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David Simson currently serves as an Acting Assistant Professor of Lawyering at NYU Law School, where he teaches the first-year Lawyering course. David's research analyzes the relationship between law and equality, with a focus on how statutory and constitutional antidiscrimination law regulates issues of race and race discrimination. His article "*Whiteness as Innocence*" was selected by the Denver Law Review as the journal's 2018 Emerging Scholar Award winner. Prior to coming to NYU in 2019, David was the Greenberg Law Review Fellow at UCLA School of Law, where he taught Employment Discrimination and a self-designed seminar on Race, Social Psychology, and the Legal Process. David grew up in Austria and initially pursued a potential career in professional tennis, but eventually decided to shift course and moved to the United States to compete in collegiate tennis, graduate from college and law school, and focus on an academic career.

When the Mean Is Not Golden: Racial Hierarchy, Threat, and the Antibalkanization Approach to Constitutional Racial Equality

At least since Justice Powell's opinion in *Bakke*, an antibalkanization rationale has significantly influenced decisive opinions in controversial race-law cases from affirmative action to voting rights, desegregation, and employment discrimination. This is not surprising given the Court's role in adjudicating America's continual racial conflict: Antibalkanization is a natural "middle" position on how to accomplish racial equality. It holds that race-conscious intervention is (sometimes) a constitutionally permitted means to address the continuing legacies of a racist past, but uses of race must be strictly limited in form and extent to avoid the understandable resentment they create in whites who are disadvantaged by them. Antibalkanization threads the needle between a pure anti-classification approach that rejects race-conscious equality intervention altogether, and a pure anti-subordination approach that supports broad intervention in many social contexts. There are good reasons to think that even with recent retirements of antibalkanization Justices, these ideas will continue to play a significant role in future racial equality controversies.

But while a middle position that caters a little bit to everyone may seem attractive, the proverbial mean is not golden in questions of racial equality law. This paper looks to social science and legal history to question antibalkanization's most fundamental assumption: that meaningful progress toward racial equality is more likely in the long run if legal doctrine structures equality interventions to avoid racial resentment and division. A robust literature on the social psychology of racial threat suggests instead that racial resentment by whites is a predictable result of any meaningful challenge to their dominant status in a society characterized by longstanding racial hierarchy. Measures that significantly increase racial equality but do not create racial resentment likely do not exist, and a constitutional choice must be made between racial progress and the management of white resentment and potential racial conflict.

An overlooked lesson of the complex history of *Brown v. Board of Education* and the civil rights movement suggests that, counterintuitively from an antibalkanization angle, racial resentment and conflict in response to decisive equality-oriented intervention can be precursors of meaningful racial progress. The Court's and activists' refusal to heed calls to proceed slowly so as to prevent the inevitable racial conflict that would come with upsetting an established (allegedly "harmonious") racial order led to serious white resentment and backlash. But, as scholars have suggested, it was precisely this backlash that provided the foundation for civil rights legislation that pushed the country beyond apartheid—because it made intolerably obvious to large parts of the population the inconsistency between professed American egalitarian ideals and the reality of an unbroken commitment to white supremacy. When the Court later returned to validating (including through antibalkanization rationales) white resentment to the changes initiated by those laws, it regrettably reverted its approach to the Constitution's racial equality ideal to the doctrinal preservation of racial hierarchy. For racial equality to receive a new boost,

Justices must again come to see that, at least in this context, deviation from the middle path may not be excess, but a virtue.