

**BROWN NOW: THE SURPRISING POSSIBILITY OF
PROGRESSIVE REFORM**

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ABSTRACT

For four decades, the Supreme Court has engaged in a determined, systematic, and successful effort to transform and tame Brown v. Board of Education. But there is a surprising counterweight to this standard narrative. If one takes modern doctrine seriously, the Supreme Court's refashioning of Brown has the potential to support some progressive goals. The modern Court's decisions provide a basis for upholding race-conscious but facially neutral measures that promote racial diversity, striking down legacy admission standards in colleges and universities, and strictly scrutinizing laws that discriminate based on sexual orientation. The last Part of this Article speculates about whether modern doctrine should be taken seriously.

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INTRODUCTION

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

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:

1. Are race-conscious but facially neutral means of increasing diversity at state-run 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 these arguments, I must introduce 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

1. 347 U.S. 483 (1954).

2. For examples of deflationary accounts, see Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 10-12 (1985) and GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 157 (1991).

3. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518-19 (1980).

differently, this is an internalist analysis of the doctrine.⁴ 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.

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; or 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 has revived the formalism and individualism that *Brown* 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 LGBTQ community.

A brief conclusion returns to questions about internalist accounts. It asks whether it is wise to expect legal doctrine to trump the other determinants 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.⁵

4. See, e.g., Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMANS. 353, 369 (1994) (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.

5. 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

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.⁶ 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 “the majestic quality of the law ... prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread”⁷—they satisfy the constitutional command of equality.

This approach was notoriously on display when the Supreme Court first endorsed an approach that came to be called “separate but equal” in *Plessy v. Ferguson*.⁸ For Justice Brown, the state’s regulation of railroad seating accommodations was majestically neutral.⁹ Yes, blacks were prohibited from sitting in white spaces, but whites were 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.”¹⁰ But remedies for this problem, if indeed it were 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.”¹¹

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

JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

6. 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”).

7. ANATOLE FRANCE, *THE RED LILY* 91 (1898).

8. 163 U.S. 537 (1896).

9. *Id.* at 551.

10. *Id.*

11. *Id.*

prohibition on white people attending schools assigned to people of color. But the *Brown* Court saw past this facial (one might say laughably¹² pretextual) equality. For Chief Justice Warren and his colleagues, what mattered was the effect of segregated education.¹³ Whatever its form, its effect was to damage the “hearts and minds” of black children “in a way unlikely ever to be undone.”¹⁴

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”¹⁵ and neighborhood school¹⁶ plans were insufficient. Instead, jurisdictions had a positive obligation to produce actual integration.¹⁷ That obligation necessarily entailed measures that were not formally neutral but, on the contrary, took race into account.¹⁸

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

12. Cf. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (“[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.”)

13. See *Brown I*, 347 U.S. 483, 494 (1954).

14. *Id.*

15. See *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439-40 (1968) (invalidating “freedom-of-choice” plan).

16. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 7, 15, 30 (1971) (upholding power of district court to order busing to overcome segregative effects of geographic zoning).

17. *Green*, 391 U.S. at 437-38 (recognizing the “affirmative duty” of school boards to “take whatever steps might be necessary to convert [a segregated school system] to a unitary system in which racial discrimination [is] eliminated root and branch”).

18. See *id.* at 442 (requiring school boards to affirmatively “formulate a new plan” using measures “such as zoning” to affirmatively generate a unitary school system).

exchange for the wages employers offered.¹⁹ The *Lochner* Court ignored the structural forces that produced these outcomes. It was hostile to unions²⁰ and government regulation,²¹ 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.²² 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. In the Court's view, it was now the argument *against* regulation that depended on group rights.²³ The Court accomplished this reversal by privatizing the problem of racial hierarchy.²⁴ People of color might have *felt* subjugated by racial segregation, but that feeling stemmed from their individual choices "to put that construction upon it."²⁵ The clear implication of this language was that African Americans had an individual obligation to feel differently about it.

What about white people? On the Court's view, regulation vindicated—rather than frustrated—private, individual choice. If there

19. See *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 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 rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action").

20. See, e.g., *Adair v. United States*, 208 U.S. 161, 179 (1908) (invalidating statute forbidding employers from requiring that employees agree not to join a union); *Coppage v. Kansas*, 236 U.S. 1, 13 (1915) (invalidating a similar law and drawing no distinction from *Adair*).

21. See, e.g., *Adkins v. Child's Hosp. of D.C.*, 261 U.S. 525, 539, 562 (1923) (invalidating statute establishing minimum wage for women); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113-14 (1928) (invalidating statute limiting entry into pharmacy business).

22. 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); see also 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).

23. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

24. See *id.*

25. *Id.*

was to be integration, it must come about through the “voluntary consent of individuals.”²⁶ 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.²⁷

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.²⁸

Of course, *Brown* itself took the form of vindicating the rights of the individual plaintiffs who brought the suit.²⁹ The case or controversy requirement guaranteed that.³⁰ 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 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.³¹

If there was 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”³² formula has been justly

26. *Id.*

27. 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 of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (“[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.”).

28. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298 (1955) (noting the “nationwide importance” of the *Brown I* decision).

29. See *id.* at 300.

30. See *Brown I*, 347 U.S. 483, 493 (1954).

31. 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 (1958).

32. *Brown II*, 349 U.S. at 301 (ordering district courts “to admit [students] to public schools on a racially nondiscriminatory basis with all deliberate speed”).

criticized as temporizing in a way that encouraged white resistance.³³ 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.³⁴

The Court's much criticized decision in *Naim v. Naim* illustrates the same point.³⁵ The case arose shortly after *Brown* when the success of the Court's project was endangered by "massive resistance."³⁶ At stake was the constitutionality of so-called "anti-miscegenation" laws that prohibited individuals of different races from marrying.³⁷ Now public, but then secret, conference notes make clear that the Justices were troubled by the denial of the individual right to marry³⁸—a right eventually vindicated in *Loving v. Virginia*.³⁹ But faced with a serious and immediate challenge to their power, the Justices also worried about fueling the political conflagration.⁴⁰ They thought that the individual rights of couples had to be subordinated to the group rights of the African American community.⁴¹ Accordingly, the Court went through the legal gyrations necessary to bury the individual case and preserve the broader effort.⁴²

33. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1065-76 (1978); Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 244-46 (1968).

34. See, e.g., Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 614 (1983) ("In desegregation cases, the typical remedy requires redrawing attendance lines, arranging for any needed pupil transportation, adjusting programs and facilities, and reassigning teachers.").

35. 350 U.S. 891 (1955).

36. For an account of the *Naim* deliberations, see KLARMAN, *supra* note 5, at 320-23.

37. See *id.*

38. See *id.*

39. 388 U.S. 1, 12 (1967).

40. See KLARMAN, *supra* note 5, at 321-22.

41. See *id.* at 322.

42. See *id.* at 321-23.

When the political winds shifted, the Court intensified the struggle to implement its decision.⁴³ When it did so, its group orientation became still more obvious.⁴⁴

In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court upheld a judicially ordered busing program designed to produce actual integration.⁴⁵ On the individual level, the plan necessarily meant that the race of individual school children determined whether and where they were bussed.⁴⁶ Individual black and white children were discriminated against because of their race.⁴⁷ 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.”⁴⁸

II. *BROWN* NOW

Starting in the 1970s, the Court began to abandon these commitments and 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 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.⁴⁹ A statute that formally classifies according to

43. *See id.* at 341-43.

44. *See id.*

45. 402 U.S. 1, 9-11, 32 (1971).

46. *See id.* at 8-10.

47. *See id.*

48. *Id.* at 25.

49. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 241-42, 246 (1976) (“[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023) (noting that the college admissions

race is “strictly scrutinized.”⁵⁰ That is true even if the statute’s effect is to dismantle racial hierarchy.⁵¹ Conversely, a statute that is formally race-neutral is subject to only minimal rational basis review.⁵² That is true even if the statute’s effect is to entrench racial hierarchy.⁵³

The twin pillars of the new formalism, *Washington v. Davis*⁵⁴ and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,⁵⁵ 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.⁵⁶ *Students for Fair Admissions* makes clear that formally race-based measures *are* unconstitutional whether or not they produce salutary effects.⁵⁷

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 shall see,⁵⁸ 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.

programs at issue could not be “reconciled with the guarantees of the Equal Protection clause” because they “unavoidably employ race in a negative manner”).

50. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

51. *See, e.g., id.* at 227 (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).

52. *See Washington*, 426 U.S. at 246.

53. *See id.* (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).

54. *Id.*

55. 143 S. Ct. 2141 (2023).

56. *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.”).

57. 143 S. Ct. at 2161-62 (“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.’” (citations omitted) (first quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); and then quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-290 (1978))).

58. *See infra* Part III.

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.⁵⁹ In *Gomillion v. Lightfoot*, 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.”⁶⁰ The city’s new shape fenced out all but four or five of its four hundred black voters.⁶¹ Even though the legislation nowhere mentioned race, the Court held that the lines were “tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters.”⁶²

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,⁶³ the criminalization of narcotic drugs,⁶⁴ immigration laws,⁶⁵ gun control measures,⁶⁶ and a whole range of housing and public welfare programs—including minimum wage and maximum hour legislation and zoning and land use regulation—and countless other government programs can be traced back

59. See *Gomillion v. Lightfoot*, 364 U.S. 339, 341-42 (1960) (explaining that this statute “obviously discriminate[s]” against blacks).

60. *Id.* at 340.

61. *Id.* at 341.

62. *Id.*

63. See, e.g., NAACP, *The Origins of Modern Day Policing*, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> [<https://perma.cc/295T-E6US>].

64. See, e.g., Desmond Manderson, *Symbolism and Racism in Drug History and Policy*, 18 *DRUG & ALCOHOL REV.* 179, 184-85 (1999).

65. See, e.g., Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 *IND. L.J.* 1455, 1456-60 (2022).

66. See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *GEO. L.J.* 309 (1991).

to racist assumptions and goals.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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 to make the check almost entirely theoretical. Disproportionate impact, even if dramatic, does not alone demonstrate impermissible purpose.⁷⁰ Meticulous statistical studies bolstered by sophisticated regression analysis are also insufficient.⁷¹ So is mere awareness that the challenged law will have a disproportionate impact.⁷² Instead, to satisfy the Court’s exacting standard, opponents of a law must show that the legislature acted

67. See generally DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013).

68. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977).

69. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 191 (2007) (“[M]any States and the Federal Government apply some form or variation of [the natural and probable consequences] doctrine.”).

70. See *Arlington Heights*, 429 U.S. at 270-71 (holding that when discriminatory purpose is not proved, a discriminatory effect “is without independent constitutional significance”).

71. See *McCleskey v. Kemp*, 481 U.S. 279, 293-95 (1987) (rejecting the constitutional relevance of such an analysis in the context of a challenge to racially discriminatory application of capital punishment).

72. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

“because of,’ not merely ‘in spite of’” the law’s discriminatory effect.⁷³

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.⁷⁴

1. Impermissible Purpose as Unequal Caring

First, as Professor David Strauss has argued, impermissible purpose might be equated with unequal caring.⁷⁵

Suppose that a city council locates a toxic dump in a predominantly black neighborhood. It does so because, after all, the filth must go somewhere, and, for a variety of nonracial reasons, this site seems appropriate. But suppose further that the council would never have placed the dump in this location if the area had been a predominantly white neighborhood. In this hypothetical counter-narrative, 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 white residents than black residents.

But despite the attractiveness of this unequal caring approach, the Court has rejected it. In *Personnel Administrator of Massachusetts v. Feeney*, the Court upheld a statute granting a preference for veterans applying for civil service jobs despite its discriminatory

73. *Id.*

74. *See infra* Part III.

75. *See* Strauss, *supra* note 3, at 957 (“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*, 96 *YALE L.J.* 1006, 1038-39 (1987).

impact on women applicants.⁷⁶ If the Court had asked whether the legislature would have enacted the same program if it instead harmed men, the challengers might have prevailed. But because “nothing in the record demonstrate[d] that this preference for veterans was 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,” the challenge failed.⁷⁷

2. Impermissible Purpose as the Desire to Harm

Building on this holding, Professor Deborah Hellman has suggested a second definition of illicit purpose.⁷⁸ 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.⁷⁹ The former prohibits any overt use of race in the absence of a compelling state interest.⁸⁰ The latter prohibits only measures that are infected by the purpose of imposing harm.⁸¹

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.⁸² Second, a university disfavors applicants from a particular ZIP code for the purpose of decreasing racial diversity.⁸³

Hellman claims that the second policy is unconstitutional but that the first is not.⁸⁴ The second policy reflects an impermissible

76. 442 U.S. at 281.

77. *Id.* at 279.

78. See Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. 1901, 1934-36 (2024).

79. *Id.* at 1927.

80. See *id.* at 1929.

81. *Id.* at 1934; cf. Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024) (arguing that the Equal Protection Clause outlaws race-conscious means but not race-conscious ends).

82. Hellman, *supra* note 78, at 1909-10.

83. *Id.*

84. *Id.* at 1927-28.

purpose of harming African Americans.⁸⁵ The first reflects a permissible purpose of promoting diversity.⁸⁶

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's reminder in *Students for Fair Admissions* that university admissions processes are zero-sum.⁸⁷ 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.⁸⁸ 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 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

85. *Id.* at 1928.

86. *See id.* Justice Scalia's concurring opinion in *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring), might be read as inconsistent with Hellman's approach. Justice 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. *Id.* If Justice 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*, 88 GEO. L.J. 2331, 2333-34 (2000) ("[W]hen 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) ("[E]qual 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 Justice 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 Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1117 (2016) ("[S]tate 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.").

87. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2169 (2023).

88. *See id.* at 2167-69.

otherwise would have been?” Chief Justice Roberts wrote.⁸⁹ On Chief Justice Roberts’s approach, the top ten percent plan, which Hellman would uphold,⁹⁰ is unconstitutional because it leads to “members of some racial groups [being] admitted in greater numbers than they otherwise would have been.”⁹¹

Chief Justice Roberts made this point in the context of a policy that facially discriminated based on race,⁹² 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.”⁹³ But Chief Justice Roberts’s point is that because admissions is zero-sum, this supposedly benign purpose is indistinguishable from the purpose of excluding students from the disadvantaged class. Chief Justice Roberts may be wrong to insist on this equation,⁹⁴ but for as long as a 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.⁹⁵

But that assertion does no more than reproduce policy disputes about the effect of affirmative action. Opponents of affirmative action argue that efforts to increase racial diversity *harm* racial minorities by, for example, implying that racial minorities cannot satisfy traditional standards of merit,⁹⁶ creating a “mismatch”

89. *Id.* at 2169.

90. See Hellman, *supra* note 78, at 1927-28.

91. See *Students for Fair Admissions*, 143 S. Ct. at 2169.

92. See *id.* at 2167 (describing the Harvard and UNC admissions policies).

93. See Hellman, *supra* note 78, at 1909.

94. See discussion *infra* Part III.C.

95. See Hellman, *supra* note 78, at 1928.

96. See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (“When 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.”).

problem,⁹⁷ or promoting the theory that people of color need the presence of white people to thrive.⁹⁸

Hellman attempts to avoid this problem by distinguishing between the standard for proving purpose and the standard for proving harm. Purpose, she insists, must be determined subjectively, but whether the policy harms a protected group must be determined objectively.⁹⁹ 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 am 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.¹⁰⁰ For her, subjective purpose is a gateway requirement that must be satisfied before we get to questions of harm.¹⁰¹ It follows that a ZIP code policy is unconstitutional only if opponents of affirmative action are not only objectively wrong but are also hypocrites who do not believe their own purported reasons for their discrimination. And perhaps they are hypocrites, 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*, the Court held that plaintiffs 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.¹⁰²

97. See Richard H. Sander, *A Systemic 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).

98. See, e.g., *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting) (citing evidence that black students perform better at Historically Black Colleges and Universities to show that "heterogeneity actually impairs learning among black students").

99. See Hellman, *supra* note 78, at 1948-49.

100. See *id.*

101. *Id.*

102. See 509 U.S. 630, 633-34, 637, 642 (1993).

Although there was no dispute that race influenced the drawing of district lines, the desire to harm that Hellman insists upon was absent.¹⁰³ The state's subjective purpose was to promote equality of representation, not to harm black or white constituents.¹⁰⁴ Further, as an objective matter, neither racial group was harmed.¹⁰⁵ On the contrary, the plan was implemented to avoid the harm of unequal representation¹⁰⁶—a goal roughly equivalent to promoting diversity in the affirmative action context.

Yet, the Court held that the plan embodied unconstitutional racial stereotyping.¹⁰⁷ Elaborating on the point in *Miller v. Johnson*, Justice Kennedy wrote for the Court that “[j]ust 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.”¹⁰⁸

From Hellman's perspective, Justice 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.¹⁰⁹ 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. Purpose 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

103. See *id.* at 642 (“No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.” (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979))).

104. See *id.* at 633-35, 655.

105. See *id.* at 641 (“[A]ppellants did not claim that the General Assembly's reapportionment plan unconstitutionally ‘diluted’ white voting strength.”).

106. See *id.* at 633-35, 655.

107. See *id.* at 647-49.

108. 515 U.S. 900, 911 (1995) (citations omitted).

109. See Hellman, *supra* note 78, at 1948-49.

conduct.¹¹⁰ 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 in *Gomillion v. Lightfoot*.¹¹¹ For Justice Frankfurter, the problem was not that African Americans were subject to unequal caring or even that the city intended to harm African Americans.¹¹² 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."¹¹³ 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's assertion in the affirmative action context that "[w]hat cannot be done directly cannot be done indirectly."¹¹⁴ It also 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 [without] ... sufficient justification" is unconstitutional.¹¹⁵ 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,"¹¹⁶ and when the state has "subordinated traditional race-neutral districting principles."¹¹⁷

This understanding of impermissible purpose unites the formal and purpose-based threads of equal protection that Hellman wants to disentangle.¹¹⁸ The problem is not that the government has exhibited unequal caring or that it is motivated by an intent to

110. *Shaw*, 509 U.S. at 642; *Miller*, 515 U.S. at 916-17.

111. 364 U.S. 339, 340-41 (1960); see *supra* notes 59-62 and accompanying text.

112. See *Gomillion*, 365 U.S. at 341.

113. *Id.*

114. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. at 2141, 2176 (2023) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

115. *Shaw*, 509 U.S. at 649.

116. *Miller*, 515 U.S. at 916.

117. *Id.*

118. See *supra* Part II.A.2.

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*, Justice O'Connor, writing for the Court, went out of her way to disown the proposition that "race-conscious state decision-making is impermissible in *all* circumstances."¹¹⁹ Instead, the general prohibition extends to conduct that "rationally can be viewed only as an effort to segregate the races,"¹²⁰ or where race is the "predominant [motivating] factor."¹²¹ In other words, as Justice O'Connor asserts, this is an area where "appearances do matter."¹²²

Why should appearances matter? In what follows, I engage in the Dworkinian project of formulating the best version of the Court's formalism. That 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.¹²³ 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.¹²⁴

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

119. 509 U.S. at 642.

120. *Id.*

121. *Miller*, 515 U.S. at 917.

122. *Shaw*, 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. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024) (citations omitted) (first quoting *Miller*, 515 U.S. at 912; and then quoting *Shaw*, 509 U.S. at 647).

123. See Larry Alexander, "With Me, It's All Er Nuthin": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 551 (1999).

124. For a defense of formalism along these lines, see *id.* at 551-55, 562-65.

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 such as segregation and slavery itself were justified on the ground that they benefited African Americans.¹²⁵ Modern racial preferences may seem 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.”¹²⁶ 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 the 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

125. For an extended argument along these lines, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2196-99 (2023) (Thomas, J., concurring).

126. See *Shaw*, 509 U.S. at 647.

*Parents Involved in Community Schools v. Seattle School District No. 1.*¹²⁷

The case concerned voluntarily adopted race-conscious student assignment plans designed to promote racial diversity in state-run schools.¹²⁸ Recall that in the wake of *Brown* the Court had endorsed mandatory race-conscious plans.¹²⁹ 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.¹³⁰

Parents Involved turned this understanding on its head.¹³¹ On the new understanding, not only were race-conscious plans not *required*, they were not even *permitted*.¹³²

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.¹³³ But in the Court's view, the time when these remedies were necessary had long passed.¹³⁴ The school districts before the Court had either never engaged in de jure segregation or had long ago achieved unitary status.¹³⁵

When remedy was unnecessary, the Court held that individual rights trumped group rights.¹³⁶ 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."¹³⁷

Chief Justice Roberts's opinion for the Court in *Students for Fair Admissions* returned to this theme.¹³⁸ Chief Justice Roberts wrote that the Court's decision invalidating Harvard's affirmative action plan did not mean that "universities [were prevented] from

127. See 551 U.S. 701 (2007).

128. *Id.* at 710.

129. See *supra* Part I.A.

130. See *supra* Part I.A.

131. See 551 U.S. at 723-25.

132. See *id.*

133. *Id.* at 720.

134. See *id.* at 721.

135. *Id.* at 720-21.

136. See *id.* at 722-23.

137. *Id.* at 722.

138. See 143 S. Ct. 2141, 2176 (2023).

considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."¹³⁹ 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."¹⁴⁰

The new individualism, similar to 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 that plaintiffs demonstrate "injury in fact"—that is that they, as individuals, have suffered "concrete" harm because of government action.¹⁴¹ Stigmatic injury caused by belonging to a group that is mistreated will not do.¹⁴² Instead, plaintiffs must demonstrate that, as individuals, they were materially disadvantaged.¹⁴³

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.¹⁴⁴ As the Court held in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, "[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."¹⁴⁵ 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.

139. *Id.*

140. *Id.*

141. *See, e.g.,* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he plaintiff 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."'" (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))).

142. *See Allen v. Wright*, 468 U.S. 737, 755 (1984).

143. *See id.*

144. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

145. *Id.*

Cynics might attribute this exception to the Court's hostility toward affirmative action and willingness to bend its rules in order to facilitate litigation challenging affirmative action plans.¹⁴⁶ This explanation may 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.¹⁴⁷

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's insistence on individualism, it is hard to see how the district's diversity plans harmed individual students.¹⁴⁸ 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.¹⁴⁹

These cases demonstrate that the Court's embrace of individualism, similar to 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."¹⁵⁰

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*, recognition of group rights "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think

146. For a compelling argument along these lines, see Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1487 (1995).

147. See *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 666.

148. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-23 (2007).

149. See *id.* at 746-48.

150. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

alike, share the same political interests, and will prefer the same candidates at the polls.”¹⁵¹

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.¹⁵² 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 jurors.... [O]ne 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.¹⁵³

Yet despite this recognition, Justice O’Connor joined the majority in invalidating gender-based challenges.¹⁵⁴ Writing for the majority, Justice Blackmun explained 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.”¹⁵⁵

It follows that the Court’s defense of individualism, similar to 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.¹⁵⁶ A majority of the justices invalidated plans that assigned students to schools in a manner that overtly and obviously subsumed individual difference into racial categories.¹⁵⁷ But it did not follow that the

151. *Id.*

152. *See* J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994).

153. *Id.* at 148-49 (O’Connor, J., concurring).

154. *See id.* at 146.

155. *Id.* at 140 (majority opinion).

156. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782, 788-89 (2007) (Kennedy, J., concurring).

157. *See id.* at 710-11 (plurality opinion).

government could not achieve the same results if it kept its group orientation under the radar. Far from disavowing such measures, Chief Justice Roberts's plurality opinion chastised the government for not utilizing them.¹⁵⁸ The government should not have resorted to the "extreme means" of classifying students based on race when other means, such as race-conscious choices about where to build schools, might have achieved its purposes.¹⁵⁹ According to the Chief Justice, these other means "implicate different considerations than the explicit racial classifications at issue in these cases."¹⁶⁰

Although Chief Justice Roberts expressed no view about the constitutionality of these other means,¹⁶¹ Justice Kennedy, who cast the deciding vote, left no doubt that they were constitutionally permissible. On his view, the assertion that "[o]ur 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."¹⁶² 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 tracking enrollments, performance, and other statistics by race."¹⁶³ 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"¹⁶⁴—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

158. *See id.* at 745.

159. *Id.*

160. *Id.*

161. *See generally id.* at 701.

162. *Id.* at 788 (Kennedy, J., concurring) (first alteration in original).

163. *Id.* at 789.

164. *Id.*

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 courts interpret Chief Justice Roberts's Delphic words at the conclusion of his *Students for Fair Admissions* opinion.¹⁶⁵ 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.¹⁶⁶

If one emphasizes part of this passage, it seems to rule out facially race-neutral means of advancing affirmative action. Because "[w]hat cannot be done directly cannot be done indirectly,"¹⁶⁷

165. Cf. Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race Conscious Admissions after SFFA*, 4 AM. J.L. & EQUAL. 295, 297 (2024) ("[T]he Court is torn between conflicting impulses and uncertain, so far at least, about just how to reconcile them.").

166. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (alteration in original) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

167. *Id.* (alteration in original) (quoting *Cummings*, 71 U.S. (4 Wall.) at 325).

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. Chief Justice Roberts also asserted that admissions committees can consider how racism affected a student's life or a student's "courage and determination" in overcoming racial discrimination.¹⁶⁸

Chief Justice Roberts suggested that these factors may be considered so long as they are applied on an individual basis.¹⁶⁹ But, as Chief Justice Roberts must know, bureaucratized admissions procedures necessarily involve group generalizations. If admissions committees are to consider the factors Chief Justice Roberts mentioned, then they 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.¹⁷⁰

Perhaps Chief Justice Roberts thought 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. That sort of individualized judgment is little different from what the Court had previously required in its now-discredited cases endorsing affirmative action.¹⁷¹ It follows that universities will, indeed, be able to accomplish indirectly what they cannot do directly.

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

168. *Id.*

169. *See id.*

170. *See id.* at 2155.

171. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("[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.'" (alteration in original) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978))).

matter.”¹⁷² 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.¹⁷³ Those rules amount to an approach that permits all but the most blatantly racist purposes to fly under the radar.

As Professor 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.”¹⁷⁴ For example, the Court upheld President Trump’s travel ban despite findings that previous iterations were infected with a discriminatory purpose.¹⁷⁵ It summarily rejected arguments that Georgia’s death penalty statute was originally instituted for racially discriminatory reasons.¹⁷⁶ And, as noted above, in its most recent case about discriminatory purpose influencing legislative district line drawing, the Court wrote that “[w]e should not be quick to hurl such accusations at the political branches.”¹⁷⁷

Lower courts have been even more dismissive of discriminatory purpose claims that might have advantaged racial minorities. For example, in *Johnson v. Governor of Florida*, the Court of Appeals for the Eleventh Circuit 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.”¹⁷⁸ Similarly, in *Coleman v. Miller*, the same 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

172. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

173. *See supra* Part II.A.

174. W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1193 (2022).

175. *See id.* at 1205.

176. *See McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

177. *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024).

178. 405 F.3d 1214, 1219-20 (11th Cir. 2005).

regrettable period in Georgia's history when its public leaders were implementing a campaign of massive resistance to the Supreme Court's school desegregation rulings."¹⁷⁹

Undoubtedly, decisions such as 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.¹⁸⁰ True, Chief Justice Roberts himself did not commit to upholding these means. It fell to Justice Kennedy to spell out the contours of constitutionally permissible indirection,¹⁸¹ 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 "Top Ten Percent" plan—pursuant to state law—similar to the hypothetical law that Hellman discussed.¹⁸² Under the plan, the top ten percent of graduates from any high school in Texas were automatically admitted to any of the public universities in Texas.¹⁸³ Because of de facto racial segregation in Texas public schools, the plan had the effect of increasing minority enrollment.¹⁸⁴ 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

179. 117 F.3d 527, 528 (11th Cir. 1997).

180. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007).

181. *See id.* at 797-98 (Kennedy, J., concurring).

182. *See Fisher v. Univ. of Tex.*, 579 U.S. 365, 371-73 (2016).

183. *See id.* at 372.

184. *See id.* at 384.

criticized the decision because the ten percent plan served the same ends without using a race-based classification.¹⁸⁵ 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 the diversity of its admitted students without taking race or ethnic background into account.¹⁸⁶

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 quite the judicial bait-and-switch to say such race-neutral efforts are presumptively unconstitutional" when "[t]he Supreme Court has repeatedly blessed seeking to increase racial diversity in government programs through race-neutral means."¹⁸⁷

There is some evidence that Justice Alito himself was 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.¹⁸⁸ There was no doubt that the changed policy was motivated by a desire to increase the school's diversity, but the Court of Appeals for the Fourth Circuit nonetheless upheld it.¹⁸⁹ The Supreme Court then denied

185. *See id.* at 426 (Alito, J., dissenting).

186. *Id.* at 437 (emphasis in original) (citation omitted).

187. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 891 (4th Cir. 2023) (Heytens, J., concurring).

188. *See id.* at 871 (majority opinion).

189. *See id.*

certiorari,¹⁹⁰ but Justice Alito, joined by Justice Thomas, filed a bitter dissent.¹⁹¹

Justice Alito accused the lower court of holding that “intentional racial discrimination is constitutional so long as it is not too severe,”¹⁹² characterized its reasoning as “indefensible,”¹⁹³ and asserted that the lower court opinion “cries out for correction.”¹⁹⁴ In fairness, Justice Alito directed most of his ire to the lower court’s treatment of the plaintiff’s disparate impact claim, not to the issue of impermissible purpose.¹⁹⁵ 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 was 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’ judgments about the merits.¹⁹⁶ But as a real-world matter, the fact that Justice 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.¹⁹⁷

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

190. See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024).

191. See generally *id.* at *1-2 (Alito, J., dissenting).

192. *Id.* at *1.

193. *Id.*

194. *Id.*

195. See *id.* at *3-4.

196. See, e.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989) (“As we have often stated, the ‘denial of a writ of certiorari imports no expression of opinion upon the merits of the case.’” (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923))).

197. See Amy Howe, *Rule of Four*, SCOTUSBLOG (2020), <https://www.scotusblog.com/election-law-explainers/rule-of-four/> [<https://perma.cc/R2CU-CUQP>] (“The ‘rule of four’ is the Supreme Court’s practice of granting a petition for review only if there are at least four votes to do so. The rule is an unwritten internal one; it is not dictated by any law or the Constitution.”).

action. Instead, progressives must watch closely what the Court does, rather than what it says. *Coalition for TJ* suggested 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?¹⁹⁸ There is some reason to think that it does,¹⁹⁹ 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.²⁰⁰ The policy does not facially discriminate against African Americans, and, on Hellman's account of illicit purpose, it is constitutionally permissible.²⁰¹ 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 African Americans.²⁰² Similar to the veteran's preference in *Personnel Administrator of Massachusetts v. Feeney*, legacy admissions are put in place "in spite of" rather than "because of" their effect on vulnerable groups.²⁰³

But, as we have seen, Hellman's account does not fit with the Court's current stance, and *Students for Fair Admissions* raised doubts about how we should now understand *Feeney*. Although

198. The Department of Education has opened an inquiry into whether Harvard's legacy admissions program is illegal. See Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html> [https://perma.cc/JAT3-DWRD].

199. 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, 185-86, 191-92 (2023), https://virginialawreview.org/wp-content/uploads/2023/12/Hellman_Book.pdf [https://perma.cc/D43X-QPZ8].

200. See, e.g., Michael Lind, *Prescriptions for a New National Democracy*, 110 POL. SCI. Q. 563, 583 (1995-96); John B. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 496, 503-04 (1993).

201. Hellman, *supra* note 78, at 1953.

202. See Leah Shafer, *The Case for Affirmative Action*, HARV. GRADUATE SCH. EDUC. (July 11, 2018), <https://www.gse.harvard.edu/ideas/usable-knowledge/18/07/caseaffirmative-action> [https://perma.cc/3SRW-7VLS].

203. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261-62, 279 (1979).

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.²⁰⁴ Race was not a negative factor for individual applicants.²⁰⁵ Their competitive disadvantage was merely a side effect of a policy designed to promote diversity.²⁰⁶

None of this mattered to the Court's majority. It is worth quoting again Chief Justice Roberts's 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?"²⁰⁷

Chief Justice Roberts wrote these words in a context where the policy was overtly race-based.²⁰⁸ In contrast, legacy admissions do not facially discriminate based on race, but 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. Remember, the affirmative action policy in *Students for Fair Admissions* did not facially discriminate against white and Asian American students.²⁰⁹ A university that gives preference to point guards does not facially discriminate against tuba players, even if no tuba player is a point guard and even if a particular 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.²¹⁰ Whatever the university's intent, Chief Justice Roberts argued whites and Asian Americans were harmed by the policy.²¹¹ Just so, but whatever the university's intent, African Americans are harmed by favoring legacy applicants.²¹²

204. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 177 (D. Mass. 2019).

205. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2155 (2023).

206. *See id.* at 2168-69.

207. *Id.* at 2169.

208. *See id.*

209. *Id.* at 2168-69.

210. *Id.*

211. *Id.* at 2168-70.

212. *See Lamb, supra* note 200, at 503-04.

If there is a difference between the two cases, it must be about the winners rather than the losers. In the affirmative action plans invalidated by *Students for Fair Admissions*, the winners were African Americans, who are members of a class that the Fourteenth Amendment protects.²¹³ 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.

To summarize, then, both affirmative action for African Americans and legacy admissions harm racial groups (whites and Asian Americans in the case of affirmative action, African Americans in the case of legacy admissions). In contrast, affirmative action for African Americans, but not legacy admissions, helps a protected group. It would seem to follow that the case for invalidating legacy admissions is actually stronger than the case for invalidating racial affirmative action.

Is there nonetheless an argument for striking down racial affirmative action but permitting legacy admissions? 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.²¹⁴ The zero-sum feature of admission decisions means that legacy policies have a similar effect on African American students. Of course, none of this assures victory for opponents of legacy admissions, but Chief Justice Roberts' opinion gives them at least a fighting chance.

213. See *Students for Fair Admissions*, 143 S. Ct. at 2177 (Thomas, J., concurring).

214. See *id.* at 2169 (majority opinion).

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 LGBTQ community constitutes a suspect class or that discrimination based on sexual orientation should be strictly scrutinized.²¹⁵ Nonetheless, in *Bostock v. Clayton County*,²¹⁶ the Court held that discrimination based on sexual orientation violated Title VII of the 1964 Civil Rights Act²¹⁷—an act that nowhere mentions sexual orientation.²¹⁸ The Court reached this conclusion by holding that sexual orientation discrimination necessarily involved sex discrimination, which is prohibited by the Act.²¹⁹ 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.²²⁰ Because her individual treatment depended upon her sex, a claim of sex discrimination had been established.²²¹

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 that Title VII is about individual rights.²²² Discrimination based on sexual orientation violates the statute because an

215. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 665-67, 669, 671, 673, 675-76, 678, 681 (2015) (invalidating laws prohibiting same-sex marriage without discussing standard of review); *Romer v. Evans*, 517 U.S. 620, 622-23, 631-32, 635-36 (1996) (invalidating constitutional amendment denying protected status based on homosexuality under rational basis review).

216. 140 S. Ct. 1731, 1737 (2020).

217. *See generally* 42 U.S.C. § 2000(e)-2.

218. *See Bostock*, 140 S. Ct. at 1737-38.

219. *See id.* at 1737.

220. *Id.* at 1741-42.

221. *Id.* at 1739-41.

222. *See, e.g., id.* at 1740 (“The statute ... tells us three times—including immediately after the words ‘discriminate against’—that our focus should be on individuals, not groups”); *id.* at 1741 (“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.”).

individual woman attracted to women loses her job that she would have been allowed to keep if she were a man.²²³

In his dissenting opinion, Justice Alito worried that the gravitational pull of *Bostock* will extend to the equal protection analysis.²²⁴ 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.²²⁵

Recently, the Supreme Court granted certiorari in a case raising the question whether the gender discrimination inherent in discrimination based on sexual orientation triggers constitutional strict scrutiny.²²⁶ At this writing the case remains undecided, but we will find out soon enough whether Justice Alito is right.

For now, all we can say is that the modern Court's individualism provides a powerful argument in favor of strict scrutiny. 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.²²⁷ There was no showing that one set of schools was better than the other or that the policy was designed to advantage or disadvantage either black or white students.²²⁸

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 or women. Men who want to have sex with men are

223. *See id.* at 660-61.

224. *See Bostock*, 140 S. Ct. at 1778-79 (Alito, J., dissenting).

225. For example, Title VII mandates a disparate impact test that is not part of the constitutional standard. *Compare Ricci v. DeStefano*, 557 U.S. 557, 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).

226. *United States v. Skrametti*, 144 S. Ct. 2679 (2024) (granting petition for certiorari).

227. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711-13 (2007).

228. *See generally id.*

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 race, it was unconstitutional even though it did not harm any group of students.²²⁹ Similarly, it would seem that a policy that disadvantages the LGBTQ 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.

CONCLUSION: BETTING ON THE FUTURE *BROWN*

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.²³⁰

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

229. See generally *id.*

230. Compare, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 253-54 (1977) (demonstrating how economic interests drove legal change in the nineteenth century), with Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 60-61, 66-67, 88-91, 100-01, 122-23, 125 (1984) (arguing that law is underdetermined and, therefore, relatively autonomous).

progress toward social justice. If the 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 soon find out. Meanwhile, although my heart is with the optimists, I know from sad experience that gamblers lose lots of money when they follow their hearts.²³¹ 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 would not put my money on it.

231. 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 the way to bet." See *The Race Is Not Always to the Swift, Nor the Battle to the Strong; But That Is the Best Way to Bet*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2015/06/04/race-swift> [<https://perma.cc/DN5L-BYTU>].