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## Article

# Valuing Identity

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### INTRODUCTION

Identity—race, gender, and sexuality—is having a moment, both good and bad. Black Lives Matter, a movement initiated in response to state-sanctioned violence committed against Blacks, is fueled by a demand that the lives of black people in the United States be valued and dignified.<sup>1</sup> Gay, lesbian, and transgender communities have built an advocacy network grounded in a commitment to queer identity that resulted in support from the federal government.<sup>2</sup> Celebrities can successfully drop “visual albums” centered exclusively on the experiences of Southern black women and still enjoy a debut at number one on music charts.<sup>3</sup>

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1. See *infra* notes 152–56 and accompanying text.

2. Loretta E. Lynch, U.S. Attorney Gen., Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint>.

3. Lizzie Plaugic, *Beyoncé’s Lemonade Debuts at No. 1 on the Billboard Charts*, VERGE (May 1, 2016), <https://www.theverge.com/2016/5/1/11552580/beyonce-lemonade-no-1-billboard-charts>.

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From social justice movements anchored by race to artistic expression centering legacies of pain and pleasure that shape our racial, cultural, and geographic senses of self, identity is on the rise as a tool that animates both self-affirmation and liberation.

At the same time, identity is prompting severe backlash. From the “All Lives Matter” slogans developed in response to the fight against police brutality to the ambitious calls for universality in the law, identity politics is characterized as undemocratic, exclusionary, and harmful to minoritized<sup>4</sup> identities. Having closed the identity cannon in equal protection, the Supreme Court refused to reopen it when presented an opportunity to do so in the 2015 same-sex marriage cases. The Court’s latest rejection of identity, however, is only the most recent in a line of legal pronouncements that not only present colorblindness as a legal framework to which society should aspire, but also insist that race has increasingly little to do with contemporary legal or social problems. In this post-race legal world, racial identity is impoverished and problematic, and the insistence of plaintiffs and scholars on examining conflicts through a racial lens is not only misplaced, but socially, politically, and legally counterproductive. Prominent legal scholars sympathetic to identitarian frameworks have had to surrender to the Court’s disengagement with identity.<sup>5</sup>

The law’s rejection of identity is out of step with the current cultural buzz but consistent with longer-held notions about the problematic nature of racial identity in general, and blackness, in particular. Narratives about the stigmatizing or essentializing nature of identity are not new, and much of the Court’s opposition to racial classifications is grounded in anxieties about the inherent harms of racial identity. Through both colorblind legal ideology and the outright denial of the salience of race in social conflict, legal jurisprudence doubles-down on notions of blackness as impoverished, even as the law implicitly affirms white racial identity.

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4. Some societal groups are positioned as outsiders to dominant norms and are thus perceived to fall short of dominant group standards. When this deviation is the basis for exclusion, some groups are privileged, and others minoritized. See Debra A. Harley et al., *Race, Class, and Gender: A Constellation of Positionalities with Implications for Counseling*, 30 *J. MULTICULTURAL COUNSELING & DEV.* 216, 216–17, 228–30 (2002). The term “minoritized” is preferable to “minority” as the phenomenon is affirmative and can occur regardless of numerical proportion in society.

5. See *infra* notes 193–96 and accompanying text.

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Although post-identity and universal legal frameworks are increasingly embraced by scholars and jurists as the logical alternative to identity, universality imposes significant harms on minoritized communities. Post-identity and universal frameworks undermine the race-conscious solutions that more effectively dismantle institutional and structural discrimination, and miss opportunities to capitalize on race in ways that maximize democratic participation and inclusion. Moreover, capitulation to narratives that ignore identity is harmful not just to plaintiffs of color before the court, but to entire populations subject to legal solutions that destroy solidarity and community among people of color.

Identity gets the legal and social job done. In this time of identity circumscription, this Article argues that identity politics are not just a vehicle for anti-discrimination claims, but also a positive social good. As a social good, identitarian frames are central to proper democratic recognition in the United States, reflecting both a political and social resilience, and embodying essential notions of dignity for minoritized groups. By reconstructing racial identity in the law more positively, courts can step away from decision-making informed primarily by concerns about stigma or essentialism, making way for more effective responses to racial subordination and clear-eyed assessment of the universal equality movements poised to usurp identity.

In arguing for the retention of identity frameworks, this Article uses black racial identity as an exemplar for an alternative lens through which law and policy might engage race in the public sphere. Black racial identity is the focus both because of its significance in informing broader political attempts to secure justice and equality, and because black racial identity has long been perceived in the United States as debilitating.<sup>6</sup> Accordingly, the black-white racial binary is centered not only because of the urgency with which dignity for black lives is currently being championed across the country, but also because of the foundational ways in which that particular binary has shaped other forms of oppression.<sup>7</sup>

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6. See Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 328 (2014) (discussing a racial hierarchy in the United States in which Blacks, by virtue of being at the bottom of the hierarchy, are the hierarchy's starkest victims).

7. See Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107, 110 (2010) (affirming the black-white binary as providing "important context in the ongoing political and academic discourse on race,"

Using equal protection doctrine and case studies, Part I focuses on the Court's denial of racial conflict and the value of racial identity. This denial is part of a legal shift that is only amplified by post-racial or universal equality constructs that embed asymmetric treatment of white and non-white racial identity. In response to this shift, Part II presents race as resilience, arguing that racial identity can operate usefully and positively in social, political, and legal spaces. Using this more constructive notion of racial identity, Part III then reframes the purported harms of racial classifications and interrogates our responses to structural discrimination as informed by impoverished notions of identity. Part IV closes with initial thoughts about what a renewed understanding of the value of black racial identity means both for other identity groups in America and the concept of identity more generally going forward.

### I. DEVALUING IDENTITY

Identity can be understood as a person's internal sense of self, as well as an association of that self with a particular group or groups.<sup>8</sup> Identity and association with a particular group is shaped by multiple social categories, including gender, religion, ethnicity, and race.<sup>9</sup> Racial categories yield racial identities, and, thus, identification with racial groups. Although there is no biological basis for race,<sup>10</sup> race does exist as a social construct<sup>11</sup>

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without diminishing the "very real and important needs and experiences of other subordinated groups"); see also Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm to Build Racial Coalitions*, 12 WASH. & LEE J. C.R. & SOC. JUST. 81, 86 (2005) (arguing that "the enslavement of Blacks by Whites has certainly shaped our history more than any other single event," and that understanding the origins of racism as a method to rationalize the enslavement of African Blacks is essential in order to understand racism toward all people of color). But see Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1213-15, 1221 (1997) (arguing that, although slavery and white racism against Blacks is at the core of American history and society, omitting other groups in the struggle for civil rights distorts history and further contributes to the marginalization of non-black people of color).

8. See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLAL. REV. 263, 266, 282-83 (1995).

9. See *id.* at 288, 314 n.226.

10. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994) ("There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites.").

11. Professor Neil Gotanda has described four meanings of race, including: (1) status-race, a now discredited conception of race that indicates social status;

that is continually<sup>12</sup> developed according to both social meanings and physical attributes.<sup>13</sup> In addition to being signaled through phenotypic characteristics like skin color, hair texture, and facial features, race can also be conveyed by an individual's social characteristics like class, geography, and political affiliation.<sup>14</sup> Racial identity is also performed in a strategic and social constructivist manner<sup>15</sup> and subject to both internal navigation and external imposition.<sup>16</sup>

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(2) formal-race, which refers to socially constructed formal categories like "black" or "white" that are understood as neutral, apolitical descriptions merely reflecting skin color or country of ancestral origin; (3) historical-race, which embodies past and continuing racial subordination; and (4) culture-race, which refers to a group's culture, including shared beliefs and social practices. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 3–4 (1991).

12. See D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1365–70 (2008) (arguing that the concept of the "immutability" of race defies society's actual understanding of race, both historically and contemporarily).

13. See Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 883 (2006) (footnote omitted) ("[R]ace, while often signaled by phenotype, is not biologically defined . . . . Instead, race is socially constructed; it is formed through human interactions and commonly held notions of what it means to be a person of a certain race.").

14. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1293–94 n.42, 1296.

15. In the context of race, racial identity performance must correspond to symbolic representations that are culturally understood as evocative of a particular racial identity. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1180 (2004) (applying Butler's performativity concept to the performance of race and ethnicity); see also Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1265 n.11 (2000) (citing JUDITH BUTLER, *BODIES THAT MATTER*, at x–xi (1993)) (explaining that there is a distinction between identity performed as a result of social construction and identity performed as a strategic decision given the constraints linked to a particular context); Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1334 (2016) ("[O]ut-group members leverage their out-group status to derive social and economic value for themselves.").

16. Internally, individuals assign themselves a racial identity, or identities, based on the particular group with which they most closely associate; although, this assignment is navigated by people with varying levels of freedom or choice, and is socially constructed through negotiations and renegotiations with the people of whom one interacts. See Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1239 (1994) (discussing the two approaches of racial and ethnic classification, including "self-reported identity" and "other-ascribed identity"); see also KENNETH KARST, *LAW'S PROMISE, LAW'S EXPRESSION* 287 (1993) (asserting that creating and maintaining social identity is a process of negotiation between oneself and others); Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN'S L.J.

Identity is also the cornerstone of modern equality jurisprudence in the United States. The Equal Protection Clause mandates that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>17</sup> Ratified by the states during Reconstruction in 1868, the Fourteenth Amendment encompassed a specific intent to abolish the Black Codes, the southern states’ attempt to negate the Thirteenth Amendment’s prohibition of slavery by targeting Blacks for unequal treatment in labor, land ownership, and criminal penalties.<sup>18</sup> Just four years later, the Supreme Court, cognizant of the doctrine’s commitment to African Americans, interpreted the Fourteenth Amendment’s “pervading purpose” as securing the “freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>19</sup> Justice Miller, writing for the majority, further noted that the Thirteenth, Fourteenth, and Fifteenth Amendments were all specifically intended to “address the grievances of race.”<sup>20</sup>

Despite the liberatory origins of identity, scholars, jurists, and laypersons have expressed concern regarding the centrality of identity and racial identity, in particular, in our equality and anti-discrimination jurisprudence. From the tactical<sup>21</sup> and doctrinal<sup>22</sup> weaknesses of an identitarian regime to the potentially disempowering social messages identity sends,<sup>23</sup> identity is often

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389, 393 (2007) (discussing the economics model of identity, focused on the utility-driven choices that individuals make based on their own identity, as well as influence from others).

17. U.S. CONST. amend. XIV, § 1.

18. JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 41 (2005).

19. *Slaughter-House Cases*, 83 U.S. 36, 71 (1872).

20. *Id.* at 71–72. *But see* Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 769–70 (2009) (arguing that the Thirty-ninth Congress which ratified the Equal Protection Clause also intended to institute an equal-birth principle, prohibiting discrimination of categories beyond race).

21. Tactical critiques of identity suggest that identitarian claims are vulnerable to legal or political challenge long-term because they balkanize groups by appearing to award benefits or protection to particular groups at the expense of others. *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2847–55 (2014).

22. *See infra* notes 24–31 and accompanying text.

23. Scholars have expressed concern that identity has a tendency to essentialize individuals, especially when legal claims based on discrimination against the identity marker are presented. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 795 (2011); *see also* Lauren Sudeall Lucas, Essay,

perceived in social, political, and legal discourse as problematic. The result has been an increasingly accelerated shift to anti-classification legal regimes, and the denial of the significance of minoritized racial identity all together. At the same time, white racial identity, understood to be a non-racialized baseline, is implicitly affirmed.

#### A. LEGAL DOCTRINE HOSTILE TO RACE

Hostility towards identity as a vehicle to substantive equality is already reflected in the equal protection doctrine. Courts have extended tiered levels of scrutiny that provide more or less rigorous interrogation of governmental classifications based on identity to a limited number of racial and ethnic groups, women, and children of non-marital parentage,<sup>24</sup> while ultimately denying it to gays and lesbians, the poor,<sup>25</sup> and the disabled.<sup>26</sup>

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*Identity as Proxy*, 115 COLUM. L. REV. 1605, 1621–22 (2015). Other scholars have focused on the messages identitarian frames send to identity holders, themselves. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1731–37 (1993) (arguing that whiteness provides social and psychological benefits to Whites, who are buoyed by the sense of superiority that whiteness confers by virtue of its monopoly on political, legal, financial, and social power). Wendy Brown has argued that, “insofar as [identity politics] are premised on exclusion from a universal ideal, [politicized identities] require that ideal, as well as their exclusion from it, for their own perpetuity as identities” and “identity structured by this ethos becomes deeply invested in its own impotence, even while it seeks to assuage the pain of its powerlessness through its vengeful moralizing, through its wide distribution of suffering, through its reproach of power as such.” Wendy Brown, *Wounded Attachments*, 21 POL. THEORY 390, 398, 403 (1993).

24. Black racial identity, in particular, was an initial protected class under the Fourteenth Amendment, and the Court later extended legal solicitude to other identity groups that have been targets for exclusion and discrimination, including groups that have been saddled with disabilities, subjected to a “history of purposeful unequal treatment,” relegated to “a position of political powerlessness as to command extraordinary protection from the majoritarian political process,” “subjected to discrimination,” or “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *see Korematsu v. United States*, 323 U.S. 214 (1944) (recognizing Japanese Americans as a suspect class); *see also* Knouse, *supra* note 20, at 776–77 n.120 (noting that suspect class status has typically been extended to racially-premised groups (e.g., Japanese, Chinese, Mexicans, and aliens)).

25. *See, e.g., Rodriguez*, 411 U.S. at 28–29, 39 (declining to use a strict scrutiny standard when families living in poor school districts challenged the funding scheme of Texas public schools).

26. *See* Knouse, *supra* note 20, at 778.

Combined with the Court's enduring insistence that equal protection rights are guaranteed not to groups, but to individuals,<sup>27</sup> Fourteenth Amendment jurisprudence has precluded an anti-subordination or distributive justice model of equal protection, which would impose on the state an affirmative duty to dismantle unequal conditions between racial groups created by historical systems of domination or inequities.<sup>28</sup> An anti-subordination model would also permit, without regard to conclusively established intent, challenges to policies that reinforce political, social, or economic marginalization of historically disadvantaged groups.<sup>29</sup>

The rejection of an anti-subordination model has resulted in formal, rather than substantive, equality, where both benign and invidious racial classifications are subject to the same forms of judicial scrutiny by the Court. Based on this reading of the Fourteenth Amendment, the Court has preserved facially neutral laws with disparate impact on minority groups as long as discriminatory intent cannot be found, while prohibiting race-conscious government policies with a specific intent to ameliorate racial inequality.<sup>30</sup> This approach to equality has eroded

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27. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)) (“[T]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”).

28. See Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622–24. Absent an intent requirement, a prima facie case for relief under a distributive justice theory of equal protection would be established whenever one racial or ethnic group is substantively worse off than another. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345 n.115 (1987).

29. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066–76 (2011) (concluding that although it is impossible to completely understand what equality meant in a society that simultaneously freed slaves but nevertheless socially subordinated Blacks, it is possible to conclude that: (1) the conflicted nature of the history of the reconstruction amendments requires a normative or moral standard for equality; and (2) to the extent that the amendments not only undid the Constitution's textual acceptance of slavery, but redefined Blacks as citizens, substantive, and not just formal, equality must follow).

30. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (striking down controlled-choice plans that sought to integrate public schools and broaden access of minority students to high-quality schools, because the racial identity of students was explicitly considered in making school assignments).



protections against racial discrimination in labor and employment, education, criminal justice, and many other spheres of American life.<sup>31</sup>

#### B. JUDICIAL COMMITMENTS TO IGNORING RACE

In addition to its formal equality jurisprudence, the Court has also signaled a waning commitment to thinking about racial identity as it informs societal inequality. Judicial pronouncements regarding the salience of identity in general, and black racial identity in particular, are increasingly jurispathic,<sup>32</sup> rejecting race as the lens through which legal actors might assess obstacles to substantive societal equality.

Key desegregation cases, for example, illustrate an outright impatience with long-term commitments to race-conscious programming. In *Board of Education of Oklahoma City v. Dowell*, the Court endorsed the termination of desegregation orders once school districts became unitary, even if termination would lead to resegregation of schools.<sup>33</sup> One year later, in *Freeman v. Pitts*, the Court gave federal courts the authority to relinquish supervision of school district desegregation in incremental stages, notwithstanding the resulting likelihood that district students would never attend fully integrated systems.<sup>34</sup>

In higher education, the Court has consistently refused to acknowledge societal discrimination against minorities as a compelling interest that might justify the consideration of race in the admissions process.<sup>35</sup> Instead, the Court embraced diversity, citing its potential to enhance classroom discussion and prepare

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31. *See id.* (striking down controlled-choice plans that used race as one factor to facilitate racial integration in public schools); *City of Richmond*, 488 U.S. at 485–86 (holding that societal discrimination was insufficiently compelling as a justification for Richmond’s set-aside program for minority business enterprises); *McClesky v. Kemp*, 481 U.S. 279, 287–91 (1987) (upholding the Georgia death penalty, despite conclusive evidence showing that, even after taking account of nonracial variables, defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing black victims).

32. Courts are jurispathic in their role when choosing between two or more laws or imposing a hierarchy upon laws (e.g., deciding that federal law trumps state law). Here, the courts are actively rejecting or “killing” law and policy that affirms the salience of racial identity in legal and policy attempts to secure racial equality. For more on jurispathic courts, see Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983).

33. *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 249–50 (1991).

34. *Freeman v. Pitts*, 503 U.S. 467, 489–90 (1992).

35. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (“[T]he purpose of helping certain groups whom the faculty of the Davis Medical School

students for the labor force, leadership, and citizenship.<sup>36</sup> In the Court's 2007 *Parents Involved* opinion concerning K-12 integration, Justice Roberts made the Court's impatience with race and remedy quite explicit, striking down race-conscious integration plans while asserting that "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race."<sup>37</sup>

The Court's decisions in key voting rights cases also serve as examples of the Court's increasing discomfort with understanding or recognizing subordination of minoritized racial identity, particularly when that understanding necessitates the recognition of accompanying white supremacy. In *Shaw v. Reno*, for example, Justice O'Connor's opinion relied heavily on aspirations of colorblindness, resorting to the automatic conclusion that racial classifications are necessarily harmful, inevitably "balkaniz[ing] us into competing racial factions" and "carry[ing] us further from the goal of a political system in which race no longer matters."<sup>38</sup> Justice O'Connor then proceeded to declare unconstitutional a reapportionment scheme that she characterized as "an effort to segregate voters into separate voting districts because of their race."<sup>39</sup>

In dismissing appellees' suggestions that the revised plan was necessary to avoid dilution of black voting strength in violation of section 2 of the Voting Rights Act, Justice O'Connor drew on "recent black electoral successes [that] demonstrate[d] the willingness of white voters in North Carolina to vote for black candidates."<sup>40</sup> She further noted that several state leaders, including Speaker of the North Carolina House of Representatives, were Black, and that only a few years earlier, a black candidate

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perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent . . ."). Although raised again in subsequent cases, the claim has never gained traction with the Court. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 323-25 (2003).

36. *See Grutter*, 539 U.S. at 330-32. A coalition of intervenors argued that universities' excessive reliance on standardized tests was at the heart of a racial caste system that excluded Blacks and Hispanics from competitive colleges and universities, perpetuating de facto segregation in public schools and discrimination in the workforce. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1458-61 (2005). Despite this intervention, their claims were not addressed in the Court's opinion. *See Grutter*, 539 U.S. at 306.

37. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

38. *Shaw v. Reno*, 509 U.S. 630, 657 (1993). Racial classification, however, is not necessarily and inevitably harmful to democracy. *See infra* Part II.B.

39. *Shaw*, 509 U.S. at 658.

40. *Id.* at 656.

defeated a white opponent in a Democratic Party runoff for the Senate before being “defeated narrowly” by a Republican incumbent in the general election.<sup>41</sup> Justice O’Connor ignored, however, observations made by dissenting Justices that the plan had, in fact, allowed North Carolina to send its *first* black representative to the United States Congress since Reconstruction<sup>42</sup>—a fact that belies any suggestion that white supremacy was so diminished as to provide no compelling justification for race-conscious voting reapportionment.

More recently, *Shelby County v. Holder* illustrates the eagerness with which the Court is committed to dismissing race as the proper lens through which to assess inequality, particularly if it cannot be supported with intentional and egregious examples of racial subordination. In the case, the Court struck down as unconstitutional section 4 of the Voting Rights Act, thus nullifying the coverage formula that dictated which states had to obtain preclearance before making changes to their voting laws.<sup>43</sup> In doing so, the Court again relied heavily on the suggestion that race relations no longer warranted the sort of checks that section 4 provided, noting that black voter turnout in some of the covered states exceeded white voter turnout,<sup>44</sup> that “[b]latantly discriminatory evasions of federal decrees are rare,”<sup>45</sup> and that “minority candidates hold office at unprecedented levels.”<sup>46</sup> Moreover, although Congress relied on “thousands of pages of evidence” before reauthorizing section 4, the Court ultimately suggested that the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination needed to justify maintaining the preclearance formula was simply not before the Court.<sup>47</sup>

Justice Ginsburg’s dissent, however, detailed ongoing voting discrimination in the form of second generation barriers that attempt to diminish the impact of minority votes rather than blocking access to the ballot directly, including racial gerrymandering, at-large voting systems, and annexation of majority-white residential areas.<sup>48</sup> Nevertheless, the majority pressed on. In choosing to strike down a race-conscious voting policy because

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41. *Id.*

42. *Id.* at 659 (White, J., dissenting).

43. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

44. *Id.* at 2625.

45. *Id.* at 2631.

46. *Id.*

47. *Id.* at 2629.

48. *Id.* at 2634–35, 2640–42 (Ginsburg, J., dissenting).

racial subordination did not present itself as obviously or typically as it did during the Civil Rights era, the Court communicated a belief that voter suppression targeted against Blacks can be addressed through means that do not require the consideration of race; the Court wants to address racial injustice without actually engaging race.

### C. ASYMMETRY AND UNIVERSALITY

By ignoring race, however, the Court also implicitly centers whiteness in ways that reinscribe, rather than dismantle, racial hierarchy.<sup>49</sup> Black racial identity is currently preserved in the law through a deficit lens. In contrast, white racial identity is understood to be a non-racialized baseline, embedded so deeply as to be barely detected at all. Decentering identity in the move to universal frameworks only further facilitates the already existing entrenchment of both (negative) black and (positive) white identity in the law.

#### 1. Entrenched Black Deficit

Black American culture and identity are often fetishized, presented, and perceived in popular culture as exciting, exotic, or exclusive. Rachel Dolezal, for example, a white woman who had successfully presented herself as Black, seemed motivated, in part, by a belief that only such a ruse would give her access to black professional and cultural spaces.<sup>50</sup> Dolezal's attraction is mirrored in popular perceptions of black artistic work. In her research about perspectives on black culture, for example, Baz

49. See *infra* notes 50–92, 176–85 and accompanying text.

50. Although the NAACP maintains that black racial identity is not a prerequisite for leadership, some commentators wondered whether Dolezal would have risen to president of the local chapter if she had been white. Jamilah Lemieux, *The Infallibility of Miss Ann (Or, the Last Rachel Dolezal Thinkpiece Ever)*, EBONY (June 15, 2015), <http://www.ebony.com/news-views/last-rachel-dolezal-thinkpiece-ever-065> (noting that Dolezal, in serving as NAACP chapter president and an Africana studies professor, occupied some of the few leadership roles afforded to black people and gained access to black professional and cultural spaces); Press Release, NAACP Statement on the Resignation of Rachel Dolezal (June 15, 2015), <http://www.naacp.org/latest/naacp-statement-on-the-resignation-of-rachel-dolezal1> (“The NAACP is not concerned with the racial identity of our leadership but the institutional integrity of our advocacy.”). Moreover, Dolezal was able to produce and sell “black art,” and booked public speaking engagements as a professor of African American studies, ostensibly aided by her presentation as a black woman. Kirk Johnson, Richard Pérez-Peña & John Eligon, *Rachel Dolezal, in Center of Storm, is Defiant: ‘I Identify as Black’*, N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/2015/06/17/us/rachel-dolezal-nbc-today-show.html>.

Dresinger interviews artists who describe black culture as “irresistible,” “vital,” “life-giving,” and “productive.”<sup>51</sup> Moreover, white artists and celebrities have been criticized for appropriating black culture to broaden their market appeal and capitalize on the exoticism associated with non-white identity.<sup>52</sup>

The law, however, characterizes black racial identity as valuable far less often, consistently presenting black racial identity as impoverished. A famous example of this phenomenon is the case of *Brown v. Board of Education*, where the Court relied on social science purportedly affirming the inferiority complex of young black children to justify declaring school segregation unconstitutional.<sup>53</sup> At no point, however, did the Court interrogate the mental pathology and sense of unjustified superiority that develops among white schoolchildren as a result of the racial hierarchy that school segregation supported. Rather, segregation was deemed unacceptable on the basis of conclusions regarding internalized inferiority and self-hate among black children.

In reality, when selecting white dolls over black ones, the young children tested in the studies on which the *Brown* Court relied signaled to the researchers that they had already observed patterns of white supremacy around them, and knew which doll was perceived as “more desirable” by greater society. The developmentally accurate interpretation of the doll tests is not that

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51. BAZ DREISINGER, NEAR BLACK: WHITE-TO-BLACK PASSING IN AMERICAN CULTURE 4 (2008).

52. This is not to say that white artists who play black music cannot be legitimately interested in the art forms, nor that black artists have never enjoyed commercial success in arts forms typically thought of as “White.” See, e.g., RAY CHARLES, MODERN SOUNDS IN COUNTRY AND WESTERN MUSIC (ABC-Paramount Records 1962); DARIUS RUCKER, LEARN TO LIVE (Capitol Records Nashville 2008). Due to racial power dynamics, however, the latter is more accurately characterized as cross-cultural sharing, rather than appropriation. For commentary on the politics of cultural appropriation, see Adrienne Keene, Opinion, *The Benefits of Cultural ‘Sharing’ Are Usually One-Sided*, N.Y. TIMES (Aug. 4, 2015), <https://www.nytimes.com/roomfordebate/2015/08/04/whose-culture-is-it-anyhow/the-benefits-of-cultural-sharing-are-usually-one-sided> (arguing that “borrowing” of cultural elements are not just equal cultural exchange, but a more “insidious, harmful act that reinforces existing systems of power”); Sally Kohn, *How the Kardashians Exploit Racial Bias for Profit*, WASH. POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/the-kardashians-arent-just-trashy-theyre-dangerous> (arguing that non-black women have a history of appropriating black women’s bodies and culture and exploiting the fetishization of women of color for their own material gain).

53. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

children were saying “I know I am of lesser value”—a message children of the age tested are not yet capable of internalizing—but rather “I know that the correct answer, as informed by what I observe, is to pick the white doll.”<sup>54</sup>

Faulty conclusions regarding black self-hate, however, went virtually unchallenged until the late 1960s and early ’70s, when researchers noted that early work erroneously assumed that reference group orientation—the societal group of which people understand themselves to be a part—was necessarily related to, if not synonymous with, self-concept. Since then, multiple studies have challenged flawed understandings of racial identity, confirming that African Americans, despite enduring bias and discrimination, do not, in fact, suffer from poor self-esteem.<sup>55</sup>

Despite these studies, cultural-deficit models persist, making it difficult for people to recognize, much less understand, how minoritized racial identity is a source of pride and resiliency for group members.<sup>56</sup> The cultural-deficit model becomes the baseline from which cultural phenomena in the black community is assessed and understood.<sup>57</sup> Take for example, Dr. John Ogbu’s “acting-white” theory, which suggests that the racial achievement gap is due, in part, to a disassociation among black youths with academic achievement. According to the theory, black students have concluded that academic success is a white, rather than black, cultural practice, and have thus developed an oppo-

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54. Vinay Harpalani et al., *Doll Studies*, ENCYCLOPEDIA OF RACE AND RACISM 67, 69 (2013) (explaining that in early childhood, children are cognitively egocentric, lacking awareness of how others view them and primarily modeling the values and behaviors they observe; accordingly, although children were aware of the connotations associated with skin color, they had neither low self-esteem nor feelings of inferiority); Stephanie J. Rowley et al., *The Relationship Between Racial Identity and Self-Esteem in African American College and High School Students*, 74 J. PERSONALITY & SOC. PSYCHOL. 715, 719 (1998).

55. Rowley et al., *supra* note 54, at 716.

56. Some of the reaction to the controversy regarding Rachel Dolezal’s false claims to black racial identity was grounded in disbelief that a woman, given the option, would voluntarily choose to adopt black identity. See, e.g., Fredrik deBoer, Opinion, *Why Rachel Dolezal Would Want to Pass as a Black Woman*, L.A. TIMES (June 13, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0614-deboer-rachel-dolezal-20150614-story.html>.

57. The impact of preexisting theoretical frameworks for race shape even the research questions asked and methodologies used. See Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155, 3157 (2015) (arguing that the observation of race is never a neutral one, and calling for “empirically informed critical race theory and critical race theory informed philosophy of science” to mitigate the problem).

sitional sense of collective identity that rejects academic achievement associated with Whites.<sup>58</sup>

Sociologist Dr. Margaret Beale Spencer has challenged the theory, examining Ogbu's claim and concluding that it lacks empirical verification, is informed by a cultural-deficit model, and ignores the long history of African American valuing of, and investment in, education.<sup>59</sup> Others have come to similar conclusions, finding that African Americans possess a strong belief in, and desire for, learning, exhibited through an ongoing collective struggle for educational opportunity and equality.<sup>60</sup> Moreover, African American teachers have long emphasized racial pride and commitment to academic excellence in black youth, believing that Blacks must prove themselves qualified by producing not just equal, but superior, work.<sup>61</sup> Other research on the "acting white" phenomenon finds that it only occurs in majority-white schools where group racial solidarity is most important.<sup>62</sup> As such, the phenomenon is not about black rejection of academic success at all, but rather about black students patrolling the lines of solidarity in spaces where that solidarity is understood as necessary for survival.<sup>63</sup>

Impoverished notions of black racial identity nevertheless continue to inform not only legal holdings but the actual framing of black claims for justice before the Court. Contrasting narratives of "white innocence" and "black guilt," for example, litter

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58. Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White'"*, 18 URB. REV. 176, 181 (1986).

59. Margaret Beale Spencer & Vinay Harpalani, *What Does "Acting White" Actually Mean? Racial Identity, Adolescent Development, and Academic Achievement Among African American Youth*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 222, 223 (John U. Ogbu ed., 2008).

60. Mavis G. Sanders, *Overcoming Obstacles: Academic Achievement as a Response to Racism and Discrimination*, 66 J. NEGRO EDUC. 83, 84 (1997) (summarizing arguments advanced by Weinberg, Anderson, and Perry).

61. *Id.* at 84–85; Gloria Ladson-Billings, *Toward a Theory of Culturally Relevant Pedagogy*, 32 AM. EDUC. RES. J. 465, 468 (1995) (citing to a long "history of African-American educational struggle and achievement" that contradicts assertions that Blacks do not value education).

62. Roland G. Fryer, "Acting White", 6 EDUC. NEXT 53, 57 (2006); Roland G. Fryer, Jr. & Paul Torelli, *An Empirical Analysis of 'Acting White'* 20 (Nat'l Bureau of Econ. Research, Working Paper No. 11334, 2005), <http://www.nber.org/papers/w11334.pdf>.

63. Fryer, *supra* note 62, at 58–59 (rejecting the theory of oppositional culture, and adopting instead the theory that students will necessarily experience a "trade-off" between academic success and rejection by peers when that student comes from a "traditionally low-achieving group," fearful of losing one of their own); Fryer, Jr. & Torelli, *supra* note 62 (describing a trade-off between popularity and achievement).

the Court's affirmative action jurisprudence. Whites challenging affirmative action consistently characterize the measures as unfair. The Court subscribes to this narrative, characterizing white plaintiffs in affirmative action cases as "innocent" victims of race-conscious policies implemented in response to problems not of their own making. In *Regents of the University of California v. Bakke*, the Court highlighted the unfairness of asking "innocent persons . . . to endure . . . [deprivation as] the price of membership in the dominant majority,"<sup>64</sup> going on to note that the Court had "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent* individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."<sup>65</sup> Casting Whites as innocent fails to acknowledge the group as undeserving beneficiaries of white privilege.

This narrative of white innocence and victimhood necessarily derives its power from the implicit contrast with a guilty person of color who unfairly benefits from affirmative action.<sup>66</sup> This comparison is only strengthened by enduring stereotypes about black people as lazy, undeserving, and marginalized on account of their own bad decision-making.<sup>67</sup> These beliefs in black failure, laziness, and flawed choices inform welfare retrenchment,<sup>68</sup> education policy that ignores structural issues in favor of standardization and high-stakes testing meant to create "accountability,"<sup>69</sup> and even policing strategies that profile people

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64. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (emphasis added).

65. *Id.* at 307 (emphasis added).

66. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 315 (1990) ("The assertion of the innocent white victim draws power from the implicit contrast with the 'defiled taker.' The defiled taker is the black person who undeservedly reaps the advantages of affirmative action.")

67. The problematic consequences of beliefs in the bad decision-making of people of color are only aggravated in an era of increased commitment to "choice" in the United States. In the public education context, the commitment to school choice allows politicians and policymakers to abdicate responsibility for quality public education, forcing parents to make choices for which they are to blame if made in error. This has particularly grave consequences for parents of color, whose "choices" and agency in the school system are significantly constrained relative to Whites. See Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1083–87 (2014).

68. See JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* 95–101 (2011).

69. James, *supra* note 67, at 1111 (arguing that *No Child Left Behind*, with its focus on standardization and high-stakes testing, focuses on the failures of



of color, despite evidence consistently confirming that the profiling is unjustified.<sup>70</sup> Although the language of affirmative action opinions is not definitive as to state and federal policy, the Court does affirm and perpetuate notions of black guilt and irresponsibility in ways that shape broader social policy and public perception.

## 2. Entrenched White Affirmation

Just as Blacks are presented as guilty in affirmative action jurisprudence, white plaintiffs are repeatedly presented as hard-working, industrious, and committed to justice. Again trading on the notion of black guilt, the Court in *Grutter* noted that there are “serious problems of justice connected with the idea of preference itself,”<sup>71</sup> and that “[e]ven remedial race-based government action generally ‘remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.’”<sup>72</sup> Notably absent from the Court’s opinion in *Grutter* was engagement with corrective or distributive justice claims raised in amicus briefs that would implicitly acknowledge white responsibility for, or at least complicity in, racial subordination, and also undercut notions of white innocence.<sup>73</sup>

Instead, white plaintiffs in cases challenging affirmative action are often favorably presented by the Court, and their innocence affirmed in the language of the opinions and final rulings. In striking down race-conscious school assignment policies in *Parents Involved*, the Court affirmed the innocent Crystal Meredith who was simply defending her child’s educational rights against the school district,<sup>74</sup> and who was “shocked” that people

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students while ignoring structural conditions that drive the achievement gap, including poverty, resource inequity, and racial and economic isolation).

70. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (striking down New York City’s stop and frisk program as unconstitutional and not justified by successful crime prevention).

71. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298).

72. *Id.* (emphasis added) (quoting *Bakke*, 438 U.S. at 308).

73. *Brown-Nagin*, *supra* note 36, at 1485–86 (noting that the *Grutter* majority, and even Justices supportive of race-conscious policies, responded to the credentials bias claim of intervenors with silence).

74. Bill Mears, *Divided Court Rejects School Diversity Plans*, CNN (June 28, 2007), <http://www.cnn.com/2007/LAW/06/28/scotus.race> (quoting Meredith accusing the school board of wanting her to “sacrifice [her son’s] learning in order to maintain the status quo,” and asserting that the school board felt “[her] son’s education was not as important as [the school district’s] plan.”).

could understand race to be an issue in the desegregation case.<sup>75</sup> The Court similarly affirmed the innocent Kathleen Brose who insisted that Seattle's integration plan was "terribly unfair" to her white daughter.<sup>76</sup> In upholding Brose's claim, the Court failed to acknowledge that, like other Whites in Seattle, Brose had enjoyed a monopoly on access to the city's best schools for years, and was thus complicit in the denied access of the city's students of color.<sup>77</sup>

Affirmative action, moreover, is an increasingly favored target for claims of reverse discrimination against individual Whites. Scholars like Ira Katznelson have challenged our understanding of affirmative action, broadening both our historical attention span and understanding of the constituent laws and policies. Before programs were initiated in the 1960s to broaden access for minorities to elite education and jobs, affirmative action began in the 1930s and '40s, through welfare, work, and war policies that benefited Whites.<sup>78</sup> The web of economic and social policy, for example, that the New Deal ushered in to secure prosperity for Americans systematically excluded African Americans while privileging white Americans through three key features: (1) the use of "racially laden" legislative language that excluded black laborers;<sup>79</sup> (2) the placing of enforcement power in racist local officials throughout the South;<sup>80</sup> and (3) the absence of any anti-discrimination provisions in the New Deal framework.<sup>81</sup>

These features were further mirrored in welfare and war policies of the same period. Unchecked discrimination, combined with already existing structural inequalities,<sup>82</sup> ensured racial

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75. Janelle MacDonald, *Local Mom Makes National Headlines with Lawsuit Against JCPS*, WAVE3 NEWS (Oct. 10, 2006), <http://www.wave3.com/story/5522206/local-mom-makes-national-headlines-with-lawsuit-against-jcps>.

76. Transcript, *An Imperfect Revolution: Voices from the Desegregation Era*, AM. RADIOWORKS (last visited Oct. 12, 2017), <http://americanradioworks.publicradio.org/features/deseg/transcript.html>.

77. The Seattle school district was segregated by white and non-white peoples, with Whites enjoying near-exclusive access to the city's better schools on the North side. Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 287–88 (2007).

78. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 18–23 (2005).

79. *Id.* at 22.

80. *Id.* at 22–23.

81. *Id.*

82. Relief payments, for example, were calibrated so as not to undercut the labor market. As a result, Blacks who experienced lower earning power had

differentials in government support for poor Blacks and Whites, with Blacks receiving fewer benefits relative to their needs than Whites.<sup>83</sup> Moreover, even after Blacks were permitted to serve in the military, racialized policies ensured that opportunities provided by the military to veterans for education and training, occupational advancement in a post-industrial world, and the amassing of social and cultural capital, were denied to Blacks while enjoyed primarily and most fully by Whites.<sup>84</sup> The G.I. Bill, described as a “model welfare system” providing the “most wide-ranging set of social benefits ever” in the form of home purchasing and college education, created middle-class America near-exclusively for Whites, while leaving black veterans readjusting to civilian life to navigate their return from war alone.<sup>85</sup>

The politics, however, underlining obstacles to black equality and support for white privilege (without ever stigmatizing Whites) are rarely thought of as identity politics, even though they are clearly designed to benefit white people. President Nixon’s appeals to the silent majority, as part of his “southern strategy,”<sup>86</sup> for example, invoked policy positions that maintained and affirmed white interests at the expense of black ones,<sup>87</sup> including the concentration of state power in opposition to national policies meant to protect the minority from the majority, opposition to bussing in service of desegregation, and colorblind liberalism that equated benign and invidious discrimination.<sup>88</sup>

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their benefits limited to reflect what they would actually earn if they had a job. *Id.* at 38.

83. *Id.* at 36–39.

84. *Id.* at 106–12.

85. *Id.* at 113–41; see also Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court’s Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 588–604 (2014).

86. The “southern strategy” is the term used to describe President Nixon’s courtship of conservative southern Whites through “retrogressive” public rhetoric and the denunciation of bussing in service of integration. DEAN J. KOTLOWSKI, *NIXON’S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 1–2 (2001). *But see* MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006) (arguing that overreliance on race-reductionist narratives like “Southern Strategy” and “white backlash” to explain political transformations downplays the centrality of class ideology in the outlook of suburban voters, and also ignores class divisions among white southerners throughout the era).

87. LASSITER, *supra* note 86, at 5.

88. *Id.* (“[T]here is no reason to feel guilty about wanting to enjoy what you get and . . . about wanting your children in good schools close to home, or about wanting to be judged fairly on your ability . . . . [Liberals] believe that the only

Nor are these movements historical artifacts. Affirmative action is steadily being dismantled, despite operating under the court-approved mantle of diversity. The Court, for example, granted certiorari for the second time in a case challenging the University of Texas's race-conscious admissions program, despite the program having passed a heightened review by the Fifth Circuit that the Court itself mandated.<sup>89</sup> In spring of 2014, the Court affirmed the right of white voters to prohibit, through state constitutional amendment, race-conscious policies in education and labor.<sup>90</sup> In *Shelby County v. Holder*, the Court gutted the Voting Rights Act, eliminating preclearance requirements that helped prevent changes in voting laws or practices that could disenfranchise voters by race, particularly in southern states where voter disenfranchisement of non-white voters is at its worst.<sup>91</sup> The changes to the University of Texas's admission program and to the Voting Rights Act were primarily advocated for by Whites who believe that race-conscious government policies work to their disadvantage, in violation of equal protection and due process.<sup>92</sup> Given this trend, group recognition for Whites exists under the purportedly race-neutral cloak of colorblindness and equality. Moreover, to the extent that they are rhetorically stylized as colorblind, white-interest-group politics become deeply embedded in American law and policy in ways less recognizable but more potent than black identity politics. Our current equality jurisprudence both undermines anti-racist interpretations of the law and devalues minoritized identity, while affirming white racial identity under the guise of colorblindness.

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way to achieve . . . social justice is to place power in the hands of a strong central government which will do what they think has to be done, no matter what the majority thinks . . . [The United States represents] the land of opportunity, not the land of quotas and restrictions.”).

89. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (affirming district court decision that the University's use of race in its admissions policy satisfied strict scrutiny). In 2016, the Supreme Court issued a final opinion in *Fisher*, affirming the diversity rationale and the university's use of it in their admissions policies. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

90. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (declining to set aside amendment to the Michigan constitution that prohibited affirmative action in public education, employment, and contracting).

91. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

92. For example, Edward Blum, a key player in bringing the *Fisher* case to the Supreme Court, is motivated by a desire to create a “color-blind” society and insists he's fighting for civil rights. Stephanie Mencimer, *Meet the Brains Behind the Effort To Get the Supreme Court To Rethink Civil Rights*, MOTHER JONES (Mar./Apr. 2016), <http://www.motherjones.com/politics/2016/04/Edward-blum-supreme-court-affirmative-action-civil-rights>.

## II. VALUING BLACK IDENTITY

*“I am Black. Black is specific. Black centers me.”*<sup>93</sup>

*“And I have the resilience of a race who has survived every previous effort to exterminate it (and to compel it to exterminate itself).”*<sup>94</sup>

*“Sometimes it’s important to remind ourselves that blackness isn’t just a parade of calamities and disadvantage.”*<sup>95</sup>

The law and policy canvassed above reflects the incapacity of legal actors to perceive minoritized racial identity as a positive good, with a useful function in society. Whiteness has come to represent a positive property right in the American political, social, and economic landscape, providing its owners with benefits such as higher wages, racially exclusive access to public facilities, and the affirmation of self.<sup>96</sup> At the same time, “blackness” has come to represent only a negative social experience.<sup>97</sup> And this negative conception of blackness is what informs the Court’s engagement with racial identity. Unable to engage identity untethered to the scourge of racism and discrimination, the Court is content to simply dispense with identity all together.

Such a perception of identity fails to recognize the curative and protective benefit that minoritized identity in general, and

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93. Fanta, *WOC vs. Black Women*, BLOGSPOT ARCHIVER (May 20, 2015), <http://fansylla.blogspot.com/2015/05/woc-vs-black-women.html>.

94. Stacia L. Brown, *When Parenting Feels like a Fool’s Errand: On the Death of Michael Brown*, STACIAL.BROWN.COM (Aug. 10, 2014), <http://stacialbrown.com/2014/08/10/when-parenting-feels-like-a-fools-errand-on-the-death-of-michael-brown>.

95. Gene Demby, *Who Gets To Be Black? Honor the Struggle, But Don’t Forget the Jokes*, NPR: CODESWITCH (June 17, 2015), <http://www.npr.org/sections/codeswitch/2015/06/17/414972407/if-you-dont-get-to-be-black-without-the-struggle-lets-not-forget-the-jokes>.

96. Harris, *supra* note 23, at 1724–28 (explaining how whiteness might be characterized as a property interest, providing benefits to all those who can lay claim to white racial identity, and excluding non-Whites from the same).

97. Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 64–66 (2005) (“[B]lackness is a negative property right in America’s legacy . . . beginning with a history of blacks as whites’ enslaved property, continuing to second-class citizenship status following the Civil War, and still persisting in a wealth and education gap compared to white Americans.”).

black racial identity in particular, can confer on individuals.<sup>98</sup> Moreover, minoritized identity is valuable for broader social, political, and legal reasons. Using black racial identity as a case study provides the opportunity to rethink the utility of identity in legal, political, and policy contexts, revealing the value of

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98. In exploring the idea of “black resilience,” I do not endorse the myth of the “magical Negro,” a perception of Blacks as less vulnerable to pain, more generous with forgiveness, endowed with superhuman physical capabilities and endurance, wiser and more resilient for navigating oppression, and generous with the use of these gifts in service of white people. Indeed, these myths about black people inform any number of macro- and micro-racial aggressions, including poor pain management in hospitals and increased vulnerability to police violence even among young children. See Matteo Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, 2 FRONTIERS PSYCHOL., May 2011, at 1 (finding that white observers reacted to pain suffered by black participants significantly less than to the pain of other Whites); Sophie Trawalter et al., *Racial Bias in Perceptions of Others’ Pain*, 7 PLOS ONE, Nov. 2012, at 1 (finding evidence that people assume Blacks feel less pain than Whites, a conclusion rooted in perceptions of status and the privilege or hardship that status confers); Jonathan Capehart, *It’s Tamir Rice’s Fault*, WASH. POST: POSTPARTISAN (Mar. 2, 2015), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/03/02/its-tamir-rices-fault> (detailing how, after shooting and killing 12-year-old Tamir Rice for playing with a toy gun, police officers described him as a “black male, maybe 20,” while the president of the Cleveland Police Patrolman’s Association described Rice as “menacing,” “[not] that little kid you’re seeing in pictures,” and “a 12-year-old in an adult body”).

Moreover, the impact of race and racial discrimination regarding Blacks in the United States may also be implicated in higher rates of mental illness, a phenomenon to which reports regarding increasing suicide rates among black children might attest. Sabrina Tavernise, *Rise in Suicide by Black Children Surprises Researchers*, N.Y. TIMES, (May 18, 2015), <http://www.nytimes.com/2015/05/19/health/suicide-rate-for-black-children-surged-in-2-decades-study-says.html> (articulating, as one possibility for increasing suicide rates, the possibility that “black children are more likely to be exposed to violence and traumatic stress”). Nevertheless, positive racial identity for Blacks can enhance psychological resilience in ways that should not be discounted when considering how and whether identity should be centered in anti-discrimination jurisprudence. For more on the “magical Negro” trope, see D. MARVIN JONES, RACE, SEX, AND SUSPICION 35–36 (2005) (detailing several characters, including John Coffey in *The Green Mile* and Bagger Vance in *The Legend of Bagger Vance*, as examples of the “magic negro”); THE GREEN MILE (Castle Rock Entertainment 1999); THE LEGEND OF BAGGER VANCE (Twentieth Century Fox 2000). On the perceived enhanced capacity of Blacks for forgiveness, see Julia Craven, *It’s Not Black Folks’ Burden To Forgive Racist Killers*, HUFFINGTON POST (July 1, 2015), [http://www.huffingtonpost.com/2015/07/01/forgiveness-charleston-shooting\\_n\\_7690772.html](http://www.huffingtonpost.com/2015/07/01/forgiveness-charleston-shooting_n_7690772.html); Kiese Laymon, *Black Churches Taught Us To Forgive White People. We Learned To Shame Ourselves*, GUARDIAN (June 23, 2015), <http://www.theguardian.com/commentisfree/2015/jun/23/black-churchesforgive-white-people-shame>; Stacey Patton, *Black America Should Stop Forgiving White Racists*, WASH. POST: POSTEVERYTHING (June 22, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/06/22/black-america-should-stop-forgiving-white-racists>.

identity in the struggle to dismantle structural discrimination and enhance democracy.

A. THE CURATIVE BENEFIT OF “WE”

In the context of liberatory politics, blackness is most useful when understood simply as a social construction, racing some individuals as Black in ways that undermine equality.<sup>99</sup> Although practical and ideological problems with defining and drawing the contours of black identity exist, scholarship has nevertheless recognized the potential of black racial identity to ensure social belonging and security. Scholars have characterized blackness as “crucial” to the social identities of African Americans,<sup>100</sup> while others have noted that race does not only impact one’s identity or sense of self, but rather “renders that identity meaningful, and, therefore, valuable—especially among the racially oppressed.”<sup>101</sup>

In contrast to white racial identity, which is typically not salient for Whites unless juxtaposed against non-white racial groups, racial minorities form identities around shared cultural norms, histories of immigration, or racial oppression.<sup>102</sup> Latinos, for example, might develop racial identities informed by immigration of ancestors to the United States, while Blacks might develop racial identities informed by a shared struggle against racial subordination within America.<sup>103</sup> In this sense, non-white racial identity, even when constituted of individuals from radically different ethnic groups,<sup>104</sup> can still be shaped by historical

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99. TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* 23, 209–23 (2005).

100. Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1097 (2013) (citing sociologist Michael Eric Dyson’s remarks about the possibility of a post-racist future after the election of Barack Obama as President of the United States).

101. *Id.*; see also JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* 66–67 (2012) (arguing that “[b]y addressing how race functions to dominate,” we can potentially “transform racial meanings without necessarily destroying racial identity”).

102. Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 701–02 (1996).

103. *Id.*

104. MANNING MARABLE, *BEYOND BLACK AND WHITE: TRANSFORMING AFRICAN-AMERICAN POLITICS* 186 (2009) (explaining that although native-born African Americans, Trinidadians, Haitians, Nigerians, and Afro-Brazilians have “remarkably little” language, culture, ethnic traditions, rituals, or religious affiliations in common, they are all racially “black” in the United States, united by their identification as “black” on the streets and subject to the same “pitfalls

experiences of group subjugation and the struggle to forge a more positive racial and American identity against presumptions of inferiority.

The claim to identity of non-white groups, then, cannot be disentangled from the experience of group resistance to inequality and oppression. As explained by Manning Marable, non-white racial identity in the United States is

*not an ethnic identification or culture, but an awareness of shared experience, suffering and struggles against the barriers of racial division. These collective experiences, survival tales and grievances form the basis of a historical consciousness—a group’s recognition of what it has witnessed and what it can anticipate in the near future.*<sup>105</sup>

Black Americans, for example, not only constitute a distinct cultural group, but have also experienced a history of systemic oppression as a racial minority.<sup>106</sup> “[T]heir individual identities as Blacks and as Americans are affected both by Black culture and by American racism.”<sup>107</sup> Even among scholars who reject the idea of a shared black identity,<sup>108</sup> there is recognition that the familiar sense of “we-ness,” cultivated by that shared experience, enables Blacks to empathize and provide mutual support for one another, motivates Blacks to agitate for racial and social justice, and enables Blacks to cultivate pride and dignity in the face of marginalization.<sup>109</sup>

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and prejudices built into the . . . established social order for those defined as ‘black’”).

105. *Id.* at 187.

106. Maurianne Adams, *Core Processes of Racial Identity Development*, in *NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT: A THEORETICAL AND PRACTICAL DEVELOPMENT* 209, 212 (Charmaine L. Wijeyesinghe & Bailey W. Jackson III eds., 2001) (quoting Rita Hardiman & Bailey W. Jackson, *Racial Identity Development: Understanding Racial Dynamics in College Classrooms and on Campus*, in *49 NEW DIRECTIONS FOR TEACHING AND LEARNING* 21, 22 (Maurianne Adams ed., 1992)).

107. *Id.*

108. Tommie Shelby argues that the basis of black political unity should not be a shared black identity. A shared black identity, or “thick” conception of blackness, views the mark of blackness as more than a vague social marker imposed by those outside the group, but rather as signifying something “deeper”—an identity with which individuals can engage with some measure of agency, adopting or losing the marker through individual action. This thicker conception of blackness operates through five modes based on notions of biology, ethnicity, nationality, culture, and kinship. Shelby argues, however, that this “thick” black identity is “not needed for political solidarity” and may be counter-productive to the emancipatory goals of the group. SHELBY, *supra* note 99, at 23, 209–11, 216–23.

109. *Id.* at 245.



It is accordingly of no surprise that theoretical and empirical work in psychology, sociology, and social psychology have consistently demonstrated links between racial identity and positive psychosocial adaptation.<sup>110</sup> Literature reviews on African-American identity and self-concept, for example, have found at least thirty-six percent of the literature reporting a significant positive association.<sup>111</sup> Similarly, researchers have found that a primary function of internalized racialized identity for African Americans is to buffer them against the potential deleterious impact of racism on their psychological well-being.<sup>112</sup> Accordingly, individuals for whom race is more central are more likely to report lower levels of psychological distress.<sup>113</sup> These findings are consistent with studies that use racial identity attitude scales to conclude that race centrality is associated with better mental health, and that strongly identifying with a minoritized racial identity is beneficial to young African American adults.<sup>114</sup>

Similarly, “students who strongly identify with their racial group are better able to negotiate [racially-]negative environments, deal with discrimination and prejudice, and have high self-esteem.”<sup>115</sup> Knowing this, African American parents often transmit meaning of racial status through an emphasis on ethnic and racial pride, self-development, awareness of racial barriers,

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110. Ebony McGee & Margaret Beale Spencer, *Theoretical Analysis of Resilience and Identity: An African American Engineer’s Life Story*, in THINKING COMPREHENSIVELY ABOUT EDUCATION: SPACES OF EDUCATIVE POSSIBILITY AND THEIR IMPLICATIONS FOR PUBLIC POLICY 161, 163–64 (2012).

111. Rowley et al., *supra* note 54, at 716 (citing WILLIAM E. CROSS, SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY 189–217 (1991)) (reviewing forty-five studies published between 1939 and 1987). Part of the problem in identifying more studies that show a significant positive association is researcher difficulty in explicating “the mechanism by which a strong racial identity should result in higher levels of self-esteem.” *Id.*

112. Robert M. Sellers et al., *Racial Identity, Racial Discrimination, Perceived Stress, and Psychological Distress Among African American Young Adults*, 43 J. HEALTH & SOC. BEHAV. 302, 304 (2003) (citing WILLIAM E. CROSS ET AL., AFRICAN AMERICAN IDENTITY DEVELOPMENT: THEORY, RESEARCH, AND INTERVENTION 3–64 (Reginald L. Jones ed., 1998)).

113. *Id.* at 311.

114. Interestingly, race centrality may also serve as a risk factor for perceiving more discrimination, possibly because people with high levels of race centrality are more sensitive to the presence of discrimination in ambiguous situations, because Whites are more sensitive to their high race centrality, or because their high race centrality makes race more salient for Whites, thus triggering more out-group bias behavior. *Id.* at 311–12.

115. McGee & Spencer, *supra* note 110, at 164.

and the value of egalitarianism.<sup>116</sup> For the children parented by these adults, both personal efficacy and academic performance are enhanced by proactive orientation toward racial barriers;<sup>117</sup> moreover, “African-American students with a high-awareness of racial discrimination respond to discrimination in ways that are conducive rather than detrimental to academic success.”<sup>118</sup> Studies examining this phenomenon, for example, find that high-awareness students are more likely to be both high-achieving students and the students with a strong racial identity.<sup>119</sup> In the face of discrimination, these students do not consciously or subconsciously withdraw, but instead exert more academic effort.<sup>120</sup>

Research specifically studying college students similarly explores the impact of racial socialization—“explicit and implicit messages that provide African American youth with healthy methods for coping with the realities of racism and racial hostility.”<sup>121</sup> These messages cover common themes, including the development of cultural pride and the promotion of cultural knowledge, including history, traditions, and the current state of racial oppression that African Americans face.<sup>122</sup> Moreover, these messages are positive, promoting healthy identity formation, “as well as an awareness of and constructive responses to racism without promoting hatred or discrimination toward members of other racial or ethnic groups.”<sup>123</sup> Examining these messages, researchers have found that racial socialization messages, as well as socialization messages specifically emphasizing the appreciation of cultural legacy, moderated the link between perceived discrimination and resilience among African American college students.<sup>124</sup> Students who received fewer racial socialization messages demonstrated lower resilience in response to higher levels of perceived racial discrimination.<sup>125</sup> Conversely,

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116. Phillip J. Bowman & Cleopatra Howard, *Race-Related Socialization, Motivation, and Academic Achievement: A Study of Black Youths in Three-Generation Families*, 24 J. AM. ACAD. CHILD PSYCHIATRY 134, 137–40 (1985).

117. *Id.* at 134.

118. Sanders, *supra* note 60, at 83.

119. *Id.* at 90.

120. *Id.*

121. Danice L. Brown & Tracy L. Tylka, *Racial Discrimination and Resilience in African American Young Adults: Examining Racial Socialization as a Moderator*, 37 J. BLACK PSYCHOL. 259, 262 (2011).

122. *Id.*

123. Sanders, *supra* note 60, at 91.

124. Brown & Tylka, *supra* note 121, at 274–75.

125. *Id.* at 275.

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for those students who received more racial socialization messages, higher levels of perceived racial discrimination were no longer negatively associated with resilience; and those receiving the most messages had significantly higher resilience scores.<sup>126</sup>

Blackness has functioned as an affirmation of self, but without the accompanying sense of racial superiority. Instead, in the face of white supremacy and American racism, Blacks have rejected the stigma that might attach to black identity, transforming it into a source of pride and social resilience.<sup>127</sup> Moreover, that transformation has functioned within the black community even when it would be denied externally by Whites in power.

#### B. BLACKNESS IN DEMOCRACY

Black racial identity also has value not just within the black community, but also in broader American society. The recognition of black racial identity, in both social and legal spaces, defines individuals and their relationships to others in ways that are integral to a healthy democracy.

##### 1. Democratic Recognition

Legal frameworks play both a regulatory and expressivist function in our democracy, and that expression can change over time. Identity, historically recognized in our equal protection structure as central to equality claims, has conveyed particular messages about racial group status.<sup>128</sup> Legal standing in *Brown v. Board of Education*, for example, turned African Americans into full-fledged members of the human race entitled to equal protection under the law.<sup>129</sup> Standing in *Brown* was also about the equal standing and participation of African Americans in our broader democracy. When *Brown's* plaintiffs and judges leveraged our identitarian equal protection framework in this way, it served as an authoritative declaration that Blacks—with a particular experience in the country—deserved to be heard and that their particular experience was to be recognized and validated.<sup>130</sup> When legal frameworks change, the altered structures tell new stories, allowing for different expressions that impact

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126. *Id.*

127. *Id.* at 263.

128. KARST, *supra* note 16, at 90.

129. *Id.* at 187.

130. *Id.* at 107. See also K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149, 161–63 (Amy Gutmann ed., 1994).

and frame identity development and equality claims under the law. Moving away from identity, then, is a new story that prompts both misrecognition and non-recognition for Blacks.

Demands for recognition are informed by the link between recognition and identity. Identity, or who we understand ourselves to be, is partly shaped by recognition or its absence, the latter most often in the form of misrecognition.<sup>131</sup> If individuals or groups are exposed to confining, demeaning, or contemptible reflections of themselves, they suffer psychological damage and distortion.<sup>132</sup>

Misrecognition can also take the form of erasure—a failure to be acknowledged altogether. Attempts, for example, to broaden literary canons in university humanities departments, or adopt multicultural curricula at elementary and secondary schools, are in response not just to what students are missing when their academic studies are limited to “dead white males,” but also to what students who cannot see themselves in the materials experience.<sup>133</sup> By being made invisible, students from the excluded groups are subject to the presumption that members of their group do not produce culture or knowledge worthy of focus, attention, or even consideration. This form of misrecognition can demean worth and constrain full development.<sup>134</sup> Recognition scholarship, then, underscores the importance of “mutually affirming [social relationships] that allow[] citizens to operate as equals within the confines of the social contract”;<sup>135</sup> although citizens require a fair distribution of resources in order to flourish, they also need “recognition of their humanity and uniqueness.”<sup>136</sup>

As such, the state must offer equal opportunities for recognition, ensuring that groups do not systematically suffer from misrecognition in the forms of stereotype, stigma, or erasure.<sup>137</sup> Although African Americans surely want to be recognized as more than their racial identity,<sup>138</sup> they also want recognition for

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131. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25–26 (Amy Gutmann ed., 1994).

132. *Id.*

133. *Id.* at 65–66.

134. *Id.*

135. MELISSA HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 35–36 (2011).

136. *Id.* at 36.

137. *Id.* at 37.

138. *Id.* at 37–39 (explaining that recognition scholarship emphasizes connection between individuals *and* groups, with those from marginalized groups).

their group history, culture, and struggle in the United States.<sup>139</sup> Although recognition scholarship and identity politics are critiqued as being concerned with symbols and cultural battles, rather than substance, economic battles, and the actual exercise of power,<sup>140</sup> there is nevertheless a relationship between recognition and redistribution; “recognition is not just about actualization or individual interactions,” but about “institutionalized patterns of cultural value in ways that prevent one from participating as a peer in social life.”<sup>141</sup> Ultimately, you cannot effectively and equally redistribute patterns of cultural value if you cannot accurately recognize citizens from low-status and stigmatized identities.<sup>142</sup>

## 2. Democratic Participation and Evaluation

In addition to its importance in democratic recognition, black racial identity also enhances democratic practice and inclusion. Black group identity and accompanying political solidarity has informed black emancipatory politics and progress in the United States, from abolition of slavery to the civil rights movement that dismantled Jim Crow.<sup>143</sup> Until the 1960s, race was the “decisive factor” in determining opportunities for virtually all African Americans, regardless of social and economic status.<sup>144</sup> Accordingly, it is not surprising that African Americans have had a tendency to use assessments of what was good for the status of the racial group as a proxy for what was good for themselves as individuals,<sup>145</sup> a phenomenon to which Michael Dawson refers as the “black utility heuristic.”<sup>146</sup>

Even as economic heterogeneity and mobility in the black community increase, perceptions of group interest still inform African American political behavior. The fate of group status

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139. *Id.*

140. *Id.* at 41.

141. *Id.* at 42 (quoting NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE 29 (2003)).

142. *Id.*

143. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 40–42, 49–51 (1994).

144. *Id.* at 10.

145. *Id.* at 10–11. In addition, information sources in the black community like kinship networks, civil rights organizations, and black churches were tight, “reinforc[ing] the political salience of racial interests and . . . provid[ing] information about racial group status.” *Id.* at 11.

146. This heuristic may also be applicable during various historical periods to other groups, including Jews for much of their history, or North Africans in France of the 1980s. *Id.* at 10.

“still plays a dominant role in shaping African American partisanship, political choice, and public opinion.”<sup>147</sup> Moreover, within the parameters of mainstream American politics, individual economic status plays only a small role in shaping political choice.<sup>148</sup> Although the communal nature of black politics does not prohibit political conflict within communities,<sup>149</sup> black political solidarity continues to be useful and integral to achieving “full freedom and equality that American ideals promise” for Blacks.<sup>150</sup>

Movements against both police brutality and mass incarceration serve as compelling examples. In the wake of Trayvon Martin’s death, audio and video recordings have increasingly made visible state-sanctioned abuse of people in poor and minority communities at the hands of both private citizens and police.<sup>151</sup> Using the slogan “Black Lives Matter,”<sup>152</sup> social justice activists and protestors responded to racialized vulnerability that black people experience on a daily basis, while also affirming the value of black lives.<sup>153</sup> The Black Lives Matter project ultimately

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147. *Id.* at 205.

148. Dawson notes, however, that individual economic status does play a large role in shaping African American public opinion on several key issues, including economic redistribution and “African-American political, social, and cultural autonomy from white America.” *Id.* at 204–05.

149. MICHAEL C. DAWSON, BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES 11 (2001).

150. SHELBY, *supra* note 99, at 1. Shelby also argues, however, that solidarity be informed by multi-racial and trans-institutional commitments. *Id.* at 136–41.

151. See, e.g., Mercy Benzaquen et al., *The Raw Videos That Have Sparked Outrage over Police Treatment of Blacks*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html> (last updated Aug. 19, 2017) (providing an overview of video recordings of incidents of police brutality from 2013 to 2017).

152. Some debate has surrounded the slogan. Historian Andy Seal, for example, considered the phrase a retreat, a devolution from a movement for resources framed by “Black Power” to the mere request to exist free of state-sanctioned violence. Andy Seal, *From “Black Power” to “Black Lives Matter”*, U.S. INTELL. HIST. BLOG (Nov. 28, 2014), <https://s-usih.org/2014/11/from-black-power-to-black-lives-matter>. Writer Khalil Gibran Muhammad, however, characterized Black Lives Matter as a return to first principles—the “necessary assertion of the humanity of black life by the democratic crowd beyond the legal fictions of equality.” Khalil Gibran Muhammad, *The Revolution Will Be Live-Tweeted: Why #BlackLivesMatter Is the New Model for Civil Rights*, GUARDIAN (Dec. 1, 2014), <https://www.theguardian.com/commentisfree/2014/dec/01/black-lives-matter-civil-rights-movement-ferguson>.

153. Muhammad, *supra* note 152.

served as both a “love note” to black people<sup>154</sup> and a distress signal about the heightened risk of profiling and police brutality in black communities. Although police brutality has long been an issue in communities of color,<sup>155</sup> an unapologetically identitarian movement to address police brutality as disproportionately leveled against black Americans unified and galvanized black people across class, education, and geographic lines, forcing recognition at a national scale. Similarly, understanding mass incarceration as specifically targeting black men and women has helped spark national engagement with race and criminal justice in America.<sup>156</sup>

These movements have been made stronger because of, not in spite of, their focus on racial identity. Moreover, race need not be only powerful when mobilizing against subordination. Rather, race can also work to prompt democratic participation by signaling possibility. Black voter turnout in the historic election of Barack Obama, for example, was higher than any other minority group that election cycle and also surpassed white voter turnout in the younger age groups.<sup>157</sup> “Unlike other minority groups whose increasing electoral influence has been driven mainly by population growth,” the participation of black voters was driven by rising turnout, a milestone the Pew Research Center charac-

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154. Laura Flanders, *Building Movements Without Shedding Differences: Alicia Garza of #BlackLivesMatter*, TRUTHOUT (Mar. 24, 2015), <http://www.truth-out.org/news/item/29813-building-movements-without-shedding-differences-alicia-garza>.

155. See Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1 (2015) (tracing the history of police force and violence in black communities, before arguing that police use of deadly force against unarmed black men is enabled by legal jurisprudence). See generally POLICE BRUTALITY (Jill Nelson ed., 2000) (providing a general overview of police use of force in communities of color).

156. The impact, for example, of Michelle Alexander's *The New Jim Crow* was far reaching—inspiring the creation of public groups dedicated to addressing mass incarceration, winning several awards, being assigned as required reading for incoming freshman at Brown University in 2015, and prompting literary scholarly critiques, reviews, and engagement. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); *About First Readings*, BROWN UNIV. LIBRARY, <http://library.brown.edu/create/firstreading2015/about> (last visited Oct. 12, 2017); *The New Jim Crow*, NEW PRESS, <http://www.thenewpress.com/books/new-jim-crow> (last visited Oct. 12, 2017) (listing awards granted to THE NEW JIM CROW, including the Emerson Award, and various scholarly work on the book).

157. Sam Roberts, *2008 Surge in Black Voters Nearly Erased Racial Gap*, N.Y. TIMES (July 20, 2009), <http://www.nytimes.com/2009/07/21/us/politics/21vote.html>.

terized as “notable” given both a “long history of black disenfranchisement” and voter identification laws criticized for disproportionately depressing minority voter turnout.<sup>158</sup>

Rather than signaling the country’s arrival at a post-racial moment where racial subordination no longer shaped life outcomes,<sup>159</sup> historic black voter turnout signaled possibility and promise—a vision of what more inclusive democracy could look like when long-marginalized groups are exposed to the possibility of equal access. While President Obama’s election in no way eliminated racial barriers in the United States, it did illustrate how central identity can be in signaling inclusion and belonging that results in participation. Through an identitarian legal lens, we can evaluate more positively the artificially constructed minority voting districts that Justice O’Connor refused to approve in *Shaw v. Reno*, absent explicit and egregious black voter disenfranchisement.<sup>160</sup>

Black racial identity can also play a diagnostic function in American democracy. In their book on emancipatory racial politics, Lani Guinier and Gerald Torres present race as the miner’s canary: the distress of those who are racially marginalized is “the first sign of a danger that threatens us all.”<sup>161</sup> The difficulty that working- and middle-class Blacks have in achieving financial security, for example, reflect larger problems in the economy more generally.<sup>162</sup> Black financial mobility is primarily impeded by the inability to accumulate wealth, a pattern largely dictated by both race-conscious and purportedly race-neutral policies throughout America’s history.<sup>163</sup> That denial, however, tells us

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158. Paul Taylor, *The Growing Electoral Clout of Blacks Is Driven by Turnout, Not Demographics*, PEW RESEARCH CTR.: SOCIAL & DEMOGRAPHIC TRENDS (Dec. 26, 2012), <http://www.pewsocialtrends.org/2012/12/26/the-growing-electoral-clout-of-blacks-is-driven-by-turnout-not-demographics>.

159. Conservative commentator Bill Bennett, for example, noted on the evening of Obama’s 2008 victory: “You don’t take any excuses anymore from anybody who says, ‘[t]he deck is stacked’ [or] ‘there’s so much in-built this and that.’” *Election Night ’08 Coverage Continues*, CNN (Nov. 4, 2008), <http://www.cnn.com/TRANSCRIPTS/0811/04/ec.03.html>.

160. See *Shaw v. Reno*, 509 U.S. 630, 633–57 (1993).

161. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002).

162. *Id.* at 44–49.

163. For more on how purportedly race-neutral policies marginalized Blacks, see KATZNELSON, *supra* note 78 (discussing the New Deal and GI Bill); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (discussing housing); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www>



not only about how black economic success has been impeded, but also about the failure of an American economy to support economic security and stability through any means other than intergenerational wealth transfer.<sup>164</sup> Although amplified in black communities, the same structures, or lack thereof, that deny black accumulation of wealth, also operate to the detriment of poor and working-class Whites.<sup>165</sup>

Similarly, police brutality and mass incarceration as it has impacted black people has also brought to light larger systemic problems with crime and policing in the United States. An authoritarian and militaristic style of policing and community engagement which has trickled down even into the public school system,<sup>166</sup> points to larger problems with how police officers are trained, incentivized, and rewarded in a purportedly democratic society.

Race also serves as a litmus test for defects in our democratic system, alerting us to the ways in which non-relevant factors shape political discourse and, ultimately, policy implementation. Researchers Joe Soss, Richard C. Fording, and Sanford F. Schram, for example, conducted research on poverty governance between the 1970s and 1995.<sup>167</sup> Using models that control for factors impacting welfare benefit levels, the researchers found that after the 1960s, notions regarding race significantly

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.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 (providing insight into housing policy).

164. GUINIER & TORRES, *supra* note 161, at 44–45, 49 (noting that although only thirty-nine percent of the wealthiest men in America emerged from wealthy families in 1900, the percentage moved up to sixty-eight percent in 1950 and eighty-two percent by 1970, and explaining that “the most potent determinant of economic success [in the U.S.] lies in the accumulated assets that are passed on from one generation to the next”). The problem, however, is amplified in the black community. DARRICK HAMILTON ET AL., *THE NEW SCHOOL, UMBRELLAS DON’T MAKE IT RAIN: WHY STUDYING AND WORKING HARD ISN’T ENOUGH FOR BLACK AMERICANS 3* (2015) (concluding that for Black families and other families of color, “hard work” and academic success are not associated with the same levels of wealth as amassed among Whites and that it is “the unearned birthright of inheritance or other family transfers that has the greatest effect on wealth accumulation, and . . . is the largest factor erecting barriers to wealth accumulation for people of color”).

165. HAMILTON ET AL., *supra* note 164, at 5 n.14.

166. Niraj Chokshi, *School Police Across the Country Receive Excess Military Weapons and Gear*, WASH. POST (Sept. 16, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/16/school-police-across-the-country-receive-excess-military-weapons-and-gear>.

167. SOSS ET AL., *supra* note 68, at 95–101.

informed welfare retrenchment.<sup>168</sup> Informed by pathological images of the black underclass that prevailed in political rhetoric, and enduring stereotypes about Blacks as lazy and irresponsible, benefit reductions in the period were larger in states where Blacks made up a higher percentage of the rolls.<sup>169</sup>

Other scholars have affirmed the link between race and public policy, noting that policies which benefit Blacks, but are not explicitly race-targeted, like tax breaks for job creation in poor areas or welfare programming, ultimately become racialized,<sup>170</sup> and thus more politically vulnerable.<sup>171</sup> These linkages reflect democratic defects—ways that legal analysis and accompanying political policy, ranging from changes in voting laws<sup>172</sup> to how citizens engage in political debate,<sup>173</sup> undermine the American democratic project. Using group racial identity as a diagnostic tool allows us to raise awareness about system-wide structures of power and inequality, resulting in consciousness that can potentially spark reformation and change.<sup>174</sup>

This is not to say that the social construct of race must forever be preserved in order to better track inequality. It is to say, rather, that as long as inequalities exist, we would do well to understand both how those inequalities are raced, and the potential of racial identity as a political tool to assist in identifying and overcoming those injustices.<sup>175</sup>

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168. *Id.*

169. *Id.*

170. David O. Sears & P.J. Henry, *The Origins of Symbolic Racism*, 85 J. PERSONALITY & SOC. PSYCHOL. 259, 273 (2003).

171. Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANN. REV. SOC. 135, 160 (2000) (noting that economic policies that become associated in the public's mind with race will face many of the same public opinion obstacles as those that are explicitly racial).

172. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (holding section 4 of the Voting Rights Act unconstitutional).

173. Osamudia R. James, *Diversity, Democracy and White Racial Identity: Schuette v. Coalition to Defend Affirmative Action*, 71 NAT'L LAW. GUILD REV. 1, 5 (2014) (arguing that the diversity rationale has warped public discourse regarding racial inequality in the United States, enabling white voters to eliminate affirmative action through "democratic" processes).

174. GUINIER & TORRES, *supra* note 161, at 14.

175. As explained by Guinier and Torres, although people can help to disrupt relationships between race and power without regard to their actual skin color or racial category, those who have been raced as "losers" will often be among the first to see the effects of normalized inequality. *Id.* at 17. These same people are thus well-positioned to lead movements for social justice that others will want to follow if they can frame the movements in response to conditions of injustice that warp social institutions more generally. *Id.*

## C. IDENTITY, DIGNITY, AND BLACK LIVES

In addition to the ways in which identity operates to drive the formal mechanisms of democracy and policy, identity also shapes how individuals are regarded in a democracy; identity is fundamental to dignity. The concept of dignity encompasses the idea that every human being possesses an intrinsic worth by virtue of being human, and that some ways of treating humans are either inconsistent with, or integral to, respect for the intrinsic worth of humans.<sup>176</sup> Although the idea of dignity can certainly be contemplated independently of racial identity, acknowledging and respecting the intrinsic worth of human beings requires acknowledging that their humanity has been shaped by their identity and accompanying experiences. This is especially important for minoritized identities, who, unlike Whites, are not permitted to understand their humanity through a lens uninformed by racial identity.<sup>177</sup>

One need not look very far into American culture for examples of how non-recognition of racial identity results in the denial of dignity all together. For example, as the Black Lives Matter movement gained traction, protestors, cultural commentators, and even police officers<sup>178</sup> began to respond with “All Lives Matter.” The “All Lives Matter” retort made invisible disparities in police brutality faced by Blacks in particular.<sup>179</sup> As noted by Judith Butler, however, although it is true that “all lives matter,” it is “equally true that not all lives are understood to matter,” making it important to recognize those lives that are still struggling for genuine recognition.<sup>180</sup> Failing to specifically name Blacks in their movement against police brutality when Blacks

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176. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. OF INT'L L. 655, 679 (2008).

177. Even for those who find identity burdening and seek to shed it, the effort required to step away from it is a defining experience that merits acknowledgment. See, e.g., CLIFFORD THOMPSON, *TWIN OF BLACKNESS: A MEMOIR* 1 (2015) (“I feel toward blackness the way one might toward a twin. I love it, and in a pinch I defend it; I resent the baggage that comes with it; I have been made to feel afraid of not measuring up to it; I am identified with it whether I want to be or not—and never more than when I assert an identity independent of it.”).

178. See Raymond Cowin, Opinion, *All Lives Matter*, POLICE MAG. (Apr. 10, 2015), <http://www.policemag.com/channel/patrol/articles/2015/04/all-lives-matter.aspx>.

179. George Yancy & Judith Butler, Opinion, *What's Wrong With 'All Lives Matter'?*, N.Y. TIMES (Jan. 12, 2015), <http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/>; Flanders, *supra* note 154; see also Cowin, *supra* note 178.

180. Yancy & Butler, *supra* note 179.

so disproportionately encounter police violence does not merely alienate the group, but rather erases them all together. Even in the midst of a visible struggle for equality, Blacks were told that their claims for a dignified life, free of state violence and abuse, will never be independently sufficient; their claims must be subsumed into claims that also include Whites if they are to be recognized at all.

The withholding of dignity through the rejection of identity is similarly reflected in legal doctrine. The Court's colorblindness ideology, for example, prohibits institutions from considering racial identity while permitting those institutions to take into account other forms of social identity. As such, the colorblindness ideology stigmatizes and demeans the dignity of those who identify by race, denying them the full expression of their identity, and significantly restricting their agency regarding how they present themselves to the state, and to others.<sup>181</sup>

Outside the context of race, the Court's same-sex marriage jurisprudence locates a right to same-sex marriage not in the equal status of gays and lesbians, but rather on the right of everyone to access the dignity of marriage.<sup>182</sup> By framing the right so generally, Justice Kennedy hoped to prompt members of the majority to contemplate the potential pain of denied access in their own lives and to respond in sympathy for those actually denied.<sup>183</sup>

Full dignity, however, requires more than drawing on familiarity and self-interest. Rather, equality requires that individuals believe others are owed dignity and respect *even when* they are not like us—and that the parts of their identity which differ from ours are nevertheless dignified, worthy, and valuable.<sup>184</sup> In

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181. Elise Boddie, *The Indignities of Colorblindness*, 64 UCLA L. REV. DISCOURSE 64, 67 (2016).

182. “The fundamental liberties protected by the [Due Process Clause of the Fourteenth Amendment] . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). “The lifelong union of a man and woman always has promised nobility and dignity to all persons . . .” *Id.* at 2594. “There is dignity in the bond between two men or two women who seek to marry . . .” *Id.* at 2599. “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.” *Id.* at 2608.

183. Yoshino, *supra* note 23, at 794 (discussing the appeal of universal claims like dignity or liberty, which “performs the empathy it seeks”).

184. See Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290–91 (1991) (decrying the conventional legal command that “like cases be treated alike” for implicitly conveying that “women . . . are entitled to equal treatment mainly to the degree they are the same as men.”). The

this sense, then, bestowing dignity must be specifically responsive to the basis on which dignity was denied. It is through this acknowledgement that we broaden our conception of humanity and genuinely recognize intrinsic worth of all humans.

Ultimately, despite the impoverished view of minoritized identity embedded in our equality doctrine, affirming black racial identity can positively impact individuals, can inspire and encourage democratic participation, and is central to notions of dignity.

### III. USING IDENTITY

Addressing negative conceptions of racial identity is certainly beneficial for social reasons that are tethered to, but nevertheless distinct from, formal law and policy. Less stigmatizing black racial identity, for example, can address the faulty and ingrained mental associations between notions of deviance and racial identity performance<sup>185</sup> that subject Blacks to racial disparities in contexts ranging from school discipline<sup>186</sup> to criminal

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movement to create empathy by presenting marginalized identities as “just like” non-marginalized identities can backfire, reaffirming hierarchy in undesirable ways. The marriage equality movement, for example, featured White, upper-class plaintiffs in an attempt to secure success in the court of public opinion. In the process, however, wealthy, White, two-parent households were further inscribed as “normal” and deserving, while people of color, the poor, and individuals within alternate family arrangements were erased from the images representing the marriage equality movement, and their identity-informed concerns ignored. Scott Skinner-Thompson, *The “Straight” Faces of Same-Sex Marriage*, SLATE (Apr. 24, 2015), [http://www.slate.com/blogs/outward/2015/04/24/the\\_straight\\_faces\\_of\\_same\\_sex\\_marriage.html](http://www.slate.com/blogs/outward/2015/04/24/the_straight_faces_of_same_sex_marriage.html) (describing the commitment of same-sex marriage movement attorneys to presenting White, professional, middle- to upper-class, and widowed plaintiffs before the Court, even after it was clear that the Court was prepared to proclaim marriage equality the law of the land, and thus missing an opportunity to transition from “a movement about marriage to a movement about justice”); see also Darren Hutchinson, “*Not Without Political Power*”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1021–23 (2014) (detailing the disproportionate impact of poverty, homophobia, and racism on low-income gays and lesbians of color).

185. Dress, speech patterns, and even artistic preferences can dictate whether individuals place black men in the “good black man,” or “bad black man” categories. The former distances himself from blackness and embraces white norms, while the latter is crime-prone and hypersexual. Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 875–85 (2006) (arguing that bipolar representations of heterosexual black men as either crime-prone and hypersexual, or “good,” are used to help resolve the white mainstream’s post-Civil Rights anxiety about inclusion and exclusion of black men).

186. Blacks are overrepresented in public school suspensions and corporal

justice.<sup>187</sup> Moreover, equality movements anchored in identity, from Black Power to Black Lives Matter, have made important socio-political gains, pushing civil rights leaders and presidential candidates alike to name and confront racial privilege, systematic racism, and anti-black structural discrimination on national stages.<sup>188</sup>

Negative conceptions of racial identity, however, also shape formal law in ways that warp equality doctrines and undermine responses to structural race discrimination. The particularities of identity constructs are needed to counter racial asymmetries in the law that are hidden when universal frameworks are employed. Moreover, positive legal engagement with black racial identity in ways that do not reinscribe notions of black deficit, and are instead informed by pride and celebratory blackness, is key to crafting successful responses to structural discrimination.

#### A. A NEED FOR THE PARTICULAR

A legal commitment to universality has developed in the void left by the Court's shift away from identity. Universal approaches to equality are informed by a movement away from identity groups as forming the baseline for anti-discrimination and equality law. As such, all individuals, without reference to their identity, are guaranteed a set of rights, benefits, or protections.<sup>189</sup>

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punishment, with schools (1) more likely to implement extremely punitive discipline and zero-tolerance policies; and (2) less likely to use mild discipline and restorative techniques, as the percentage of black students enrolled increases. These relationships operate independently of economic status, gender, crime salience, urban residence, and teacher training. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1240; Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 35–41 (2010).

187. See ALEXANDER, *supra* note 156 (describing the criminal justice system's impact on African American communities).

188. See *infra* note 199 and accompanying text. Although often perceived as distinct, scholars increasingly characterize the civil rights movement and the Black Power movement as interconnected movements that played off of each other.

189. See, e.g., Bagenstos, *supra* note 21, at 2842–43 (defining a “universalist approach” to civil rights law as one that either guarantees a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes highlighted by our anti-discrimination laws); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1221–22 (2011) (identifying a “universal turn” in workplace protections as part of a “larger trend of expanding civil rights protections beyond rules that prohibit discrimination to rules of universal applicability”). There is also debate about

Vulnerability theory, for example, mobilizes around a concept of shared, inevitable vulnerability among all humans.<sup>190</sup> It responds to the realization that disadvantage, produced independently of racial and gender biases in many instances, provides an important political tool.<sup>191</sup> Under the vulnerability framework, institutional arrangements are the targets of protest and political mobilization, thus eliminating the need to have interest groups organized around identities.<sup>192</sup>

The concept of dignity similarly moves away from identity, and is often deployed in human rights discourse.<sup>193</sup> U.S. courts have been influenced by the idea of dignity, with scholars like Kenji Yoshino arguing that the Supreme Court has responded to pluralism anxiety by moving away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to “dignity claims” rooted in the due process guarantees of the same;<sup>194</sup> these claims reflect the interconnectedness of equality and liberty.<sup>195</sup>

Identity constructs, however, are still needed to destabilize and ultimately eliminate asymmetries in law and policy. Non-identitarian frames, for example, fail to engage or interrogate the dual realities of entrenched deficit and affirmation in racial identities for Blacks and Whites, respectively. In their focus on all citizens, appeals to universal equality do not disrupt the implicit understanding of Whites as *the* universal subject, and thus

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what constitutes a universal movement. Labor movements, for example, might be considered a departure from identity, although plausibly still grounded in the identity category of the poor or working-class. The presidential campaign of 2016 highlighted uncertainty about such movements, with Senator Bernie Sanders campaigning on a set of economic redistribution policies which sparked debate about what sorts of movements—race or economics—would improve long-term outcomes for Blacks in the United States. See Cedric Johnson, *An Open Letter to Ta-Nehisi Coates and the Liberals Who Love Him*, JACOBIN (Feb. 3, 2016), <http://jacobinmag.com/2016/02/ta-nehisi-coates-case-for-reparations-bernie-sanders-racism>; Lester K. Spence, *Reparations and the Racial Residual*, BALTIMORE CITY PAPER (Feb. 2, 2016), <http://www.citypaper.com/news/mobtownbeat/bcp-020316-reparations-lester-spence-20160202-story.html>.

190. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 17 (2008).

191. *Id.*

192. *Id.*

193. The language of dignity has been central in both the United Nations Charter and the Universal Declaration of Human Rights. McCrudden, *supra* note 176, at 656.

194. Yoshino, *supra* note 23, at 748–49.

195. These claims are further characterized as either “liberty-based” or “equality-based” dignity claims, depending on whether the liberty or equality dimension of any one claim is ascendant. *Id.* at 749.

fail to account for how white racial identity is privileged in the law, even as it is made invisible. Calls to move away from identity, without making the affirmation of white racial identity less opaque, will only leave white supremacy undisturbed, while eliminating a useful tool to identify and focus on racial subordination of non-Whites.

Moreover, the move from the particular to the universal, and from identity to dignity or vulnerability, has the potential to further distance law and legal analysis from the continuing significance of identity for racialized minorities and from the process of bestowing full dignity. In the shift, racialized minorities are misrecognized—their identities deemed insufficiently compelling as central to claims for equality and dignity, and devoid of value for identity holders at all. This, in turn, limits societal imagination as we contemplate solutions to inequality in our communities.<sup>196</sup>

Identity scholars and activists, many of whom grapple with the impact of racial identity in their own lives, have not pushed for a shift from the particular to the universal—in fact, many have forcefully argued against it.<sup>197</sup> Founders of Black Lives Matter, for example, could have headlined the movement “All Lives Matter,” or some other slogan focused on the universal harm of police brutality. Instead, they chose, even in the midst of a protest movement focusing on subordination and dehumanization of blackness, to characterize blackness as positive and

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196. Nor does a shift to universality placate Whites suffering from pluralism anxiety, racial exhaustion, or both. The “anti-balkanization” approach, for example, that has informed limitations placed on race-conscious remedies did not successfully prevent additional rounds of challenges to affirmative action in 2012 and 2015. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 922 (2008) (defining racial exhaustion); Yoshino, *supra* note 23, at 751–52 (defining pluralism anxiety); see *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (holding that a white student was not discriminated against by a school’s admission process); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (remanding white student’s discrimination claim because the Fifth Circuit did not apply the strict scrutiny test to the school’s admission process).

197. See, e.g., Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339 (2015) (rejecting vulnerability theory for its post-identity approach to identity-based problems such as racial profiling); Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1 (2015) (critiquing the “anti-balkanization” aims of universal constructs like dignity as actually facilitating racial domination).



valuable in an example of self-identification as a source of validation and identity.<sup>198</sup> And justifiably so—the decidedly identitarian movement has centered the concerns of black people more forcefully than any movement in recent history, including advocacy in support of affirmative action or voting rights.

Indeed, Black Lives Matter activists forced the 2016 presidential election candidates to engage, however reluctantly, with questions about mass incarceration, police brutality, access to education, income inequality, structural discrimination, systemic racism, racial privilege, and intersectionality during their campaigns.<sup>199</sup> Even Supreme Court Justices have been influenced by the movement, infusing judicial opinions with the language and themes of the protests.<sup>200</sup> At the same time, public

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198. Harris, *supra* note 23, at 1766.

199. See, e.g., Kali Holloway, *Hillary Clinton Tries To Grasp 'Intersectionality' To Understand the Mix of Race, Gender and Class—Does She Get It?*, ALTERNET (Mar. 14, 2016), <http://www.alternet.org/gender/hillary-clinton-tries-grasp-intersectionality-understand-mix-race-gender-and-class-does-she> (detailing Clinton's engagement with the concept of intersectionality); Victoria M. Massie, *Hillary Clinton Said "Systemic Racism" in Tonight's Speech. That's Major*, VOX (July 29, 2016), <http://www.vox.com/2016/7/29/12320118/hillary-clinton-speech-systemic-racism>; *Issues: Racial Justice*, BERNIE SANDERS (2016), <https://berniesanders.com/issues/racial-justice> (revealing a more detailed racial justice platform after a series of challenges by Black Lives Matter activists); Carimah Townes, *How the Democratic Presidential Candidates Responded to the Black Lives Matter Question*, THINK PROGRESS (Oct. 14, 2015), <https://thinkprogress.org/how-the-democratic-presidential-candidates-responded-to-the-black-lives-matter-question-91ce0cf2d588> (detailing the responses of Democratic presidential candidates to questions about the Black Lives Matter movement); John Walker, *Did Hillary Clinton Blow the White Privilege Question?*, SPLINTER (Jan. 11, 2016), <http://splinternews.com/did-hillary-clinton-blow-the-white-privilege-question-1793854022> (detailing Hillary Clinton's response to a town hall meeting question about white privilege in her life).

200. In her dissent to *Utah v. Strieff*, Justice Sotomayor not only cited to authors who write about race and racial subordination, but also critiqued state-sanctioned racial profiling and police brutality by reference to rhetorical themes deployed by the movement. 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (“[I]t is no secret that people of color are disproportionate victims of this type of scrutiny . . . . By legitimizing the conduct that produces this double consciousness, this case tells everyone . . . that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of the carceral state . . . the countless people who are routinely targeted by police . . . are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere . . . . Until their voices matter too, our justice system will continue to be anything but.”).

displays of celebratory blackness continue to enter the mainstream.<sup>201</sup>

The absence, therefore, of voices of color in advocating for a jurisprudential shift from the particular to the universal is of no surprise. Moreover, given the work racialized identities have put into turning their stigmatized racial identities into sources of resilience, a turn away from identity is all the more troubling. In light of the state's refusal to bestow dignity on black communities, black individuals and families had to bestow dignity on themselves, often through messages of racial socialization. Although this bestowal through positive racial identity formation was not properly recognized in social science literature, communities of color nevertheless used the law, among other means, to make claims for protection, for recognition, and for affirmation; to lay claim to identity, and thus dignity. Shifts to universal constructs that do not fully account for this work not only undermine these hard-fought claims, but are acts of dispossession.

#### B. REFRAMING THE "HARMS" OF RACIAL CLASSIFICATION

Successfully preventing, however, a shift to universal constructs is insufficient. Rather, anxieties about black racial identity that inform legal thought regarding racial classifications, stigma and essentialism, must also be addressed, lest the positive potential of identity be undermined.

##### 1. Stigma

When assessing the legitimacy of both discrimination claims and state attempts to remediate racial inequality, courts are informed by two complementary notions regarding the impact of identity. The first is the dominant way of thinking about racial identity among Whites—that of having no identity. The second is the deficit-oriented frame through which we typically view minoritized identity.

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201. See, e.g., *Remarks by the President at Howard University Commencement Ceremony*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (May 7, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/05/07/remarks-president-howard-university-commencement-ceremony> ("First of all . . . be confident in your heritage. Be confident in your blackness.").

“Transparency” is the failure of Whites to recognize their own racial identity, as well as a tendency to assume that the experiences of privileged Whites are normative.<sup>202</sup> Unlike racially minoritized groups that form racial identities around shared cultural norms, racial oppression, or histories of oppression, the racial identities of white Americans typically become salient only when juxtaposed against other non-white racial groups.<sup>203</sup> White students, for example, often don’t understand racism as affecting them because they are not people of color; they do not see “whiteness” as a racial identity.<sup>204</sup>

At the same time, non-white racial identity has historically been the basis on which individuals have been denied access to quality housing, education, job opportunities, and healthcare, with black racial identity, in particular, understood as degraded

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202. Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–73 (1993) (describing the transparency phenomenon).

203. Davis, *supra* note 102, at 701–02. Despite everyday transparency, white racial identity has, of course, been salient at key points in the history of the Americas. Theodore Allen has argued that the bourgeoisie response to the potential for black-white labor solidarity in the early decades of the eighteenth century was to cultivate a sense of white racial identity to which social privileges could attach. Today, race may again be taking on heightened significance for white Americans. THEODORE W. ALLEN, *CLASS STRUGGLE AND THE ORIGIN OF RACIAL SLAVERY: THE INVENTION OF THE WHITE RACE* (2006). Reverse discrimination claims have prompted litigation, with Whites increasingly alleging not only that they are discriminated against on the basis of race, but that discrimination against Whites is a bigger problem than discrimination against Blacks. FRED L. PINCUS, *REVERSE DISCRIMINATION: DISMANTLING THE MYTH*, at x–xi, 3–9 (2003); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215 (2011); *Does Affirmative Action Punish Whites?*, NBC NEWS (Apr. 28, 2009), [http://www.nbcnews.com/id/30462129/ns/us\\_news-life/t/does-affirmative-action-punish-whites](http://www.nbcnews.com/id/30462129/ns/us_news-life/t/does-affirmative-action-punish-whites) (describing recent reverse discrimination cases). Moreover, debate continues about the extent to which Donald Trump’s election as President was rooted in the grievances of white Americans. Mona Chalabi, *Trump’s Angry White Men—and Why There Are More of Them Than You Think*, GUARDIAN (Jan. 8, 2016), <https://www.theguardian.com/us-news/2016/jan/08/angry-white-men-love-donald-trump> (describing Trump’s appeal among middle-aged, working or middle-class men). *But see* Heather Digby Parton, *The Truth About Donald Trump’s Angry White Men: Inside the Media Narrative that the Media Doesn’t Understand*, SALON (Mar. 28, 2016), [http://www.salon.com/2016/03/28/the\\_truth\\_about\\_donald\\_trumps\\_angry\\_white\\_men\\_inside\\_the\\_media\\_narrative\\_that\\_the\\_media\\_doesnt\\_understand](http://www.salon.com/2016/03/28/the_truth_about_donald_trumps_angry_white_men_inside_the_media_narrative_that_the_media_doesnt_understand) (arguing that angst about “misunderstood and underserved” white men is decades-old, dating back to the 1960s, and continuing throughout the 1970s to the present).

204. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women’s Studies*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 291, 297 (Richard Delgado & Jean Stefancic eds., 1997).

and inferior.<sup>205</sup> Accordingly, categorizations regarding racial identity are typically considered inherently suspect because of the potential suggestion that either members of a particular identity group are unfit to receive a benefit distributed by the state, or that receipt of the benefit reflects erroneous stereotypes regarding incompetency and dependency among members of the group.<sup>206</sup>

It is no surprise then, that legal analysis of race-conscious policies proceeds from the conclusion that the racial classifications that necessarily underlie such policies are necessarily stigmatizing and harmful, and that state recognition of identity group membership is inherently undesirable. Concerns about black stigma are addressed in virtually all affirmative action cases before the Court.<sup>207</sup> In a dissenting opinion to *Grutter v. Bollinger*, for example, Justice Thomas suggested that stigma exists even when the stigmatized are actually “beneficiaries” of race-conscious state action, noting that, “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.”<sup>208</sup> Justice Thomas further noted that stigma is an important factor when assessing affirmative action because “either . . . [race-conscious state action] . . . did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or did not, in which case asking the question un-

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205. Those at the bottom of the hierarchy are subjected to a tainted (or stigmatized) identity. In the United States, the stigma particularly falls on those ascribed the identity “black.” Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 20 (2000); see also Gowder, *supra* note 6, at 339–54 (cavassing social science literature illustrating the stigma attached to black racial identity, and using a cognitive hierarchical model to argue that “the notion that blackness is worth less than whiteness seems to be built into the American psyche”).

206. Rubin, *supra* note 205, at 20–21. Of course, there are also concerns that racial identity is being used to *benefit* a particular racial group, although “benefit” for a white racial group is less likely to be stigmatized as due to laziness, unwarranted dependency, or inherent incapacity; see Girardeau Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 35–36 (finding that virtually no affirmative action program had ever been struck down on account of the way it stigmatizes Whites).

207. Spann, *supra* note 206 (finding that the question of whether affirmative action stigmatizes or stereotypes its intended beneficiaries is discussed in virtually all affirmative action decisions).

208. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting in part).

fairly marks blacks who would succeed without discrimination.”<sup>209</sup>

Stigma is considered even in race-conscious programs that do not take race into account for purposes of individual assessment. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Ninth Circuit affirmed a controlled-choice school assignment plan in which race was considered whenever the racial demographics of particular schools began to skew toward white or non-white racial isolation.<sup>210</sup> In a concurring opinion, Judge Kozinski noted that the controlled-choice plan had none of the problems of typical race-conscious affirmative action programs: the plan was not meant to suppress minorities, nor did it have that effect, as the plan was meant to promote integration; there was no attempt to give a particular group additional political power based on skin color; there was no competition among races, and no race was given preference over another; and although denial of preferred school assignment might have been disappointing, it bore no relationship at all to that individual student’s aptitude or ability.<sup>211</sup>

On review by the Supreme Court, however, the controlled-choice plan was struck down as unconstitutional.<sup>212</sup> And in a concurring opinion meant to carve out spaces in which race-conscious school assignment plans might be permissible, Justice Kennedy cautioned against the harms of defining students by race.<sup>213</sup> Justice Kennedy warned that “reduc[ing] [an] individual to an assigned racial identity for differential treatment is among the most pernicious actions” government can take, as our constitution insists that “the individual, child or adult, can find his own identity, can define her own persona . . . without state intervention that classifies on the basis of his race or the color of her skin.”<sup>214</sup> In cautioning against the problems of essentialism that are typically assumed to accompany identity, Justice Kennedy also implicitly trades on the “stigma” that may follow when individuals are categorized as members of minoritized groups.<sup>215</sup>

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209. *Id.*

210. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *rev’d*, 551 U.S. 701 (2007).

211. *Id.* at 1194 (Kozinski, J., concurring).

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

213. *Id.* at 782 (Kennedy, J., concurring).

214. *Id.* at 795–97.

215. *Id.* at 798.

How might these cases, however, have turned out if black racial identity was perceived as curative, protective, and valuable for people of color? Indeed, research on the impact of “stigma” on students of color suggests that they themselves generally do not feel stigmatized by either race-conscious admissions policies or their identification as black. In *Shape of the River*, researchers William Bowen and Derek Bok documented the impact of access to academically selective colleges and universities as facilitated by race-conscious admissions policies on minorities.<sup>216</sup> Drawing on a forty-year longitudinal study of more than 80,000 undergraduate students who matriculated at twenty-eight academically selective colleges and universities in the fall of 1976 and the fall of 1989, research found that, although more than a few black students “unquestionably suffer some degree of discomfort from being beneficiaries of the admissions process,” the beneficiaries themselves ultimately do not think they have been harmed as a result of the policies.<sup>217</sup>

In fact, seventy-five percent of the 1989 matriculates who scored over 1300 on their SATs believed that their colleges *should* place a “great deal” of emphasis on racial diversity, while seventy-seven percent of black graduates who ranked in the top third of their class were “very satisfied” with their undergraduate educational experience,<sup>218</sup> thus undermining the assertions of Justice Thomas and others that high-performing minorities will always suffer insecurity.<sup>219</sup> Furthermore, researcher Jennifer Hochschild reports that while four percent of “well-off” Blacks believe affirmative action hurts recipients, fifty-five percent of the same group believes affirmative action helps recipients.<sup>220</sup> If black students are stigmatized, it has neither dampened their commitment to race-conscious admission policies nor left them unsatisfied with their undergraduate experience.

To be sure, black academics and jurists have argued that race-conscious admissions policies “demean” people of color by perpetuating stereotypes of black people as unable to compete

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216. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

217. *Id.* at 265.

218. *Id.*

219. *See Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting in part).

220. BOWEN & BOK, *supra* note 216, at 265.

with Whites.<sup>221</sup> The stigma of “racial inferiority” shouldered by people of color, however, predates race-conscious programs, and is linked, not to solutions that try to respond to the white supremacy that prompted that stigma, but to white supremacy itself.<sup>222</sup>

Moreover, concerns about stigma are linked exclusively to enduring and impoverished views about black racial identity. The Court does not, for example, engage the curative aspects of black racial identity.<sup>223</sup> And, the Court rarely, if ever, engages questions about whether race-conscious policies meant to wrest away unearned white privilege and advantage stigmatize self-identifying Whites. Similarly, the *Brown* court did not engage the stigmatizing harm that comes from allowing Whites to maintain a segregated school system which subordinated people of color.<sup>224</sup> Indeed, equal protection doctrine does not engage white stigma because it responds exclusively to “intentional” discrimination, ensuring that even Whites who are complicit in “unintentional” discrimination will not be stigmatized as racist.<sup>225</sup> Instead, discussion regarding the impact of racial identity categories and race-conscious initiatives on Whites is typically informed by the trope of “innocent Whites” who unfairly shoulder the burden of race-conscious programs.<sup>226</sup>

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221. See, e.g., *Grutter*, 539 U.S. at 354 (Thomas, J., dissenting in part) (suggesting that black people who take positions in the highest places of government, industry, or academia must be content with whether their skin color played a role in their advancement); STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 50 (1991) (“[T]he durable and demeaning stereotype of black people as unable to compete with white ones is reinforced by advocates of certain forms of affirmative action.”).

222. See, e.g., CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 129–30 (1997) (encouraging minorities to recognize white supremacy as “the real source of the stigma and confront it directly”).

223. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (affirming the Court’s negative view on racial classifications by calling such policies “pernicious”).

224. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

225. See *supra* notes 28–30 and accompanying text.

226. The Court has affirmed this narrative in a line of affirmative action cases. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (affirming that “there are serious problems of justice connected with the idea of preference itself,” and that “[e]ven remedial race-based government action generally ‘remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit’” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298, 308 (1978))); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal*

Courts are capable, then, of embracing alternate conceptions of racial identity, especially if one considers the ways that white racial identity is typically framed. Ultimately, legal actors should take cues from the research reflecting the value of black racial identity as articulated by black people. Black people are neither ashamed of blackness, nor stigmatized by their identification with either their racial identity or race-conscious programs. If courts engage positive racial identity, concerns about stigma in the law recede, undermining implicit assumptions regarding blackness that inform our assessments of stigma, and strengthening the popular and legal support for race-conscious programming.

## 2. Essentialism

In the late Nineteenth century, W. E. B. Du Bois advocated for the conservation and cultivation of racial identities and communities, arguing for recognition and validation of a unique black experience from which important contributions to civilization and humanity could be drawn.<sup>227</sup> At the end of his essay, *The Conservation of Races*, Du Bois wrote:

We believe that the Negro people, as a race, have a contribution to make to civilization and humanity, which no other race can make . . . .

We believe it the duty of the Americans of Negro descent . . . to maintain their race identity until this mission of the Negro people is accomplished, and the ideal of human brotherhood has become a practical possibility.<sup>228</sup>

Du Bois's arguments are justifiably subject to legitimate concerns that affirming identity investment through our legal frameworks, equal protection or otherwise, may reify, conserve,

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remedies that work against innocent people, societal discrimination is insufficient and over-expansive.”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (highlighting the unfairness of asking “innocent persons . . . to endure . . . [deprivation as] the price of membership in the dominant majority”). See generally Osamudia James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014) (arguing that the diversity rationale affirms and aggravates this phenomenon, thus undermining both the development of positive white racial identity and hindering attempts in higher education to maximize diversity among students).

227. Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, 12 CRITICAL INQUIRY 21, 24 (1985).

228. *Id.* (citing W. E. B. Du Bois, *The Conservation of Races*, in W. E. B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES 1890–1910, at 84 (Philip S. Foner ed., 1970)). Du Bois was motivated by a desire to determine the meaning and “truth” about race, wrenching it from Whites who had defined it up until then, and turning it into a source of pride and solidarity for Blacks. *Id.* at 22–24, 36.



or essentialize the idea of race in troubling ways.<sup>229</sup> Indeed, much of popular discourse, political rhetoric, research, and public policy are grounded in false notions of race as a biological fact<sup>230</sup> or social reality with clearly cut delineations.

Admittedly, in an attempt to create a flexible doctrinal framework, legal actors must oversimplify identity at the cost of more complex and nuanced understandings.<sup>231</sup> Effective identity politics require not only that Blacks be allowed to live a dignified life, or be treated with equal dignity despite being black, but that Blacks be respected *as Blacks*.<sup>232</sup> Accordingly, scholars rightly raise concerns that such a goal creates scripts that go along with the identity—specific requirements regarding black identity expression.<sup>233</sup>

Essentialism, however, cannot necessarily be avoided when navigating legal claims for racial equality. Although it is true that “bureaucratic categories of identity must come up short before the vagaries of actual people’s lives,”<sup>234</sup> it is also true that essentialization is not so much about what every black person is, but about what every black person encounters. Although class, education, wealth, language, and even geography impact how anti-blackness is perceived or experienced, both navigating a racialized identity and encountering anti-blackness are ultimately phenomena to which all Blacks are exposed regardless of whether or not they choose to engage it.

Moreover, identity claims in the law are made to counter anti-blackness, regardless of whether every single black person experiences or performs blackness in the same way. Accordingly, identity does important work in service not only of racial justice,

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229. See Yoshino, *supra* note 23, at 795 (“[W]hen courts protect a trait as part of a group’s identity, they strengthen the very stereotypes they mean to disestablish.”).

230. See, e.g., DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011) (examining how the myth of biological race is advanced by purportedly cutting-edge science, race-specific drugs, and DNA bases, all of which ultimately promotes inequality).

231. Lucas, *supra* note 23, at 1628 (citing MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW* 40–41 (1997)) (“[G]aps and conflicts among self-identification, internal group membership practices, and external, oppressive assignments have given rise to poignant and persistent narratives of personal and political pain and struggle . . . [but also] inconsistent meanings of group membership.”).

232. See Appiah, *supra* note 130, at 161; see also *supra* notes 176–85 and accompanying text.

233. Appiah, *supra* note 130, at 161–62.

234. *Id.* at 163.

but also in democratic recognition and the bestowal of dignity. To the extent that racial marginalization occurs consistently across personal and political narratives of pain and struggle,<sup>235</sup> embedding notions of identity in our legal framework is not an issue of essentialization, but rather an accurate reflection of social construction. If so, the question is not whether essentialism is bad, but whether it can be considered temporary and contingent, and, if so, “how, where, and by whom is it being deployed.”<sup>236</sup>

Again, understanding our perceptions of minoritized racial identities is key. Our deficit-oriented approach to identity in general, and minoritized identity in particular, causes legal actors and policymakers to embed in the law the notions of racial identity informed primarily by the “harm” of being raced Black. These negative notions then inform essentialism concerns. If, however, we import more positive notions of black racial identity—absent the automatic and exclusive concern with stigma—essentialism concerns are mitigated, resulting in a more clear-eyed assessment of identity.

Identity is more than “inscri[ption] in the law and in other political registers [the] historical and present pain” in which people become invested.<sup>237</sup> Rather, recognition of identity and its accompanying investment for non-Whites serves as acknowledgement of the ongoing salience of race in a way that allows for proper democratic recognition and state-sponsored dignity. This understanding of racial identity could be, problematically, a “blackness that whiteness created,”<sup>238</sup> a suggestion that minoritized racial identity is always primarily a reaction to racial subordination by Whites. Admittedly, responses to racial marginalization do inform identity development.<sup>239</sup> But the value of identity, and the way that identity can positively function in the

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235. MINOW, *supra* note 231, at 41.

236. Trina Grillo, *Anti-Essentialism and Intersectionality: Tools To Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 21 n.26 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990) (“Even a jurisprudence based on multiple consciousness must categorize . . . . My suggestion only is that we make our categories explicitly tentative, relational, and unstable . . . .”); Harris, *supra* note 23, at 1763 (“The questions pertaining to definitions of race then are not principally biological or genetic, but social and political: what must be addressed is who is defining, how is the definition constructed, and why is the definition being propounded.”).

237. See Brown, *supra* note 23, at 400.

238. I thank my colleague, Charlton Copeland, for posing this question and insisting that I grapple with a response.

239. See *supra* notes 99–127 and accompanying text.

law to ensure democratic recognition and dignity, are nevertheless factors for which scholars must account when assessing identity.

Ultimately, the attempts of Du Bois and others to understand and develop black racial identity outside of a white gaze cannot be ignored. Minoritized identities do not depend on exclusion for validation, but they do demand respect both for the identity and resilience that exclusion has required they produce and a legal architecture that is responsive to and affirming of that production.

### C. RETHINKING RESPONSES TO STRUCTURAL DISCRIMINATION

Reframing legal thought regarding identity, stigma, and essentialism will lead to a rethinking about responses to structural discrimination. An automatic tendency to understand racial identity as impoverished or inherently negative heavily influences the nature of solutions proposed in response to structural racism and discrimination.<sup>240</sup> Even among legal actors committed to progressive outcomes, solutions tend to invoke parity without an accompanying commitment to integrity of community and identity. Mass incarceration movements rightly focus on criminal justice disparities, but discussion regarding the value of black racial identity separate and apart from those disparities is absent. Judicial decisions decrying blatant racial discrimination miss opportunities to celebrate the critical consciousness of minoritized identities that can inform their societal contributions.<sup>241</sup> These imbalances are informed by ingrained beliefs

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240. Structural inequality refers to unexamined but impactful cultural, political, and social patterns and practices that, although not easily provable as intentional, nevertheless result in material and psychic inequality, and is perpetuated through the transmission of “cultural beliefs, historical legacies, and institutional policies within and among public and private organizations.” William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 5 (2011).

241. See Gotanda, *supra* note 11, at 57–58 (arguing that in the Supreme Court’s rejection of a Florida trial court’s decision to modify a white mother’s custody of her child after she married a black man, the Court failed to affirm the possibility that a black stepfather might offer positive value to a child on account of the bicultural environment to which he contributed, and critiquing the Court for “simply lack[ing] the imagination to consider and separate the subordination dimension of race . . . from the positive concept of culture-race”). The one exception, of course, is the diversity rationale, where the Court recognizes that value of the contribution for enhancing the intellectual atmosphere at predominantly white institutions of higher education. See James, *supra* note 226. The framing of this contribution—essentially one of service—can also be problematic. *Id.*

about the poor value of minoritized identity that undermine solutions for structural inequality and impose obligations on the subordinated that result in a loss of identity.

Much has been made, for example, of the necessity of housing and school desegregation as key to ending the education and opportunity gaps for people of color. Housing segregation concentrates poverty in black neighborhoods, exposing black people to the economic, educational, and community instability that often accompanies low-income neighborhoods.<sup>242</sup> In contrast, poor Whites are more likely to be more evenly dispersed among financially stable communities, ensuring their access to the superior educational and work opportunities that can help permanently lift them out of poverty.<sup>243</sup>

In response, state- and local-run programs often attempt to move low-income families out of poor neighborhoods into more economically stable communities. Notwithstanding the significant material and psychic benefits that come from opportunities to move to safer and more economically stable environments, these programs pay insufficient attention to the meaning of a move to whiter neighborhoods and suburbs for the black families who make the change. Researchers James Rosenbaum and Leonard Rubinowitz have studied families from the Gautreaux Initiative, a Chicago housing program that provided vouchers to some of the city's black residents to move to white suburbs.<sup>244</sup> Given the racially charged nature of the 1970s during which the families moved, families encountered racially motivated street harassment and hostility.<sup>245</sup> Some families, having moved to

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242. See Paul A. Jargowsky, *The Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, CENTURY FOUND. (Aug. 7, 2015), <https://tcf.org/content/report/architecture-of-segregation> (reporting on racial disparities in poverty, with more than one-in-four poor Blacks, and nearly one-in-six of poor Hispanics, living in neighborhoods of extreme poverty, compared to only one-in-thirteen of poor Whites).

243. *Id.*

244. LEONARD RUBINOWITZ & JAMES ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000).

245. *Id.* at 96–102, 106–07.

neighborhoods that were over ninety percent white,<sup>246</sup> were disoriented by the sea of white faces that suddenly surrounded them.<sup>247</sup>

Other families had decidedly mixed experiences, reporting that although most neighbors were friendly, they experienced more negative incidents in the suburbs, including harassment, racial epithets, and exclusion, than they did in their former communities.<sup>248</sup> Suburban movers also reported the variety of ways in which sales personnel and others shoppers stigmatized them, forcing them to become used to “constant star[ing].”<sup>249</sup> Families also reported racial hostility in the form of silence, as neighbors maintained limited contact and social distance.<sup>250</sup> Children often encountered mixed messages, with white parents disrupting burgeoning relationships and declining to welcome Gautreaux children into their homes, even as they welcomed other neighborhood children who were white.<sup>251</sup>

Nor are these experiences exclusively explained by class.<sup>252</sup> Researchers Joe Feagin and Melvin Sikes have used interviews to draw a portrait of black middle-class life, documenting the day-to-day negative impact of racial hostility on black middle-class Americans in public schools, the job market, and their own neighborhoods.<sup>253</sup> Feagin and Sikes’s conclusions about racism in middle-class black life are as relevant today as they were in the 1990s. The homeschooling movement, for example, has picked up among African Americans in response to the high costs of integration for black students and their families, including

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246. Under the program’s provisions, the families had to move to areas that were more than seventy percent white. Because few suburbs, however, ranged from seventy to ninety percent white, families in fact moved to suburbs that were more than ninety percent white, with an average of ninety-six percent. *Id.* at 75.

247. Alana Semuels, *Is Ending Segregation the Key To Ending Poverty?*, ATLANTIC (Feb. 3, 2015), <https://www.theatlantic.com/business/archive/2015/02/is-ending-segregation-the-key-to-ending-poverty/385002>.

248. RUBINOWITZ & ROSENBAUM, *supra* note 244, at 106–07.

249. *Id.* at 112.

250. *Id.* at 113.

251. *Id.* at 115–17.

252. Unlike more typical Black middle-class suburban dwellers who achieve middle-class status before moving to the suburbs, Gautreaux families left the inner city for the suburbs without any prior change in economic status; their experiences then, were likely influenced by their differing socioeconomic status. *Id.* at 74.

253. See generally JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994) (summarizing interviews with African Americans about how racism impacts their daily lives).

disproportionate discipline and suspension, over-identification for special education accompanied by under-identification for gifted programming, and whitewashed curricula devoid of people of color.<sup>254</sup> As author Paula Penn-Nabrit explained: “[T]he truth is we began home schooling as a reaction to something white people did to us.”<sup>255</sup>

Extensive scholarship has also canvassed the pressures put on Blacks to “cover” or present themselves and their racial identity in ways that are palatable to white people in work and social settings, with palatable meaning “not salient.” For those who fail to meet this obligation, the consequence can be increased racial hostility.<sup>256</sup> For many Blacks, then, the price of admission to white spaces is erasure of identity and silence about the effects of that erasure.<sup>257</sup> Although scholars have lauded the “multiple consciousness” that people of color often develop in order to navigate white spaces while also continuing to retain and value their identities and perspectives, the costs of perpetually being “strangers in a strange land” are real and high.<sup>258</sup>

Recognition of these costs is not a recent phenomenon. As early as 1935, W. E. B. Du Bois wrote about education for Blacks, noting:

A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concern black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school . . . gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.<sup>259</sup>

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254. Osamudia James, *supra* note 67, at 1106–19 (detailing the racial hostility to which Black students and families are regularly subject in purportedly integrated public schools); *infra* note 257.

255. PAULA PENN-NABRIT, MORNING BY MORNING: HOW WE HOME-SCHOOLED OUR AFRICAN-AMERICAN SONS TO THE IVY LEAGUE 3 (2003).

256. *Supra* note 114 and accompanying text.

257. Osamudia James, Professor of Law and Vice Dean, Univ. of Miami, *How I Became Comfortable as That Lady: Racial Identity, Silence, and Equality in American Public Schools*, CANE TALKS (Jan. 29, 2016), <http://canetalks.miami.edu/cane-talkers/osamudia-james/index.html>.

258. See, e.g., Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989) (detailing how people of color filter their life experiences in predominantly White settings).

259. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515 (1976).

In 1976, Derrick Bell wrote about the failure of the civil rights establishment, in their ongoing fight to integrate public schools, to “consider . . . the limits imposed by the social and political circumstances under which clients must function even if the case is won.”<sup>260</sup> Yet, policy prescriptives for racial inequality perpetually underappreciate those circumstances. A 2000 online exchange among eight scholars about moving out of the ghetto prompted only one contribution suggesting that people in impoverished residential areas might prefer to remain in their communities, rather than to move to white ones, for reasons including pride in community, historical roots, friendships, or love of urban living.<sup>261</sup> School integration continues to focus on drawing black students out of their neighborhoods and into white communities.<sup>262</sup> And, building off of the blueprint of the Gautreaux program, the U.S. Department of Housing and Urban Development launched additional housing programs meant to move people of color out of their communities, to mixed success.<sup>263</sup>

There are many reasons that equality in America has typically required an assimilative bargain for people of color, including issues of political feasibility and scale. But it may also be because law and policy operate against background beliefs about minoritized racial identity as stigmatized and inferior. Minoritized racial identity, however, is “bad” only because it increases the likelihood that “bad” things will happen and decreases the likelihood that “good” things will happen;<sup>264</sup> this is so not be-

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260. *Id.* at 513.

261. See Jennifer Hochschild, *Moving Out of the Ghetto*, BOS. REV. (June 1, 2000), <http://bostonreview.net/forum/moving-out-ghetto/jennifer-hochschild-creating-options>.

262. See generally Bell, *supra* note 259 (detailing the professional and ethical concerns in the conflict between civil rights attorneys and the communities of color they represented when considering alternatives to desegregation).

263. In the 1990s, HUD launched the Moving to Opportunity for Fair Housing program (MTO). MTO did not fully replicate the positive outcomes of the Gautreaux program, although more recent research suggests that long-term outcomes will ultimately be more positive than initially understood. Generally, there were no effects on the employment and earnings of parents in the MTO programs, and few notable effects on their children, although there have been some positive effects on physical and mental health. Justin Wolfers, *Why the New Research on Mobility Matters: An Economist's View*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/05/upshot/why-the-new-research-on-mobility-matters-an-economists-view.html>; Semuels, *supra* note 247.

264. See, e.g., René Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79, 83–91 (2001) (concluding that even after controlling for socioeconomic status, racial

cause of the deficiency of blackness, but because of white supremacy and its subordinating engagement with black racial identity.

Minoritized racial identity is neither necessarily nor exclusively stigmatizing for people of color, and for many non-Whites, racial identity operates as curative, protective, and resiliency-enhancing. The question, then, is how do we, in our public and individual lives, compel and empower state actors and private citizens to remedy the material inequalities which are structurally attached to race, while restraining the state in its elimination of the particularities of identity? Ultimately, equality might compel a different bargain than the assimilative one which has historically underlined liberation movements in the United States.

The integrative ideal<sup>265</sup> is a noble and legitimate goal toward which the country should continue to strive. But based on our impoverished conception of black racial identity, our striving manifests in marginal integration into white spaces of those non-Whites who can absorb the material and psychic costs, against the context of a broader society where racial inequalities still run rampant. Bussing and gentrification are the paradigmatic responses to thinking about blackness through a deficit lens; absent the lens, we might more fully invest in social initiatives that make black schools equal, or make black neighborhoods safe and welcoming places for everyone, and not just wealthy gentrifying

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disparities in healthcare exist across a spectrum of settings and diseases); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 412–15 (2001) (reporting that racial minorities are subject to over-identification for special education, independent of their disproportionate representation among the poor); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 86 (2011) (concluding that minorities are overrepresented in public school suspensions and corporal punishment); Tara Siegel Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, N.Y. TIMES (Jan. 21, 2012), <http://www.nytimes.com/2012/01/21/business/blacks-face-bias-in-bankruptcy-study-suggests.html> (citing research concluding that independent of income, home ownership, assets, and education, Blacks are twice as likely as Whites to be steered into more onerous and costly forms of bankruptcy).

265. The *Brown* Court fused together two distinct concepts that define the integrative ideal: (1) that “minorities must be included in all-White institutions so that they have access to the full benefits of our society, including the mechanisms and processes of American economic, political, and social power”; and (2) that “a racially mixed or integrated society enhances democracy and other important societal goals.” Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 797–98 (2004).



Whites, to live. Absent a deficit lens, we might envision maintaining and supporting the integrity of black spaces without economically and socially isolating them. This vision is a commitment to disconnecting racial categories from underlying structures of subordination.<sup>266</sup>

As an example, the Baltimore Housing Roundtable is a coalition of grassroots groups attempting to address displacement while also revitalizing community-oriented housing in poor and working class Baltimore.<sup>267</sup> Using community land trusts, the Roundtable helps establish community-owned properties that permit residents to cooperatively manage land and property use, as well as control the value of the property on the market.<sup>268</sup> Leveraged against market forces, the Roundtable hopes to avoid the residential disruption that often accompanies “boom-bust speculation and gentrification,” while also helping to support small business, implement community plans, and support long-term building investments.<sup>269</sup> Seeing the value of, and being committed to, racially diverse communities that can thrive absent gentrification, the Roundtable preserves and enhances black communities in ways not sufficiently contemplated when policy is shaped by a deficit lens.<sup>270</sup>

In making this claim, this Article does not abandon the integrative ideal, but rather questions why anti-subordination for Blacks cannot mirror anti-subordination of Whites—mixed, but predominantly black neighborhoods, for example, similar to mixed, but predominantly white neighborhoods. Asking this

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266. See Gotanda, *supra* note 11, at 61 (arguing that absent a clear social commitment to rethinking race, “the politics of diversity will remain incomplete” and ineffective).

267. *Our Mission*, BALT. HOUSING ROUNDTABLE, <http://www.baltimorehousingroundtable.org> (last visited Oct. 12, 2017) (“The Baltimore Housing Roundtable’s mission is to coordinate and integrate the work of BHR members into a unified movement that will promote and facilitate social change. BHR members understand that individuals cannot create widespread social change on their own. Competition among non-profits over limited public and private resources contributes to a fragmented system that does not meet housing need in Baltimore, particularly among those with low or no income. However, as a collaborative, BHR members can pool resources and advocate to implement an agenda of systemic change and realize our shared values and vision.”).

268. Michelle Chen, *Can Neighborhoods Be Revitalized Without Gentrifying Them?*, NATION (Apr. 11, 2016), <https://www.thenation.com/article/trusting-baltimore-communities>.

269. *Id.*

270. See *id.* (detailing the benefits of the Baltimore Housing Roundtable initiative).

question implicitly rejects the assumption that the integrative ideal is necessarily beneficial when it only moves in one direction. Courts and other legal actors move away from identity because they view minoritized identity as deficient. Recognizing, however, the positive value of identity leads to fuller and more positive assessments of race-conscious solutions to racial inequality. Ultimately, attention must be paid to how our legal and structural solutions to racial subordination might change if we recognized the value of minoritized racial identity.

#### IV. POLICING IDENTITY

The curative and restorative notions of black racial identity in law and policy presented here have consequences for our understanding of racial identity more generally, as well as for other marginalized identities in law and policy.

##### A. BEYOND BLACK RACIAL IDENTITY

As the Twentieth century ended, non-white groups increasingly took their cues from black movements for justice, organizing their political and social struggles under the banner of race, and turning their “oppression into liberation.”<sup>271</sup> There may be limits, however, on the extension of this paper’s claims to other minoritized identities. Ian Haney López, for example, has noted that although Asians have formally been racialized as non-white in the United States, the model minority myth and professional success have combined to bestow honorary-white status on East Asians.<sup>272</sup> Discussing the value of minoritized racial identity, then, as a protective and curative identity that merits recognition in the law may or may not graft so neatly onto discussions of Japanese or Chinese identity. It may graft more easily onto a

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271. See Angela P. Harris, *The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN’S L.J. 207, 209 (1996). Racial organization among Mexican Americans through the Chicano movement, for example, was about both “mobilizing for ethnic politics” and “sparking the participants’ sense of peoplehood.” MARTHA MENCHACA, *RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS* 20 (2001). Outside the context of race or ethnicity, the gains made by the gay rights movement were successful, in part, because of a commitment to group identity and rights for gays and lesbians, alongside an accompanying commitment to the protection of individual differences that was built into the movement as it began in the early 1970s. ELIZABETH A. ARMSTRONG, *FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950–1994*, at 2–3 (2002).

272. Ian Haney López, *Colorblind to the Reality of Race in America*, CHRON. HIGHER EDUC. (Nov. 3, 2006), <http://www.chronicle.com/article/Colorblind-to-the-Reality-of/12577>.

discussion of Hmong or Cambodian identity—two Asian sub-groups that have been more comprehensively denied access to “whiteness.”<sup>273</sup>

Outside of race, debates surrounding sexual orientation also prompt questions about the value of minoritized identities. The same-sex marriage victory of *Obergefell v. Hodges*,<sup>274</sup> for example, helped “normalize” gay and lesbian identities.<sup>275</sup> The decision prompted scholars like Katherine Franke, however, to write about the “loving and committed forms of family, care and attachment” that were created outside of traditional marriage that “far exceed[ed], and often improve[d] on, the narrow legal definition of marriage,” and that gays and lesbians might be forced to abandon once state marriage bans are lifted.<sup>276</sup>

Although the construction of race and sexuality overlap, the phenomena are distinct. Nevertheless, comparisons might yield important insights regarding the “losses” that equality advances sometimes require, including the relinquishing of identity. Just as scholars push back against the erasure of alternate forms of

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273. Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth”*, 100 NW. U.L. REV. 331, 336–37 (2006) (detailing the harms of the model minority myth, including the way it lumps together third- or fourth-generation Japanese or Chinese Americans with recent refugees and immigrants, and masks real difficulties facing some Asian American sub-groups, including Cambodians and Hmong). This is further complicated by the overlap of racial identity with ethnic identity, a distinction that is at once more and less complicated as applied to Blacks. The Black American experience can be heavily shaped by regional, rather than ethnic, differences. Paulla Ebron, *Enchanted Memories of Regional Differences in African American Culture*, 100 AM. ANTHROPOLOGIST 94 (1998) (examining black culture variation through the lens of a contemporary film). At the same time, cultural differences based on West African or Caribbean ancestry can impact the experience in ways that mirror differences among ethnic groups. *See id.* at 96 (providing the example of linguistic differences due to West African origins creating a distinctive identity for Blacks living off the coasts of Georgia and South Carolina).

274. 135 S. Ct. 2584 (2015) (extending to same-sex couples a fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution).

275. *See, e.g.*, Jodi Kantor, *Historic Day for Gays, But Twinge of Loss for an Outsider Culture*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/scotus-same-sex-marriage-gay-culture.html> (“[J]ust as the gay marriage movement peaks, so does a debate about whether gay identity is dimming, overtaken by its own success.”).

276. Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/opinion/24franke.html>. Many of the laws in states that allowed both same-sex and different-sex couples to register as domestic partners were a response to the inability of same-sex couples to legally marry. The lift of marriage bans, however, might prompt states to only allow married individuals such benefits. *Id.*

partnership among same-sex couples, writers and policymakers have pushed back against the stigmatization of black family structures, considered deviant when compared to white families, but increasingly recognized for the support they nevertheless provide to its members.<sup>277</sup> Blackness, then, is not the only identity that exemplifies how compromises to identity are made in search of equality, or how legal language and frameworks work to preserve, erase, or dispossess people of identity all together. Ultimately, this Article invites work that explores the different contexts in which a curative and protective conception of identity might be better acknowledged and capitalized upon in the law.

## B. CONTOURS OF IDENTITY

Despite the interest minoritized identity holders might have in identifying the limits, however permeable, of legitimate claims to minoritized identity,<sup>278</sup> this Article's argument is neither grounded in, nor relies on, policing blackness. There is

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277. See, e.g., Adolph Reed, Jr., *The Underclass as Myth and Symbol: The Poverty of Discourse About Poverty*, RADICAL AM. 21, 33–34 (Jan.–Mar. 1992). Scholars have increasingly pushed back on the conclusions delivered in the Moynihan Report that established “black families” as in crisis and pathological because of the increasing numbers of single-female-headed households. See, e.g., *id.* (“As I noted in a critique of Wilson’s *The Truly Disadvantaged*, ‘family’ is an intrinsically ideological category. The rhetoric of ‘disorganization,’ ‘disintegration,’ ‘deterioration’ reifies one type of living arrangement—the ideal type of the bourgeois nuclear family . . . . But . . . why exactly is out-of-wedlock birth pathological? Why is a female-headed household an indicator of disorganization and pathology? . . . [R]ace and class bias [is] inflected through a distinctively gendered view of the world.”); see also KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 104–37, 168–85 (2005) (arguing that poor and low-income women are more likely to bear children before marrying because of both the value they place on the latter, and because unlike their commitment to their children, they are unsure about their ability to maintain a commitment to a marriage).

278. In describing claims to blackness in the United States, writer Jelani Cobb wrote, “Race . . . functions like a faith, in that the simple profession of membership is sufficient. The most—possibly the sole—democratic element of race in this country lies in this ecumenical approach to blackness. We are not in the business of checking membership cards.” Jelani Cobb, *Black Like Her*, NEW YORKER (June 15, 2015), <http://www.newyorker.com/news/daily-comment/rachel-dolezal-black-like-her>. Nevertheless, the plethora of think pieces and op-eds declaring Rachel Dolezal not-Black suggests that even this democratic feature of race in the United States has its limits. See, e.g., Jonathan Capehart, *The Damage Rachel Dolezal Has Done*, WASH. POST (June 12, 2015), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/06/12/the-damage-rachel-dolezal-has-done>; Osamudia James, *What Rachel Dolezal Doesn’t Understand: Being Black Is About More Than Just How You Look*, WASH. POST (June 12, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/>

simply no need to either definitively trace the contours of blackness, or to determine who is, and is not, Black. Rather, the argument is about understanding the experience of being raced Black, with both its individual and group-level consequences.<sup>279</sup> At the individual level, any one experience regarding black racial identity is just that—an experience mediated and shaped by other personal attributes, including gender, geography, or class.<sup>280</sup> Ending racial subordination, however, is about addressing psychic and material inequalities between groups, and using the phenomenon of racial identity en masse to better identify, interrogate, and remediate those inequalities.

This engagement with race is neither a thin nor thick conception of racial identity. A thin conception of race is the Court's current colorblindness jurisprudence, with formal references to race sufficient to trigger equal protection interrogation. These triggers are both under-inclusive in their failure to implicate race-neutral and structural discrimination, and over-inclusive in their tendency to implicate benign race-conscious policies meant to counter racial subordination.<sup>281</sup> At the other end of the spectrum is a thick conception of race, which attempts to construct race as a defined set of behaviors, relationships, and experiences that qualify a person as a member of that race.<sup>282</sup> This project, however, settles on an intermediate conception of racial identity—one that recognizes that the experience of being raced is more than mere language, but does not rely on a finite set of rules for understanding its social construction. This conception of identity recognizes that being raced is an experience to which

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12/what-rachel-dolezal-doesnt-understand-being-black-is-about-more-than-just-how-you-look; Lemieux, *supra* note 50.

279. Even pure individual election that conflicts with other modes of racial identification can be instructive. Rachel Dolezal's election as Black, for example, was not consistent with her ancestry, and only consistent with "black" phenotype after significant manipulation of her appearance. In addition, although her associations and reputation later in her life were more consistent with that of black women, for her childhood and formative years, she experienced life as a white woman. Her lies notwithstanding, her election of black racial identity does help illustrate the social construction of race, and the material and psychic consequences—some of which were beneficial—of black racial identity. See James, *supra* note 278.

280. Kimberle Crenshaw's germinal article on intersectionality theorized how race and gender intersected to shape structural, political, and representational violence against women of color. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

281. See SHELBY, *supra* note 99, at 207–09.

282. See SHELBY, *supra* note 99 and accompanying text.

a range of negative and positive phenomena attach and pushes legal actors to engage the *entire* spectrum of phenomena when engaging racial justice claims and projects. Embracing minoritized racial identity as positive only broadens access to legal solutions that help usher in substantive equality and genuine dignity.

Before settling on the term “political race project,” Guinier and Torres used the term “political blackness” to refer to the relationship between race and power, attempting to dislodge race from both the color of one’s skin and from simple identity politics.<sup>283</sup> In 1998, author Toni Morrison reflected on powerlessness when she deemed Bill Clinton “our first black President,” to the extent that Clinton had been subject to relentless prosecutorial pursuit that already assumed guilt and criminalization, and that would bring the full force of the state to ensure both full assimilation and subordination.<sup>284</sup> Guinier, Torres and Morrison are correct to think about race as an affirmative phenomenon of disempowerment to which people who match our notions of phenotypical race are disproportionately subject. As applied to legal analysis, however, understanding race as *only* this negative phenomenon both limits our responses to racial inequality and blinds us to the costs of universality for those subject to the new post-identity order. This Article’s insistence on more fully understanding and deploying racial identity in the legal context challenges both the “wounded attachment” conception of racial identity<sup>285</sup> and the Court’s racial-neutral characterizations of inequality, while presenting an alternative lens through which the public—social, legal, and otherwise—might engage race.

Finally, a serious question remains about whether, assuming all material and psychological racial inequalities are some day remediated, identity will still be relevant. It is nearly impossible to imagine a world in which stigma and racial subordination do not exist in some form for people of color. For example, refer to the difficulty that even some science-fiction writers have in creating worlds where identity is not salient.<sup>286</sup> Although this

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283. GUINIER & TORRES, *supra* note 161, at 13–14 (selecting the former because the latter prompted identity “boundary” questions about who could be part of the project, and black Americans were offended by the misappropriation of the Black American experience on which the term may have relied).

284. Toni Morrison, *Comment*, NEW YORKER (Oct. 5, 1998), <http://www.newyorker.com/magazine/1998/10/05/comment-6543>.

285. See Brown, *supra* note 23.

286. Octavia Butler, one of the preeminent voices in science fiction before her death, made race and sexual awareness a recurring theme in her work, even

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Article invites scholarship on what that world looks like, this Article makes the more modest claim that despite the potential for utopia, identity is nevertheless urgent now. Equality doctrine and movements in the United States are impoverished in identity's absence.

#### CONCLUSION

Despite doctrinal and scholarly movements toward universality, identity in general—and black racial identity in particular—can serve a protective, curative, and restorative function in both private and public spheres. Engaging this more positive understanding of identity and resisting the lure of universal equality frames, have the potential to augment the resilience of minoritized identities, strengthen our democracy, and enhance our responses to enduring inequality.

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in those stories set in the far future. *Octavia Butler*, in MAJOR 20TH-CENTURY WRITERS 488, 488–90 (Kathleen Wilson, ed., 1999); see also Margalit Fox, *Octavia E. Butler, Science Fiction Writer, Dies at 58*, N.Y. TIMES (Mar. 1, 2006), <http://www.nytimes.com/2006/03/01/books/octavia-e-butler-science-fiction-writer-dies-at-58.html>.