintiff proscriptively sought to contract with minorities. In each case the corporation faced discrimination because of the minorities with whom it associated, yet each case yielded different results.[151] Perhaps a new jurisprudence is required.

VII. PROPOSAL

Robert Strassfeld argues that law should ascribe race to corporations.[152] Because people intuitively associate race with corporations, law should as well.[153] For example, a corporation may seek to identify itself with a particular race so others perceive it as racial entity. Or, third-parties may ascribe a particular race to a corporation even if the corporation does not assent to such an ascription. Either way, corporations can and will have a racial character:

> Applying these themes, it is reasonable to ascribe racial character to corporations. Corporations may not necessarily seek to represent their constituents' racial identity, although some do, but often that representative role is thrust upon them. Their shareholders' or directors' race may be a highly visible element of the corporation's image. The very premise of a corporation's claim alleging race discrimination is that at least one person, the defendant, has harmed the corporation because to him it represented the race of its constituents or customers. Representativeness thus arises both from within and without the corporation—the result of both the character of the cor-

149. *See Godiva*, 2009 WL 2431461, at *2 (ending the inquiry on the issue of standing).

150. *See id.* ("While courts have adopted the imputed racial identity concept from Trinket, those courts have only found corporations to have an imputed racial identity when *the owner, majority of shareholders and/or president are members of the specific class that is alleged to have been discriminated against.*") (emphasis original).

151. *Compare Godiva*, 2009 WL 2431461, at *2 (refusing to grant standing to corporations asserting racial discrimination claims based on strong associations to minority groups), *with* Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 707 (2d Cir. 1982) (holding there was standing to assert a claim for racial discrimination based on the motives of the corporation to serve minority groups); *c.f.* D.B. Indy, L.L.C. v. Talisman Brookdale LLC, 2004 WL 1630976, at *3-4 (D. Minn. July 20, 2004) (holding that a corporation could not assert a discrimination claim when it alleged it was injured by discrimination against its customers).

152. Strassfeld, *supra* note 128, at 1155.

153. *Id.* at 1179.

poration's constituents and the perception of those outside the corporation.[154]

According to Strassfeld, because a corporation represents its constituents' race, it should be able to bring racial discrimination claims.[155] Otherwise, individuals could discriminate against the corporation in ways they could not if the corporation were, say, a partnership, sole proprietorship, or an individual.[156] Thus, if the latter associations have standing for racial discrimination, a corporation should as well.[157] Indeed, "[c]orporate standing based on race merely reflects reality."[158]

A. *Racial Identity*

In *Gersman v. Group Health Assoc., Inc.*, the D.C. Circuit followed Strassfeld's recommendation and created a sophisticated way of considering corporate racial identity or standing.[159] Mr. Gersman was the president of the CSI corporation, and he and his wife were its only shareholders.[160] CSI alleged the Group Health Association (GHA) terminated a contract with CSI when it discovered that the Gersmans were Jewish.[161] On appeal, the D.C. Circuit held that CSI had standing to assert a Section 1981 claim, without finding or needing to find that the corporation had a racial identity or promoted racial interests.[162] "Rather than assume that racial identity is a predicate to discriminatory harm," the *Gersman* court wrote, "we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm."[163] Therefore, "the situation would be no different if Gentile shareholders owned CSI and GHA ended the contractual relationship because the corporation had a single Jewish employee."[164] Based on this reasoning, CSI did not need a "Jewish identity" or be comprised of predominantly Jewish owners or employees to sustain injuries from GHA's discriminatory actions.[165]

---

154. *Id.*
155. *Id.* at 1180.
156. *Id.*
157. *See id.* (positing such a discrepancy "inadequately deters discriminatory behavior and undermines the goals of the amendments and Acts").
158. Strassfeld, *supra* note 128, at 1181.
159. *See* Gersman v. Group Health Ass'n, Inc., 931 F.2d 1565, 1569 (D.C. Cir. 1991), *vacated*, 502 U.S. 1068 (1992) (predicating corporate standing on the harm suffered rather than racial identity).
160. *Id.* at 1567.
161. *Id.*
162. *Id.* at 1569.
163. *Id.* at 1568.
164. *Id.* at 1569.
165. *Id.*

B. *Corporate Identity*

Assuming a normative agreement that stakeholder theory is ethically and descriptively attractive, *Des Vergnes v. Seekonk Water District* provides the proper concept of corporate identity for discrimination claims.[166] There, the plaintiff, Heritage Homes of Attleboro, Inc. (Heritage), purchased a parcel of land, relying upon the Seekonk Water District's (District) assurances that it would supply the land with water.[167] The District eventually rejected Heritage's application, allegedly believing "the Heritage subdivision would consist of Federally subsidized low-income housing and/or housing consisting of shacks designed to attract low income people and/or colored people."[168] Heritage claimed the "denial was for the purpose of keeping black people out of the District and punishing the plaintiffs for their willingness to contract with black people."[169]

Surveying cases in which a white person could claim discrimination for contracting with a black person, the court held "a person has an implied *right of action* against any other person who, with a racially discriminatory intent, injures him because he made contracts with non-whites."[170] The court reasoned that its holding "effectuate[d] the public policy embodied in [Section] 1981, and . . . protect[ed] the *legal rights* of non-whites expressly created by [Section] 1981."[171]

If the Supreme Court revisits the *Arlington Heights* dictum, it should do so through *Des Vergnes* and *Gersman.* The intertwined doctrine would read as follows: A corporation has standing to litigate a civil rights claim when a person, with a racially discriminatory intent,[172] interferes with its right to contract. This doctrine absolves a court from the burden of determining the entity's race. Instead, it focuses on the defendant's perception. This doctrine would also facilitate cleaner holdings. For example, under this doctrine, the *Hudson Valley* court would simply hold that the HFTC sought to contract, and because of the defendant's discrimination against black and Hispanic communities, it could not. Inquir-

166. *See* Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 14 (1st Cir. 1979) (envisioning corporate standing based on discriminatory due to or interfering with contracting with minorities).

167. *Id.* at 11.

168. *Id.* at 12.

169. *Id.*

170. *Id.* at 14.

171. *Id.* (emphasis original).

172. This assumes intent is necessary for standing. The debate between de jure and de facto discrimination is beyond the scope of this paper. *See generally* Gary Peller, *A Subversive Strand of the Warren Court*, 59 WASH. & LEE L. REV. 1141 (2002) (exploring the use of de jure and de facto methodologies by the Warren court).

ing into corporation's intent in advancing particular minorities' interests is thus unnecessary.

C. *Implications*

This proposal is theoretically attractive, but admittedly poses practical problems. Most importantly, it may frustrate corporate boundaries. This proposal permits a corporation to assert a claim when it is harmed by discrimination against someone who may or may not (classically) constitute the corporation. If someone with a potential contractual relationship with the corporation constitutes the corporation, and if discrimination against that someone is discrimination against the corporation, then a corporation may have standing to claim discrimination against anyone.

Nonetheless, this problem is not new, and courts are equipped to confront doctrines that facially appear to permit corporate identities without boundaries. For example, the court *Rosales v. AT&T Information Systems, Inc.*[173] held a "racially neutral corporation" had standing to bring a discrimination claim just as a non-minority corporation had.[174] The court canvassed cases permitting a non-minority discrimination claims and found that "[i]n each case the actual racial prejudice was not directed against the plaintiff, but rather against someone with whom the plaintiff maintained a relationship."[175] In each instance, the plaintiff "was nonetheless directly injured by the discrimination."[176] As in *Rosales*, courts will have opportunity to compare and contrast the quality of the relationships between the corporate plaintiff and the minority with whom it seeks a relationship. This analogical reasoning is certainly within the judiciary's institutional competence.

---

173. 702 F. Supp. 1489 (D. Colo. 1988).

174. Rosales v. AT & T Information Systems, Inc. 702 F. Supp. 1489, 1496–97 (D. Colo. 1988). See Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977); DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975), *modified*, 520 F.2d 409 (2d Cir. 1975); and Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972), for other examples of white plaintiffs with standing who were injured because discrimination against minorities with whom they had relationships.

175. *Rosales*, 702 F. Supp. at 1495; *see, e.g.*, Alizadeh v. Safeway Store, Inc., 802 F.2d 111 (5th Cir. 1986) (holding a white plaintiff had standing when her employer discriminated against her because her husband was Iranian); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) (holding a white plaintiff had standing when his employer discriminated against him because his wife was black). In *Rosales*, the corporation brought suit because of discrimination against its minority sole proprietor. *Rosales*, 702 F. Supp. at 1491.

176. *Rosales*, 702 F. Supp. at 1495.

VIII. CONCLUSION

Corporate racial standing presents a metaphysical quandary: It is a myth overlaid upon a fiction. As such, it presents the perfect set up for the Legal Realist deconstruction of forms[177] and the Critical Race Theorist denaturalization of essence.[178]

Race and corporate identity are similar constructs. A corporation is a distinct entity formed by an aggregation of individuals, yet one existing separately from those individuals. Race is also a distinct entity, a construct separate from the individuals who constitute or are perceived to constitute it. Corporations are legal constructs with social implications, whereas race is a social construct with legal implications.

Although this proposal for corporate racial identification reduces race and corporations to a type of phenomenology, the purpose is not to discount their power. Instead, it is only to recognize that as social institutions they are malleable, not inevitable. Hopefully through such recognition, progress—however so defined—will be possible.

177. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935) (considering the question "Where is a corporation?" to be "a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, 'How many angels can stand on the point of a needle?'").

178. *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) ("Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.").