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## ***Brown* Now: The Surprising Possibility of Progressive Reform**

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## ***Brown* Now:**

### **The Surprising Possibility of Progressive Reform**

Louis Michael Seidman<sup>\*</sup>

For four decades, the Supreme Court has engaged in a determined, systematic, and successful effort to transform and tame *Brown v. Board of Education*.<sup>1</sup> From the beginning, *Brown* itself was far less revolutionary than its defenders claimed,<sup>2</sup> but in recent years, it has been transmogrified from a modest, halting step toward racial justice to a pillar supporting an unjust racial status quo.<sup>3</sup>

None of this is a secret, but in this brief article, I suggest a surprising counterweight to the standard narrative. If one takes modern doctrine seriously – a big if, I concede – then it has the potential to support some progressive goals.

In particular, modern doctrine might provide progressive answers to three questions:

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> For deflationary accounts, see, e.g., Derrick A. Bell, Jr., Foreword: The Civil Rights Chronicles, 99 Harv. L. Rev. 4 (1985); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980); Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change 157 (1991).

<sup>3</sup> See, e.g., Derrick A. Bell, Jr., And We are Not Saved (1987); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 565 U. Chi. L. Rev. 935 (1989).

1. Are race-conscious but facially neutral means of increasing diversity at state-institutions of higher education constitutional?
2. Are legacy admissions to state run institutions of higher education constitutionally vulnerable?
3. Is discrimination based on sexual orientation subject to heightened scrutiny?

Surprisingly, a close look at modern doctrine suggests that the answer to all three questions might be “yes,” or at least so I will argue.

Before making the argument, a large and important caveat: In what follows, I will take Supreme Court doctrine seriously and imagine, at least for the sake of argument, that the justices feel bound by what they, themselves have said. Put differently, this is an internalist analysis of the doctrine.<sup>4</sup> There is more than enough reason for skepticism about internalist accounts, and, for that reason, I make no prediction that the Court will in fact take its own pronouncements seriously.

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<sup>4</sup> See, e.g., Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 Yale J. L. & Human 353, 369 (associating the internalist standpoint with the “Wittgensteinian view that meaning and judgment are inextricably interwoven with practice”). In this article, I take the practice of constitutional adjudication seriously and argue for outcomes based on the observance of norms internal to the practice.

One might therefore interpret what follows in one of three ways. First, as a thought experiment designed to reveal what might follow *if* the court took its doctrine seriously. Second, as a set of suggestions directed to internalist advocates of racial justice for arguments that they might use to further their project. Third, if as seems entirely possible, the Court fails to follow through on its doctrinal commitments, as a demonstration that legal doctrine is epiphenomenal.

Part I of this article lays the groundwork for my argument by describing how *Brown* transformed the law of racial discrimination. I argue that it did so by dismantling the formalist and individualist orientation of the old regime.

Part II describes the modern law of racial discrimination, which revives the formalism and individualism that *Brown* had rejected.

Part III sets out counterintuitive arguments about how the Court's revisions of *Brown* might be used by progressives to defend affirmative action, attack legacy admissions, and protect the L.G.B.T.Q community.

A brief conclusion returns to questions about internalist accounts. It asks whether it is wise to expect legal doctrine to trump the other determinates of Supreme Court decision making.

#### I. *Brown* Then

Brown v. Board of Education reversed two, interrelated commitments that marked the constitutional law of race in the late nineteenth and early twentieth centuries: a commitment to formalism and a commitment to individualism.<sup>5</sup>

### A. Formalism

Speaking very roughly, formalism is an approach to law that emphasizes the exterior form taken by legal regulation and disregards its actual effects.<sup>6</sup> In the context of equal protection law, this stance insists on the facial neutrality of government policies. So long as these policies are formally neutral – so long as “[t]he law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread”<sup>7</sup> – they satisfy the constitutional command of equality.

This approach was notoriously on display when the Supreme Court first endorsed “separate but equal” in Plessy v. Ferguson.<sup>8</sup> For Justice Brown, the state’s regulation of railroad seating accommodations was majestically neutral. Yes, Blacks were prohibited from sitting in White spaces, but Whites were

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<sup>5</sup> It bears emphasis that what I present here is an internal account of the doctrine. An external account might appropriately emphasize the pervasiveness of racism during the period I discuss and the alignment of political forces. See, e.g., Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004).

<sup>6</sup> Cf. Steven D. Smith, *The Pursuit of Pragmatism*, 100 *Yale L.J.* 409, 428 (1990) (defining formalism as an approach that relies on a “substantive rule, or ‘formula,’ that has the effect of requiring decisionmakers to act in accordance with specified criteria and to disregard other criteria”).

<sup>7</sup> Anatole France, *The Red Lily* (1894).

<sup>8</sup> 163 U.S. 537 (1896).

prohibited from sitting in Black spaces. Because the regulation was facially neutral, any claim that it violated equality assumed that the government had an affirmative obligation to “overcome [social prejudices] by legislation.”<sup>9</sup> But remedies for this problem, if indeed it was a problem, were remitted to the private sphere. As Justice Brown put it, “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.”<sup>10</sup>

A half century later, the Supreme Court disavowed this approach in *Brown v. Board of Education* and replaced it with a strikingly anti-formalist stance. As a formal matter, the prohibition on people of color attending White schools, was balanced by a reciprocal prohibition on White people attending schools assigned to people of color. But the *Brown* court saw past this facial (one might say laughably pretextual) equality. For Chief Justice Warren and his colleagues, what mattered was the effect of segregated education. Whatever its form, its effect was to damage the “hearts and minds” of black children “in a way unlikely ever to be undone.”<sup>11</sup>

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<sup>9</sup> Id. at 551.

<sup>10</sup> Id.

<sup>11</sup> *Brown v. Board of Education*, 347 U.S. 483, 487 (1954).

Because the *Brown* Court focused on real-world effects rather than legal formalities, it insisted that facial neutrality was insufficient to remedy the constitutional violation. The Court's initial enforcement efforts were feeble and ineffective, but when it finally got around to implementing its mandate, it held that formally neutral measures like "freedom of choice"<sup>12</sup> and "neighborhood school"<sup>13</sup> plans – were insufficient. Instead, jurisdictions had a positive obligation to produce actual integration. That obligation necessarily entailed measures that were not formally neutral but, on the contrary, took race into account.

### B. Individualism

The pre-*Brown* Court coupled formalism with an approach that emphasized individual rather than group rights.

The approach extended well beyond the constitutional law of race. At its core, *Lochnerism* was rooted in a vision of discrete individuals asserting their own rights by, for example, bargaining to work long hours in exchange for the wages employers offered.<sup>14</sup> The *Lochner* Court ignored the structural forces that

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<sup>12</sup> See *Green v. County School Bd.*, 392 U.S. 430 (1968) (invalidating "freedom of choice" plan).

<sup>13</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding power of district court to order bussing to overcome segregative effects of geographic zoning).

<sup>14</sup> *Lochner v. New York*, 198 U.S. 45, 57 (1905) (invalidating maximum hours law for bakers on the ground that "[t]here is no reasonable ground for interfering with the liberty of a person or right of free contract . . . in the occupation of a baker. There is no contention that bakers are not equal in intelligence and capacity to men in other trades or manual occupations or that they are not able to assert their right and care for themselves without the protecting arm of the State, interfering with their independence of judgment and action").

produced these outcomes. It was hostile to unions<sup>15</sup> and government regulation,<sup>16</sup> both of which privileged collective will over individual choice.

*Plessy* occupied an odd place within this world view. From one perspective, it reflected racial exceptionalism. After all, the case upheld government intervention that limited individual choice.<sup>17</sup> When racial subjugation was at stake, the Court seemed willing to abandon its anti-regulatory stance and to privilege group over individual rights.

Viewed from another perspective, though, *Plessy* accomplished the difficult task of marrying individualism to government regulation. On the Court's view, it was now the argument *against* regulation that depended on group rights. The Court accomplished this reversal by privatizing the problem of racial hierarchy. People of color might *feel* subjugated by racial segregation, but that feeling stemmed from their individual choices "to put that construction upon it."<sup>18</sup> The clear implication of this language was that African Americans had an individual obligation to feel differently about it.

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<sup>15</sup> See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (invalidating statute forbidding employers from requiring that employees agree not to join a union); *Coppage v. Kansas*, 236 U.S. 1 (2015) (same).

<sup>16</sup> See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (invalidating statute establishing minimum wage for women); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 195 (invalidating statute limiting entry into pharmacy business).

<sup>17</sup> See David E. Bernstein, *Plessy Versus Lochner: The Berea College Case*, 25 J. Sup. Ct. Hist. 93, 94 (2000) (arguing that *Plessy* and *Lochner* are in tension); David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 Am. U. L. Rev. 85, 97 (1993) (same).

<sup>18</sup> *Plessy v. Ferguson*, 163 U.S., at 551.



What about White people? On the Court's view, regulation vindicated rather than frustrated private, individual choice. If there was to be integration, it must come about through the "voluntary consent of individuals."<sup>19</sup> It was therefore the absence of regulation, rather than its presence, that threatened individual choice. In its absence, an individual might have no choice but to sit next to someone of a different race. In this way, government coercion forcing separation was somehow transmogrified into a protection of individual freedom.<sup>20</sup>

Once again, *Brown* changed all that. The *Brown* Court saw segregation as a problem about groups rather than individuals. State-enforced segregation both symbolized and enforced a system of racial subordination that went beyond the treatment of any individual.

Of course, *Brown* itself took the form of vindicating the rights of the individual plaintiffs who brought the suit. The case or controversy requirement guaranteed that. But that fact did not hide the Court's preoccupation with group rights. A truly individualist approach would have asked whether the particular plaintiffs before the Court suffered from the psychological harm that the Court

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<sup>19</sup> Id.

<sup>20</sup> Remarkably, more than a half century after *Plessy* and four years after *Brown*, one of America's leading, liberal academics endorsed this argument. See Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1 (1959) ("[I]f freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.").

identified. It might have meant that segregated education was constitutional in some places but not others. But the Court had no patience for this approach. Its aim was to use the individual case as an excuse for establishing a national standard designed to end racial hierarchy.<sup>21</sup>

If there were any doubt about this orientation, it was dispelled a year after its initial *Brown* decision when the Court turned to remedy. *Brown II's* “all deliberate speed”<sup>22</sup> formula has been justly criticized as temporizing in a way that encouraged White resistance.<sup>23</sup> But focus on that problem has hidden the group orientation that led to the decision. Had *Brown* been about Linda Brown’s personal, individual right to attend a particular school in Topeka, Kansas, she could have been afforded immediate relief. Because the Court’s aim was, instead, to dismantle government supported racism throughout the country, individual claims had to be subordinated to the broader, collective effort that, in the Court’s view, would take time to implement.<sup>24</sup>

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<sup>21</sup> Four years after *Brown*, the Court made this point clear by holding that *Brown* was binding on all government officials throughout the United States whether or not they were parties to the original litigation. See *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1959).

<sup>22</sup> *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (ordering district courts “to admit to public schools on a racially nondiscriminatory basis with all deliberate speed”).

<sup>23</sup> See, e.g., Alan Freeman, *Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049, 1065-76 (1978); Robert Carter, *The Warren Court and Desegregation*, 67 *Mich. L. Rev.* 237, 244-46 (1968).

<sup>24</sup> See, e.g., Paul Gewirtz, *Remedies and Resistance*, 92 *Yale L.J.* 585, 614 (1983) (noting that “[i]n desegregation cases, the typical remedy requires redrawing attendance lines, arranging for any needed pupil transportation, adjusting programs and facilities, and reassigning teachers”).

The Court's much criticized decision in *Naim v. Naim*<sup>25</sup> illustrates the same point. The case arose shortly after *Brown* when the success of the Court's project was endangered by "massive resistance." At stake was the constitutionality of so-called "anti-miscegenation" laws that prohibited individuals of different races from marrying. Now public but then secret conference notes make clear that the Justices were troubled by the denial of the individual right to marry<sup>26</sup> – a right eventually vindicated in *Loving v. Virginia*.<sup>27</sup> But faced with a serious and immediate challenge to their power, the justices also worried about fueling the political conflagration. They thought that the individual rights of couples had to be subordinated to the group rights of the African American community. Accordingly, the Court went through the legal gyrations necessary to bury the individual case and preserve the broader effort.<sup>28</sup>

When the political winds shifted, the Court intensified the struggle to implement its decision. When it did so, its group orientation became still more obvious.

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<sup>25</sup> 350 U.S. 891 (1955).

<sup>26</sup> For an account of the *Niam* deliberations, see Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 321-23 (2004).

<sup>27</sup> 388 U.S. 1 (1967).

<sup>28</sup> See Michael J. Klarman, note 26, *supra*, at 321-23.

In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>29</sup> the Court upheld a judicially ordered bussing program designed to produce actual integration. On the individual level, the plan necessarily meant that the race of individual school children determined whether and where they were bussed. Individual Black and White children were “discriminated against” because of their race. The Court nonetheless upheld the plan because, on the group level, “mathematical ratios” could be “a starting point in the process of shaping a remedy.”<sup>30</sup>

## II. *Brown* Now

Starting in the 1970’s, the Court began to abandon these commitments and to put in place modern equal protection doctrine.

### A. The New Formalism

The modern court has not disowned *Brown’s* rejection of *Plessy*. Modern doctrine remains anti-formalist in the sense that the formal equality produced by segregation statutes that “equally” prevent racial mixing are unconstitutional. But instead of altogether abandoning formalism, the modern Court has retreated to

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<sup>29</sup> 402 U.S.1 (1971).

<sup>30</sup> *Id.* at 25.

safer ground and erected a more defensible perimeter guarding against an effects-based approach.

The new formalism focuses on whether government action is race-based on its face. A statute that formally classifies according to race is “strictly scrutinized.”

That is true even if the statute’s effect is to dismantle racial hierarchy.<sup>31</sup>

Conversely, a statute that is formally race neutral is subject to only minimal “rational basis review.” That is true even if the statute’s effect is to entrench racial hierarchy.<sup>32</sup>

The twin pillars of the new formalism, *Washington v. Davis*<sup>33</sup> and *Students for Fair Admissions v. President and Fellows of Harvard College*,<sup>34</sup> embody the approach. *Washington v. Davis* establishes the proposition that the “mere” disproportionate effect of a formally neutral government policy does not make the policy unconstitutional.<sup>35</sup> *Students for Fair Admissions* makes clear that formally

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<sup>31</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 315 U.S. 200, 227 (1995) (holding that “all racial classifications . . . must be analyzed . . . under strict scrutiny” and that this standard is appropriate even if the classification is motivated by good intentions).

<sup>32</sup> See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that facially neutral government action not motivated by a discriminatory purpose is subject to only rational basis review despite its discriminatory impact on racial minorities).

<sup>33</sup> *Id.*

<sup>34</sup> 600 U.S. 181 (2023).

<sup>35</sup> See 426 U.S., at 239 ([O]ur cases have not embraced the proposition that a law . . . without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

race-based measures *are* unconstitutional whether or not they produce salutary effects.<sup>36</sup>

This structure leaves the treatment of an intermediate case unresolved. What if a statute is facially neutral but enacted for a “racial purpose”? As we will see below,<sup>37</sup> the Court’s ambiguous and ambivalent approach to this problem opens space for a progressive version of current doctrine. For now, though, it is enough to understand why this intermediate case poses a problem for modern doctrine.

On the one hand, permitting obvious and overt racial gerrymandering threatens the formal approach. An early case, involving actual, not just figurative gerrymandering, illustrates the point. In *Gomillion v. Lightfoot*,<sup>38</sup> an Alabama statute redrew the shape of the City of Tuskegee from a square to what Justice Frankfurter, writing for the Court, called “an uncouth, twenty-eight sided figure.”<sup>39</sup> The City’s new shape fenced out all but four or five of its 400 Black voters.<sup>40</sup> Even though the legislation nowhere mentioned race, the Court held that the lines

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<sup>36</sup> 600 U.S., at 207 (“Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies ‘without regard to any differences of race, of color, or of nationality’—it is ‘universal in [its] application.’ . . . For ‘[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.’”).

<sup>37</sup> See pp xx, *infra*.

<sup>38</sup> 346 U.S. 339 (1960).

<sup>39</sup> *Id.* at 340.

<sup>40</sup> *Id.* at 341.

were “tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters.”<sup>41</sup>

If the Court had held otherwise, it would have fatally discredited the formalist project. Permitting blatant and obvious subterfuge undermines the claim that formalism protects equality. What, after all, is the distinction between a statute that mentions race and a statute that avoids using the magic word but that deliberately produces the same outcome? The insistence that there is a distinction turns formalism into a bad joke.

On the other hand, striking down all statutes in the intermediate category also threatens to undermine the formalist project. Part of the problem is the sheer number of legislative programs that have historically been infected by racial purposes. The creation of an organized police force,<sup>42</sup> the criminalization of narcotic drugs,<sup>43</sup> immigration laws,<sup>44</sup> gun control measures,<sup>45</sup> and a whole range of housing and public welfare programs, minimum wage and maximum hour

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<sup>41</sup> Id.

<sup>42</sup> See, e.g., NAACP, “The Origins of Modern Day Policing,” available at <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> (last visited 4/13/22).

<sup>43</sup> See, e.g., Desmond Manderson, *Symbolism and Racism in Drug History and Policy*, 18 *Drug & Alcohol Rev.* 179 (1999).

<sup>44</sup> See, e.g., Kevin R. Johnson, *From Chinese Exclusion to Contemporary Systemic Racism in the Immigration Laws*, \_\_\_ *Ind. L. Rev.* \_\_\_ (2021).

<sup>45</sup> See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L. J.* 309 (1991).

legislation, zoning and land use regulation, and countless other government programs<sup>46</sup> can be traced back to racist assumptions and goals. A doctrine that problematized all these laws would destroy formalism.

The problem is made more intractable by possible methods for proving impermissible purpose. In theory, “purpose” and “effect” are separate categories. In practice, though, it is rarely possible to find direct evidence of impermissible purpose, especially when we are talking about collective institutions. Because subjective purpose is almost always inaccessible, the law regularly relies on the external signs of purpose. Prominent among these external signs is effect. Hence, the venerable common law presumption that people intend the natural and probable consequences of their actions.<sup>47</sup> But permitting this common mode of proof in the equal protection context collapses the distinction between purpose and effect, thereby dooming formalism.

The modern court negotiated these difficulties by a combination of compromise and evasion. The compromise: It retained discriminatory purpose as a theoretical check on formalism, but so narrowly confined the modes of proof as

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<sup>46</sup> See generally David Bernstein, *Only One Place of Redress: African Americans, Labor Regulation, and the Courts from Reconstruction to the New Deal* (2001); Richard Rothstein, *The Color of Law: The Forgotten History of How Our Government Segregated America* (2017); Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (2013).

<sup>47</sup> See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184, (2007) (noting that “many States and the Federal Government apply some form or variation of [the natural and probable consequences’] doctrine”).



to make the check almost entirely theoretical. Disproportionate impact, even if dramatic, does not alone demonstrate impermissible purpose.<sup>48</sup> Meticulous statistical studies bolstered by sophisticated regression analysis are also insufficient.<sup>49</sup> Nor does mere awareness that the challenged law will have a disproportionate impact. Instead, to satisfy the Court's exacting standard, opponents of a law must show that the legislature acted "because of" not merely "in spite of" the law's discriminatory effect.<sup>50</sup>

The evasion: The Court's pronouncements are frustratingly vague and inconsistent about precisely what purpose is necessary to trigger strict scrutiny. There are at least three theoretical possibilities – possibilities that, as we shall see, play a crucial role in assessing the progressive possibilities embedded in modern doctrine.

1. *Impermissible purpose as unequal caring.* First, as David Strauss has argued, impermissible purpose might be equated with unequal caring.<sup>51</sup>

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<sup>48</sup> See *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 270–71 (1977) (holding that when discriminatory purpose is not proved, a discriminatory effect "is without independent constitutional significance").

<sup>49</sup> See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting the constitutional relevance of such an analysis in the context of a challenge to racially discriminatory application of capital punishment).

<sup>50</sup> See *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, (1979).

<sup>51</sup> David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 957 (1989) ("A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent."). See also Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law* 1006, 1038-39 (1987).

Suppose that a city council locates a toxic dump in a predominantly black neighborhood. They do so because, after all, the filth must go somewhere, and, for a variety of nonracial reasons, this site seems appropriate. But suppose further that Black residents convincingly demonstrate that the Council would never have placed the dump in this location if the area had been White. In this hypothetical counternarrative, city council members would have said “Yes, this site meets our criteria, but surely we can find someplace else that also does so.”

In a literal sense, the location decision violates the promise of equal protection of the laws. A city council that acts in this way is using the law to protect White, but not Black citizens from environmental harm, and it is doing so because it cares more about Whites than Blacks.

But despite the attractiveness of this approach, the Court has rejected it. In *Personnel Administrator of Massachusetts v. Feeney*,<sup>52</sup> the Court upheld a statute granting a preference for veterans applying for civil service jobs despite its discriminatory impact on women applicants. If the Court had asked whether the legislature would have enacted the same program if it harmed men, the challengers might have prevailed. But the Court rejected this standard. Because “nothing in the record demonstrates that this preference for veterans was

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<sup>52</sup> 442 U.S. 256 (1979).

originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service,”<sup>53</sup> the challenge failed.

2. *Impermissible purpose as the desire to harm.* Building on this holding, Deborah Hellman has suggested a second definition of illicit purpose.<sup>54</sup> On her view, the formal prohibition on race-based classifications and the intent-based prohibition on impermissible purpose represent “distinct threads” of equal protection law.<sup>55</sup> The former prohibits any overt use of race in the absence of a compelling state interest. The latter prohibits only measures that are infected by the purpose of imposing harm.<sup>56</sup>

Consider two hypotheticals involving facially race neutral measures that Hellman offers to illustrate her thesis. First, a state university admits the top ten percent of the graduating class of each high school in the state for the purpose of promoting racial diversity. Second, a university disfavors applicants from a particular ZIP code for the purpose of decreasing racial diversity.<sup>57</sup>

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<sup>53</sup> Id. at 279.

<sup>54</sup> Deborah Hellman, *Diversity by Facially Neutral Means*, 110 Va. L. Rev. \_\_\_\_ (2024) (forthcoming).

<sup>55</sup> Id. at 54.

<sup>56</sup> Cf., Sonja Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 Stan. L. Rev. 162 (2024) (arguing that the equal protection clause outlaws race-conscious means but not race conscious ends).

<sup>57</sup> Deborah Hellman, note 53, *supra*, at \_\_\_\_

Hellman claims that the second policy is unconstitutional but that the first is not. The second policy reflects an impermissible purpose of harming African Americans. The first reflects a permissible purpose of promoting diversity.<sup>58</sup>

Hellman's solution may be normatively attractive, but, like the equal caring approach, it fails to fit the Court's current doctrine. Most obviously, it ignores Chief Justice Roberts' reminder in *Students for Fair Admissions* that university admissions processes are a zero-sum game.<sup>59</sup> Defenders of Harvard's affirmative action policy argued that the policy's purpose was to increase diversity, not to harm White and Asian-American students. Tuba players are not discriminated against if the school needs a point guard for its basketball team and therefore gives an advantage to point guards but treats tuba players the same way it treats

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<sup>58</sup> Justice Scalia's concurring opinion in *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) might be read as inconsistent with Hellman's approach. Scalia suggested that statutes making defendants liable for the disparate racial impact of their policies might be unconstitutional because they, in effect, mandated affirmative action, even if they did so by race neutral means. If Scalia was right, then race-neutral measures like the ten percent plan are unconstitutional even though they are not motivated by a desire to harm the disadvantaged class. See also Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 887 Geo. L. J. 2331 (2000) (suggesting that "when a state school intentionally seeks to admit minority students through the use of race-neutral criteria, such as economic disadvantage, it has acted with a discriminatory purpose. Such efforts, therefore, should trigger the same strict, and usually fatal, scrutiny applicable to policies that directly rely on race as a criterion for admission"); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 495 (2003) ("equal protection could prohibit the passage of [statutes outlawing disparate impact] because of their overt concern with race."). But the Court seems to have implicitly rejected Scalia's argument in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015), where it held that the Fair Housing Act might require race-neutral means to overcome disparate impact. See Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection after Inclusive Communities*, 101 Cornell L. Rev. 1115, 1117 (2016) ("state actions that do not classify individuals based on their race are not constitutionally suspect simply because they are motivated by the purpose of integrating the races.").

<sup>59</sup> 600 U.S., at 219.

the run of applicants. So too the competitive disadvantage suffered by nonminority students was merely a side effect of a policy designed to promote diversity.

But the Supreme Court would have none of it. “How else but ‘negative’ can race be described if in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been,”<sup>60</sup> Chief Justice Roberts wrote. On Roberts’ approach, the top ten percent plan, which Hellman would uphold, is unconstitutional because it leads to “members of some racial groups [being admitted] in greater numbers than they otherwise would have been.”

Roberts made this point in the context of a policy that facially discriminated based on race. But that difference does not help Hellman’s argument. Hellman stipulates that the purpose of the ten percent plan is to “increase the racial diversity of the admitted class.” But Chief Justice Roberts’ point is that because admissions is a zero-sum game, this supposedly benign purpose is indistinguishable from the purpose of excluding students from the disadvantaged class. Roberts may be wrong to insist on this equation,<sup>61</sup> but for as long as a

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<sup>60</sup> Id.

<sup>61</sup> For an argument that he is wrong, see pp xx, *infra*.

majority of the Court insists on it, Hellman’s approach is inconsistent with current doctrine.

There is a similar problem with the other half of Hellman’s hypothetical. She claims that a ZIP code policy is unconstitutional because it is motivated by a desire to decrease racial diversity, which she equates with the desire to harm a racial group.

But that assertion does no more than reproduce policy disputes about the effect of affirmative action. Opponents of affirmative action argue that “decreasing racial diversity” *helps* racial minorities by, for example, avoiding the implication that racial minorities cannot satisfy traditional standards of merit,<sup>62</sup> eliminating the “mismatch” problem,<sup>63</sup> or discrediting the theory that people of color need the presence of White people to thrive.<sup>64</sup>

Hellman attempts to avoid this problem by distinguishing between the standard for proving purpose and the standard for proving harm. Purpose, she

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<sup>62</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J. dissenting) (arguing that “[w]hen blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”).

<sup>63</sup> See Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 *Stan. L. Rev.* 367, 373 (2004) (arguing that affirmative action in law schools has the effect of harming potential black lawyers by leading them to fail at more prestigious institutions when they would have succeeded at less prestigious institutions).

<sup>64</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S.306, 364 (Thomas, J. dissenting) (citing evidence that Black students perform better at Historically Black Colleges and Universities to show that “heterogeneity actually impairs learning of black students.”)

insists, must be determined subjectively, but whether the policy harms a protected group must be determined objectively.<sup>65</sup> Presumably, then, Hellman believes that, as an objective matter, and contrary to the arguments outlined above, reducing racial diversity at institutions of higher education harms African American applicants.

But even if we assume that Hellman is right about objective harm (and, to be clear, I'm inclined to believe that she is), her argument still fails because of the subjective nature of purpose. Importantly, Hellman does not join critics of *Washington v. Davis* in arguing that objective harm alone invalidates racially neutral measures. For her, subjective purpose is a gateway requirement that must be satisfied before we get to questions of harm. It follows that a ZIP code policy is unconstitutional only if opponents of affirmative action are not only objectively wrong, but also hypocrites who don't believe their own arguments. And perhaps they are, but Hellman's article provides no evidence to support that hypothesis.

The Court's treatment of race-based legislative districting designed to promote proportionate representation of racial groups presents still more difficulties for Hellman's approach. In *Shaw v. Reno*,<sup>66</sup> the Court held that plaintiffs

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<sup>65</sup> See Hellman, note 54, *supra*, at \_\_\_.

<sup>66</sup> 509 U.S. 630 (1993).

had stated a cognizable claim when they asserted that facially neutral but race-based districting designed to assure proportionate representation violated their Fourteenth Amendment rights.<sup>67</sup>

Although there was no dispute that race influenced the drawing of district lines, the desire to harm that Hellman insists upon was absent. The state's subjective purpose was to promote equality of representation, not to harm blacks or whites and, as an objective matter, neither blacks nor whites as a group were harmed.<sup>68</sup> On the contrary, the plan was implemented to avoid the harm of unequal representation – a goal roughly equivalent to promoting diversity in the affirmative action context.

Yet, the Court held that the plan embodied unconstitutional racial stereotyping. Elaborating on the point in *Miller v. Johnson*,<sup>69</sup> Justice Kennedy wrote for the Court that “[Just] as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so . . . it may not separate its citizens into different voting districts on the basis of race.”<sup>70</sup>

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<sup>67</sup> Id. at 642.

<sup>68</sup> See id. at 641 (noting that “appellants did not claim that the General Assembly's reapportionment plan unconstitutionally ‘diluted’ white voting strength”).

<sup>69</sup> 515 U.S. 900 (1995).

<sup>70</sup> Id. at 911.



From Hellman's perspective, Kennedy missed a crucial distinction. Segregation in public facilities was accomplished through facial racial classifications, which are per se impermissible in the absence of a compelling state interest. In contrast, the districts attacked in *Miller* were facially race neutral. On Hellman's account, they were vulnerable only if infected with a purpose of inflicting harm. Perhaps Hellman is right that this is a distinction that the law should draw, but Justice Kennedy's attack on the distinction demonstrates that the law does not currently draw it.

3. *Intent as subterfuge.* *Shaw* and *Miller* point to a third definition of improper purpose that better conforms to the Court's cases: The intent that the Constitution prohibits is an intent to engage in obviously pretextual conduct. State actors may not use subterfuge that is both intended to and widely understood to achieve the same results that would be produced by formally discriminatory policies.

This understanding of impermissible intent seems to lie behind Justice Frankfurter's concern about the obvious gerrymandering of the City of Tuskegee's boundaries. For Frankfurter, the problem was not that African Americans were subject to unequal caring or even that the City intended to harm African Americans. It was, instead, that examination of the boundaries was "tantamount

for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters.”<sup>71</sup> Put differently, the new boundaries were an obvious subterfuge designed to accomplish the same ends that a facial racial classification would accomplish.

The concern about subterfuge also plays a central role in modern cases. It is captured by Chief Justice Roberts’ assertion in the affirmative action context that “[W]hat cannot be done directly cannot be done indirectly.”<sup>72</sup> And it explains Justice O’Connor’s assertion in the redistricting context, that a plan that “rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race”<sup>73</sup> is unconstitutional. As Justice Kennedy later elaborated on the same point, facially race-neutral districting is unconstitutional when “race was the predominant factor motivating the legislature’s decision”<sup>74</sup> and when the state has “subordinated traditional race-neutral districting principles.”<sup>75</sup>

This understanding of impermissible purpose unites the formal and purpose-based threads of equal protection that Hellman wants to disentangle.

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<sup>71</sup> Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

<sup>72</sup> Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181, 230 (2023).

<sup>73</sup> Shaw v. Reno, 508 U.S. 630, 649 (1993).

<sup>74</sup> Miller v. Johnson, 515 U.S. 900, 916 (1995).

<sup>75</sup> Id.

The problem is not that the government has exhibited unequal caring or that it is motivated by an intent to harm. The problem is that, whether or not there is unequal caring or intent to harm, pretextual conduct undermines formal protections.

Notice, though, that the Court has stopped short of prohibiting *any* race-based purpose in this context. In *Shaw v. Reno*, Justice O'Connor, writing for the Court, went out of her way to disown the proposition that "race-conscious state decisionmaking is impermissible in all circumstances."<sup>76</sup> Instead, the prohibition extends to conduct that it "rationally can be viewed only as an effort to segregate the races"<sup>77</sup> or where race is the "predominant [motivating] factor."<sup>78</sup> In other words, as Justice O'Connor asserts, this is an area where "appearances do matter."<sup>79</sup>

Why should appearances matter? In what follows, I engage in the Dworkinian project of formulating the best version of the Court's formalism. That

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<sup>76</sup> 509 U.S., at 642.

<sup>77</sup> *Id.*

<sup>78</sup> *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

<sup>79</sup> 509 U.S., at 647. The emphasis on appearances is closely related to a deference to political decision making and an evidentiary rule that discounts the possibility of discriminatory intent except in extreme cases. As the Court wrote in its most recent racial districting case, "when a federal court finds that race drove a legislature's districting decisions, it is declaring that the legislature engaged in 'offensive and demeaning' conduct, . . . that 'bears an uncomfortable resemblance to political apartheid,' We should not be quick to hurl such accusations at the political branches." *Alexander v. South Carolina State Conference of the NAACP*, \_\_\_ U.S. \_\_\_ (2024).

means temporarily bracketing questions about whether the version reflects the Court's actual motivations or whether it is good enough.

The version starts with a more general defense of formal rules. By their nature, rules never capture the full complexity of the social facts that they regulate. They are nonetheless important because they avoid the kinds of mistakes that actors often make if they adopted a more fine-grained, all-things-considered approach.<sup>80</sup>

How does this defense intersect with the formal rule against facially race-based government policy? It turns out that the rule is not as disconnected from the effect of government action as commonly supposed. On the deepest level, the rule is premised on the belief that, in the long run and over the range of cases, racial formalism has the effect of protecting against racial hierarchy.

Of course, in individual cases, actors may believe that race-based policy will dismantle hierarchy. In individual cases, they may even be right. But, on this account, the risk of their being wrong is too high. Throughout our history, race-based policies like segregation and slavery itself were justified on the ground that they benefited African Americans.<sup>81</sup> Modern racial preferences may seem

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<sup>80</sup> For a defense of formalism along these lines, see Larry Alexander, *"With Me, It's All Er Nuthin": Formalism in Law and Morality*, 66 U. Chi. L. Rev. 530 (1999).

<sup>81</sup> For an extended argument along these lines, see *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181, 267-72 (2023) (Thomas, J., concurring).

different, but they risk encouraging a race-based spoils system under which racial minorities will end up the losers, harmful assumptions that members of racial minorities cannot meet conventional standards of merit, and the soft and condescending racism of diminished expectations for minority groups. We therefore need a bright-line, formal rule that prohibits racial classifications in all but the most exceptional circumstances.

Put to one side whether this defense of racial formalism is persuasive or even plausible. For present purposes, the key point is that if one accepts it, this is indeed a context where “appearances do matter.” Race neutral measures subtly influenced by racial considerations may not have the impact that racial formalists fear. The key is not to rub people’s noses in it. So long as the purpose and effect of these policies are not too obvious, they need not make a joke out of racial formalism. Nor need they trigger White racial resentment or send a message of Black inferiority. Instead, they might produce the best of both worlds – race-based measures that actually help racial minorities without creating a divisive and harmful backlash that formally race-conscious measures produce.

#### B. The New Individualism

The new formalism is buttressed by a revival of the individualism that dominated the constitutional law of race before the *Brown* court embraced group

rights. The approach was on full display in *Parents Involved in Community Schools v. Seattle School District No 1*.<sup>82</sup>

The case concerned voluntarily adopted race-conscious student assignment plans designed to promote racial diversity in state-run schools.<sup>83</sup> Recall that in the wake of *Brown* the Court had endorsed mandatory race-conscious plans.<sup>84</sup> The endorsement followed from the Court's prioritizing the group right to racial equality over the individual right to freedom from disadvantage due to racial identity.

*Parents Involved* turned this understanding on its head. On the new understanding, not only were race-conscious plans not *required*; they were not even *permitted*.<sup>85</sup>

The Court accomplished this reversal by sharply distinguishing right and remedy. Race conscious plans were a permissible means of remedying the effects of prior segregation.<sup>86</sup> But on the Court's view, the time when these remedies were necessary had long passed. The school districts before the Court had either never engaged in de jure segregation or had long ago achieved unitary status.<sup>87</sup>

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<sup>82</sup> 551 U.S.701 (2007).

<sup>83</sup> *Id.* at 710.

<sup>84</sup> *See* pp xx, *supra*.

<sup>85</sup> 551 U.S., at 723-25.

<sup>86</sup> *Id.* at 721.

<sup>87</sup> *Id.* at 722-23.

When remedy was unnecessary, the Court held that individual rights trumped group rights. Even if the government was motivated by benign purposes, it was obligated to “focus[ ] on each applicant as an individual, and not simply as a member of a particular racial group.”<sup>88</sup>

Chief Justice Roberts’ opinion for the Court in *Students for Fair Admissions* returned to this theme. Roberts wrote that the Court’s decision invalidating Harvard’s affirmative action plan did not mean that “universities [were prevented] from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”<sup>89</sup> But the consideration had to proceed on an individual basis. “[T]he student must be treated based on his or her experiences as an individual—not on the basis of race.”<sup>90</sup>

The new individualism, like the new formalism, is more ambivalent and complex than it might first appear. Despite its best efforts, the Court has had trouble disentangling its conception of racial equality from group rights.

Consider in this regard the Court’s anomalous decisions regarding standing to bring challenges to affirmative action plans. As a general matter, the Court has insisted the plaintiffs demonstrate “injury in fact” – that is that they, as

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<sup>88</sup> Id. at 722.

<sup>89</sup> *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181, 230 (2023).

<sup>90</sup> Id.

individuals, have suffered “concrete” harm because of government action.<sup>91</sup>

Stigmatic injury caused by belonging to a group that is mistreated will not do.<sup>92</sup>

Instead, plaintiffs must demonstrate that as individuals they were materially disadvantaged.<sup>93</sup>

But not so with respect to standing in affirmative action cases. The Court has never required applicants challenging affirmative action plans to prove that they would have gained the benefit they sought but for the existence of the plan. As the Court held in *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville* “[t]he ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”<sup>94</sup> Put differently, standing in these cases rests on membership in a group that is disadvantaged, not on the concrete injury suffered by an individual member of the group.

Cynics might attribute this exception to the Court’s hostility toward affirmative action and willingness to bend its rules in order to facilitate litigation

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<sup>91</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (to establish standing, “the plaintiffs must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical””).

<sup>92</sup> See *Allen v. Wright*, 468 U.S. 737, 755 (1984).

<sup>93</sup> See *id.*

<sup>94</sup> 508 U.S. 656, 666 (1993).



challenging affirmative action plans.<sup>95</sup> This explanation may well be right, but the Court is able to pull off the maneuver only by taking advantage of a more general incoherence produced by conceptualizing unequal treatment as an individual right.

The Court seems to recognize in this context, albeit not in others, that the very concept of unequal treatment necessarily implicates the rights of groups. Consider again the Court's holding in *Parents Involved*. Despite Chief Justice Roberts' insistence on individualism, it is hard to see how the district's diversity plans harmed individual students. There was no claim that individual students were forced to attend inferior schools because of their race. Moreover, if the students had been assigned to schools based on the first letter of their last name or the address where they resided, no one would claim that they were victimized by unequal treatment. The claim is implausible because first letters of last names and street addresses do not define social groups. Their actual treatment was "unequal" only because the treatment depended upon membership in social groups.

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<sup>95</sup> For a compelling argument along these lines, see Girardeau A. Spann, *Color-Coded Standing*, 80 Cornell L. Rev. 1422 (1995).

These cases demonstrate that the Court's embrace of individualism, like its embrace of formalism, is ambivalent and partial. Still, the Court's individualism, like its formalism, is defensible if one again recognizes that "appearances do matter."

The danger posed by an obviously group-based approach is that it encourages racial stereotyping, which in the long run is bound to harm vulnerable minorities. As Justice O'Connor puts the point in *Shaw v. Reno*, recognition of group rights "reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls."<sup>96</sup>

Of course, stereotypes are sometimes accurate, but it does not follow that obvious official endorsement of their accuracy advances the cause of justice. The Court has made the point forcefully in the context of gender- and race-based peremptory challenges in jury trials. Concurring in a decision invalidating gender-based challenges, Justice O'Connor said the obvious part out loud: "We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male

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<sup>96</sup> 500 U.S., at 647.

jurors. . . . One need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."<sup>97</sup>

Yet despite this recognition, Justice O' Connor joined the majority in invalidating gender-based challenges.<sup>98</sup> Writing for the majority, Justice Blackmun explains why: "The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."<sup>99</sup>

It follows that the Court's defense of individualism, like its defense of formalism, is more about appearance than reality. Recognition of group rights is harmful because of the social message it sends, but the message can be obscured if the recognition is subtle and indirect. When it is obscured, the constitutional harm is dissipated.

*Parents Involved* illustrates how the process might work. A majority of the justices invalidated plans that overtly and obviously subsumed individual difference into group categories. But it did not follow that the government could

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<sup>97</sup> J.E.B. v. Alabama, 511 U.S. 137, 149 (1994) (O'Connor, J., concurring).

<sup>98</sup> Id.

<sup>99</sup> Id. at 140.

not achieve the same results if it kept its group orientation under the radar. Far from disavowing such measures, Chief Justice Roberts' plurality opinion chastises the government for not utilizing them. The government should not have resorted to the "extreme means"<sup>100</sup> of classifying students based on race when other means like race conscious choices about where to build schools might have achieved its purposes. According to the Chief Justice, these other means "implicate different considerations than the explicit racial classifications at issue in this case."<sup>101</sup>

Although Roberts expressed no view about the constitutionality of these other means,<sup>102</sup> Justice Kennedy, who cast the deciding vote, left no doubt that they were constitutionally permissible. On his view, the assertion that "Our constitution is color blind" might be a worthy aspiration, but "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle."<sup>103</sup> School boards were therefore free to recognize group identities and rights by, for example, "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and

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<sup>100</sup> 551 U.S., at 745.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id. at 788 (Kennedy, J., concurring in part and concurring in the judgment).

tracking enrollments, performance, and other statistics by race.”<sup>104</sup> For Justice Kennedy, “[a]ssigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter”<sup>105</sup> – apparently, because of the message it sends about racial stereotyping. Obscure the message and the problem goes away.

### III. *Brown’s* (Possibly) Progressive Future

No one should understate the harm done to the cause of racial justice by the modern Court’s transformation of *Brown*. That said, modern doctrine contains seeds, which, if properly nurtured, might mature into future progressive victories. Here, I focus on three possibilities: the use of facially neutral but race conscious means to achieve the goals of affirmative action; the invalidation of legacy admissions in state-run institutions of higher education; and subjecting government discrimination based on sexual orientation to heightened scrutiny.

#### A. The Future of Affirmative Action

The future of affirmative action in higher education may turn on how future courts interpret Chief Justice Roberts’ Delphic words<sup>106</sup> at the conclusion of his

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<sup>104</sup> Id. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>105</sup> Id.

<sup>106</sup> Cf. Benjamin Eidelson & Deborah Hellman, *Unreflective Equilibrium: Race Conscious Admissions after SFFA*, \_\_\_ Am. J. of L. & Eq. \_\_\_, \_\_\_ (2024) (forthcoming) (“the Court is torn between conflicting impulses and uncertain, so far at least, about just how to reconcile them.”).

*Students for Fair Admissions* opinion. Because of its importance, the passage is worth quoting at length:

[A]s all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But . . . “[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,” and the prohibition against racial discrimination is “levelled at the thing, not the name.” . . . A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.<sup>107</sup>

If one emphasizes part of this passage, it seems to rule out facially race-neutral means of advancing affirmative action. Because “what cannot be done directly cannot be done indirectly,”<sup>108</sup> pretextual use of facially neutral criteria is no different from overt racial classifications.

But this reading is difficult to reconcile with the rest of the passage.

Roberts also asserts that admissions committees can consider how racism affected a student's life or a student's “courage and determination” in overcoming racial discrimination.<sup>109</sup>

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<sup>107</sup> 600 U.S., at 230.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Roberts suggests that these factors may be considered so long as they are applied on an individual basis. But, as Roberts must know, bureaucratized admissions procedures necessarily involve group generalizations. If admissions committees are to consider the factors Roberts mentions, then it must first formulate a general policy that permits that consideration. The policy would establish that it is a “plus factor” – perhaps one that could be reduced to a numerical “score” in the overall evaluation – that a student had, for example, overcome racial barriers.

Perhaps Roberts thinks that some minority students will be able to make this showing while others will not. But given the pervasiveness of racism in our country, admissions committees might well conclude that all – or at least the vast majority – of students of color will be able to meet the bar. Of course, admissions officers must then add this factor into a holistic evaluation of the applicant’s qualifications. But that sort of individualized judgment is little different from what the Court had previously required in its now discredited cases endorsing affirmative action.<sup>110</sup> It follows that universities will, indeed, be able to accomplish indirectly what they can’t do directly.

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<sup>110</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (holding that “a university may consider race or ethnicity only as a “plus” in a particular applicant's file, without ‘insulat[ing] the individual from comparison with all other candidates for the available seats.’”

The best way to dissipate this tension is by embracing a theory of discriminatory purpose that emphasizes obvious subterfuge and, therefore, by recognizing that this is an area where “appearances do matter.” Universities can take race into account so long as they are not ham-handed in doing so. If they are adept in hiding from view what is actually going on, affirmative action remains constitutionally permissible.

Does this approach mean that race-neutral measures that subtly *disadvantage* racial minorities are also constitutionally permissible?

Unfortunately, it does. But this result should surprise no one. That is where we have been for a long time. Consider again the Court’s highly restrictive rules about the proof and definition of impermissible purpose.<sup>111</sup> Those rules amount to an approach that permits all but the most blatant racist purposes to fly under the radar.

As Kerrel Murray has written, when the rights of racial minorities are at stake, the modern Court has greeted impermissible purpose arguments with a response that “resembles a shrug.”<sup>112</sup> For example, the Court upheld President Trump’s travel ban despite findings that previous iterations were infected with a

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<sup>111</sup> See pp xx, *supra*.

<sup>112</sup> W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1190, 1193 (2022).



discriminatory purpose. It summarily rejected arguments that Georgia's death penalty statute was originally instituted for racially discriminatory reasons.<sup>113</sup> And, as noted above, in its most recent case about discriminatory purpose influencing the drawing of legislative district lines, the Court wrote that "[w]e should not be quick to hurl such accusations at the political branches."<sup>114</sup>

Lower courts have been even more dismissive of discriminatory purpose claims that might have advantaged racial minorities. For example, in *Johnson v. Governor of the State of Florida*, the Court of Appeals declined to find a discriminatory purpose behind a felon disfranchisement law despite the fact that the convention that adopted it was permeated by "an unfortunate and indefensible racial animus."<sup>115</sup> Similarly, in *Coleman v. Miller*, the Court of Appeals rejected a constitutional challenge to the Georgia state flag modeled after the Confederate battle flag despite its acknowledgment that the flag design was "adopted during a regrettable period in Georgia's history when its public leaders were implementing a campaign of massive resistance to the Supreme Court's desegregation rulings."<sup>116</sup>

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<sup>113</sup> See *McClesky v. Kemp*, 481 U.S. 279, 298 n. 20 (1987).

<sup>114</sup> *Alexander v. South Carolina State Conference of the NAACP*, \_\_ U.S. \_\_ (2024).

<sup>115</sup> 405 F. 3d 1214, 1219-20 (11<sup>th</sup> Cir. 2005).

<sup>116</sup> 117 F. 3d 527, 528-29 (11<sup>th</sup> Cir. 1997).

Undoubtedly, decisions like these obstruct the ability of racial progressives to prove unconstitutional purpose. In an ideal world, the decisions should be overruled. But that fact should not distract us from the central point: In the world we actually live in, the decisions can also help progressives by limiting the ability of racial conservatives to attack subtle forms of affirmative action.

Chief Justice Roberts himself has shown the way forward. In *Parents Involved* he acknowledged that indirect means pose “different considerations” from the obvious and overt use of race.<sup>117</sup> True, Roberts himself did not commit to upholding these means. It fell to Justice Kennedy to spell out the contours of constitutionally permissible indirection,<sup>118</sup> and no one needs to be reminded that Justice Kennedy is no longer on the Court.

But Justice Alito remains on the Court. Consider, then, what he has said about indirect means. After the Court struck down an affirmative action plan that overtly considered race in admission decisions at the University of Texas, the University adopted a “ten percent” plan similar to the hypothetical plan that Hellman discussed.<sup>119</sup> Under the plan, the top ten percent of graduates from any high school in Texas were automatically admitted. Because of racial segregation in

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<sup>117</sup> See pp xx, *supra*.

<sup>118</sup> See *id.*

<sup>119</sup> See *Fisher v. University of Texas*, 579 U.S. 365, 371-73 (2016).

Texas public schools, the plan had the effect of increasing minority enrollment.

No one doubted that the plan also had this purpose, but it accomplished it through indirect means.

Did racial conservatives attack the ten percent plan on the ground that one cannot do indirectly what is forbidden directly? Quite the contrary. When Texas later decided to reinstate facially race-based affirmative action, conservative critics of the plan attacked the decision because the ten percent plan served the same ends without using a race-based classification. And when the Supreme Court nonetheless upheld the race-based classification, Justice Alito's dissenting opinion went out of its way to defend the ten percent plan:

It is important to understand what is and what is not at stake in this case. What is not at stake is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan [the ten percent plan] that it claimed had effectively compensated for the loss of affirmative action and UT could have taken other steps that would have increased diversity of its admitted students without taking race or ethnic background into account.<sup>120</sup>

All this happened before *Students for Fair Admissions* and no one knows for sure how that decision changed the landscape. But as Judge Heytens wrote in his concurring opinion in *Coalition for TJ v. Fairfax County School Board*, "it would be

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<sup>120</sup> Id. at 437 (Alito, J., dissenting).

quite the judicial bait-and-switch to hold that such race neutral efforts are . . . subject to strict scrutiny” when courts have “repeatedly stated that it is constitutionally permissible to seek to increase racial (and other) diversity through race neutral means.”<sup>121</sup>

There is some evidence that Justice Alito himself is comfortable with bait-and-switch tactics. The issue in *Coalition for TJ* was the constitutionality of a school board’s decision to abandon heavy reliance on standardized tests to determine which students were admitted to a magnet high school. There was no doubt that the changed policy was motivated by a desire to increase the school’s diversity, but the Court of Appeals nonetheless upheld it.<sup>122</sup> The Supreme Court then denied certiorari,<sup>123</sup> but Justice Alito, joined by Justice Thomas, filed a bitter dissent.<sup>124</sup>

Alito accused the lower court of holding that “intentional racial discrimination is constitutional so long as it is not too severe,”<sup>125</sup> characterized its reasoning as “indefensible,”<sup>126</sup> and asserted that the lower court opinion “cries out for correction.”<sup>127</sup> In fairness, Alito directed most of his ire to the lower

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<sup>121</sup> 2022 W.L. 9865694 (4<sup>th</sup> Cir. 2022) (Heytens, J., concurring).

<sup>122</sup> See id.

<sup>123</sup> See *Coalition for TJ v. Fairfax County School Bd.*, 2024 WL 67459 (2024).

<sup>124</sup> Id.

<sup>125</sup> Id. (Alito, J., dissenting).

<sup>126</sup> Id. (Alito, J., dissenting).

<sup>127</sup> Id. (Alito, J., dissenting).

court's treatment of the plaintiff's disparate impact claim, not to the issue of impermissible purpose.<sup>128</sup> If we are prepared to give him the benefit of the doubt, we can hope that when directly confronted with the purpose question, he will react differently.

The important point, though, is not whether Justice Alito is a hypocrite, but what the Court as a whole made of the case. Of course, as a technical matter, denials of certiorari do not reflect the justices' judgment about the merits.<sup>129</sup> But as a real-world matter, the fact that Alito's dissent could not attract the two additional votes necessary to grant certiorari suggests that there is hope for the survival of indirect affirmative action so long as the subterfuge is not too obvious.

This compromise is delicate and paradoxical. The operative rule is that subterfuge is permissible so long as it is not too obvious, but the very statement of the rule makes the subterfuge obvious. It follows that for the rule to be effective, it must be unspoken. Viewed from this perspective, the Court's silence in denying certiorari in *Coalition for TJ* speaks volumes. It is too much to expect the Court to publicly articulate a permission structure for the new affirmative action. Instead, progressives must watch closely what the Court does, rather than

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<sup>128</sup> Id. (Alito, J., dissenting).

<sup>129</sup> See, e.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989).

what it says. *Coalition for TJ* suggests that there is reason to hope for the Court's silent acquiescence.

### B. The Future of Legacy Admissions

Does the modern version of *Brown* discredit legacy admissions?<sup>130</sup> There is some reason to think that it does,<sup>131</sup> but it must be conceded that the argument favoring racial progressives here is more difficult than in the case of indirect racial affirmative action.

At many institutions, affirmative action favoring applicants whose family members had attended the institution disadvantages African American applicants.<sup>132</sup> The policy does not facially discriminate against African Americans, and, on Hellman's account of illicit purpose, it is constitutionally permissible. Universities adopt the policy for a variety of reasons, some of which are, perhaps, problematic, but it would be an uphill climb to prove that their purpose is to harm

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<sup>130</sup> The Department of Education has opened an inquiry into whether Harvard's legacy admissions program is illegal. See "Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions," NY Times (July 25, 2023), at <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html>.

<sup>131</sup> For a nuanced argument along lines similar to those I advance here, see Deborah Hellman, *The Zero-Sum Argument, Legacy Preferences, and the Erosion of the Distinction between Disparate Treatment and Disparate Impact*, 109 Va. L. Rev Online 185 (2023).

<sup>132</sup> See, e.g., Michael Lind, *Prescriptions for a New National Democracy*, 110 Pol. Sci. Q. 563, 582-83 (1995-96); John B. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 Colum. J. L. & Soc. Probs. 491 (1993).

African Americans. Like the veteran's preference in *Feeney*,<sup>133</sup> they are put in place "in spite of" rather than "because of" their effect on vulnerable groups.

But, as we have seen, Hellman's account does not fit with the Court's current stance, and *Students for Fair Admissions* raises doubts about how we should now understand *Feeney*. Although there was some evidence in the record to the contrary, the lower court found as a matter of fact that Harvard's admissions policy was not adopted for the purpose of harming White and Asian American applicants.<sup>134</sup> Race was not a negative factor for individual applicants. Their competitive disadvantage was merely a side effect of a policy designed to promote diversity.

None of this mattered to the Court's majority. It is worth quoting again Chief Justice Roberts' emphatic rejection of the argument. "How else but 'negative' can race be described if in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?"<sup>135</sup>

Chief Justice Roberts wrote these words in a context where the policy was overtly race-based. In contrast, legacy admissions do not facially discriminate

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<sup>133</sup> See pp xx, *supra*.

<sup>134</sup> See *Students for Fair Admissions v. President and Fellows of Harvard College*, 397 F. Supp. 126, 157-59 (D. Mass. 2019).

<sup>135</sup> 600 U.S., at 219.

based on race. But it turns out that this distinction is too crude. To appreciate the relevance of *Students for Fair Admissions* to legacy admissions, we must separate out how these policies impact the winners and losers that they create.

Focus first on the losers. The affirmative action policy in *Students for Fair Admissions* did not facially discriminate against White and Asian American students. A university that gives preference to point guards does not facially discriminate against tuba players, even if a tuba player on the admissions bubble is rejected because a point guard is accepted. It was for just this reason that Chief Justice Roberts had to emphasize the zero-sum nature of the admissions process. Whatever the university's intent, Roberts argued, Whites and Asian Americans were harmed by the policy. Just so, but whatever the university's intent, African Americans are harmed by favoring legacy applicants.

If there is a difference between the two cases, it must be about the winners rather than the losers. In *Students for Fair Admissions*, the winners are African Americans, who are members of a class that the Fourteenth Amendment protects. In the case of legacy admissions, the winners are applicants whose family members attended the admitting institution, a class that the Fourteenth Amendment does not protect. This is a difference alright, but it cuts the other way. It would be bizarre to say that racial affirmative action but not legacy



affirmative action is unconstitutional because racial affirmative action, but not legacy affirmative action, benefits a protected class.

Is there nonetheless an argument for the distinction? If there is, it must rest on the claim that any classification formally implicating race – even one that benefits a protected class and does not in the constitutional sense discriminate against a protected class – produces negative effects that a facially race neutral legacy policy does not.

Perhaps the Court's commitment to formalism is strong enough to do this work. Still, it is evident that Chief Justice Roberts had doubts on this score. That is why even in a case involving a facial racial classification, he felt the need to emphasize the zero-sum nature of affirmative action and its effect on Asian American and White students. Those doubts do not assure victory for opponents of legacy admissions, but they at least give them a fighting chance.

### C. The Future of Gay Rights

Indirect affirmative action and legacy admissions both implicate the Court's embrace of formalism. In contrast, controversy about sexual orientation discrimination implicates its commitment to individualism.

Perhaps surprisingly, the Court has never held that the L.G.B.T.Q. community constitutes a suspect class or that discrimination based on sexual

orientation should be strictly scrutinized.<sup>136</sup> Nonetheless, in *Bostock v. Clayton County*,<sup>137</sup> the Court held that discrimination based on sexual orientation violated Title VII of the 1964 Civil Rights Act<sup>138</sup> – an act that nowhere mentions sexual orientation.<sup>139</sup> The Court reached this conclusion by holding that sexual orientation discrimination necessarily involved sex discrimination. It reasoned that an individual female worker who was fired because of her attraction to women would not have been fired if she had been a man. Because her individual treatment depended upon her sex, a claim of sex discrimination had been established.<sup>140</sup>

In his opinion for the Court, Justice Gorsuch relied heavily on the fact that the modern version of discrimination law is individualistic. If discrimination were a matter of group rights, then men and women are treated no differently. Both men and women are penalized for same-sex relationships. But Justice Gorsuch says over and over again, Title VII is about individual rights.<sup>141</sup> Discrimination

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<sup>136</sup> Cf. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (invalidating laws prohibiting same-sex marriage without discussing standard of review); *Romer v. Evans*, 517 U.S. 620, 622-23 (1996) (invalidating constitutional amendment denying protected status based on homosexuality under rational basis review).

<sup>137</sup> 590 U.S. 644 (2020).

<sup>138</sup> 42 U.S.C. sec. 2000(e)-2.

<sup>139</sup> See 590 U.S., at 653.

<sup>140</sup> Id. at 656-69.

<sup>141</sup> See, e.g., id. at 659 (“The statute . . . tells us three times—including immediately after the words ‘discriminate against’—that our focus should be on individuals, not groups”); id. (“From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”).

based on sexual orientation violates the statute because an individual woman attracted to women loses her job which she would have been allowed to keep if she were a man.

In his dissenting opinion, Justice Alito worries that the gravitational pull of *Bostock* will extend to equal protection analysis.<sup>142</sup> He is not necessarily right about this. The Court was interpreting a statute, and the statute might or might not track the requirements of the Constitution.<sup>143</sup>

But the modern court's individualism suggests reasons why Justice Alito's prediction might in fact be right. Consider again *Parents Involved*. A court that wanted to uphold the voluntary integration program challenged in *Parents Involved* might have said that its effect was nondiscriminatory. Importantly, this was not an affirmative action program. Yes, some black children were assigned to predominately white schools they would have preferred not to attend, but some white children were assigned to predominately black schools that they would have preferred not to attend. There was no showing that one set of schools was

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<sup>142</sup> Id. at 773 (Alito, J., dissenting).

<sup>143</sup> For example, Title VII mandates a disparate impact test that is not part of the constitutional standard. Compare *Ricci v. DeStefano*, 557 U.S. 537, 577 (2009) (holding that in some cases Title VII prohibits employment practices that have a disparate impact) with *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that employment practices are not unconstitutional solely because they have a disparate impact).

better than the other or that the policy was designed to advantage or disadvantage either black or white students.<sup>144</sup>

One might make the same point about reconceptualizing sexual orientation discrimination as gender discrimination. If one focuses on effect, these policies disadvantage neither men nor women, and if one focuses on purpose, the purpose of the policies is not to harm either men nor women. Men who want to have sex with men are disadvantaged, but so are women who want to have sex with women. The policy is not motivated by hostility to either men or women, but by opposition to gay relationships.

But that is not how the *Parents Involved* Court saw the matter. Because the policy distinguished between individual students based upon color, it was unconstitutional even though it did not harm any group of students.<sup>145</sup> By a parity of reasoning, it would seem a policy that disadvantages the L.G.B.T.Q. community is subject to strict scrutiny because individual outcomes turn on gender even though the policy has neither the purpose nor the effect of harming either men or women.

#### IV. Conclusion: Betting on the Future *Brown*

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<sup>144</sup> See pp xx, *supra*.

<sup>145</sup> See pp xx, *supra*.

For the reasons outlined above, advocates for indirect affirmative action and for strict scrutiny of laws that discriminate based on gender preference have powerful doctrinal tools at their disposal. Although the case against legacy admissions is more problematic, modern doctrine gives opponents of the practice significant arguments that they can deploy against it.

Does that mean that these arguments will ultimately prevail? A generation ago, advocates of critical legal studies divided between optimists and pessimists. Optimists believed that movement lawyers could seize upon the law's indeterminacy and contradictions to advance the cause of social justice. Pessimists thought this hope was naïve. The same indeterminacy and contradictions that optimists wanted to exploit also allowed reactionary judges to wiggle out of even the most sophisticated doctrinal traps. For the pessimists, the ultimate determinate of legal outcomes was not fancy doctrinal argument, but broader, entrenched structural forces.<sup>146</sup>

The future of *Brown* creates a natural experiment that we can use to test who is right. If skillfully advanced by advocates and taken seriously by judges, strands of modern doctrine might produce progress toward social justice. If the

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<sup>146</sup> Compare, e.g., Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977) (demonstrating how economic interests drove legal change in the nineteenth century) with Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1987) (arguing that law is underdetermined and, therefore, is relatively autonomous).

optimists are right, this article can be read as exploring the hidden possibilities embedded in the doctrine and providing a roadmap that advocates can use to achieve these ends.

Alternatively, these strands might be ignored or manipulated to maintain the racial status quo. If the pessimists are right, the article can be read as a demonstration of the pointlessness of legal argument.

So who is right? For the present, we do not have the answer, but we will find out soon enough. Meanwhile, although my heart is with the optimists, I know from sad experience that gamblers lose lots of money when they follow their hearts.<sup>147</sup> To my knowledge, no one ever went broke betting on the cynicism of the United States Supreme Court. Perhaps the optimists will prevail, but I wouldn't put my money on it.

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<sup>147</sup> Mark Tushnet has reminded me of a quotation often attributed to Damon Runyon: "The race is not always to the swift, nor the battle to the strong, but that's how the smart money bets." See Quote Investigator.com at [https://quoteinvestigator.com/2015/06/04/race-swift/#google\\_vignette](https://quoteinvestigator.com/2015/06/04/race-swift/#google_vignette) (last visited 5/30/24).