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Equal Dignity, Colorblindness, and the Future of Affirmative Action beyond Grutter v. Bollinger

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EQUAL DIGNITY, COLORBLINDNESS, AND THE FUTURE OF AFFIRMATIVE ACTION BEYOND *GRUTTER V. BOLLINGER*

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ABSTRACT

In Grutter v. Bollinger *the Supreme Court held that diversity was a compelling interest for equal protection purposes that justifies limited consideration of race through affirmative action programs. But there was a catch. The Court predicted that diversity would cease to be a compelling interest within twenty-five years. This Article examines the surprising doctrinal and conceptual implications that would follow if, having both the motive and means, the Court were to overturn* Grutter *before its predicted 2028 sunset. Exploring internal tensions within existing doctrine, this Article argues that even if the Court were to overturn* Grutter*, a form of race-conscious decision-making should remain constitutionally permissible. The Court's equal dignity jurisprudence in the line of cases running from* Lawrence v. Texas *to* Obergefell v. Hodges*, rooted similarly in the Court's existing affirmative action jurisprudence, provides a basis for*

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reconsidering the goal of affirmative action under an alternative combined due process and equality framework. Under this jurisprudence, in order to respect the equal dignity of individual persons, state actors must not dominate or deny central aspects of an individual's personal identity. The law must grant the equality of individual persons' liberty to define and present their personal identities free from government actions that would enshrine forms of disrespect as a matter of law. But because race can be a constitutive feature of a person's identity, mandating colorblindness may deny a person's equal dignity to be considered holistically for who they are.

A cornerstone of the Court's anti-affirmative-action reasoning, through both dissents and majorities, is a principle of colorblindness rooted in a conception of procedural individualism. The Constitution, we are told, protects individuals, not groups. But as this Article demonstrates, taking individual persons seriously—as the Court urges—has the unexpected implication that government institutions cannot be foreclosed from taking a person's racial identity seriously as well. The Court's interpretive and ideological commitment to individual persons as the bearers of constitutional rights entails a textually based, constitutional commitment to persons who can be seen holistically in ways that do not deny their racial identity. Thus, as this Article argues, equal dignity introduces a complication for colorblindness and creates an alternative constitutional framework applicable even if the Court were to abandon the central holding of Grutter. *Equal dignity would allow government actors to consider race when giving applicants affirmative consideration of their personal identities in light of their social structures and histories. As this Article introduces it, "affirmative consideration" is a process of considering the personal identities of applicants holistically in their best light, including their personal histories and constitutive features, which necessarily might include their race. To the extent that society continues to make race relevant to the lives of persons through explicit and implicit institutional practices, then to fail to consider an individual as a person for whom race has mattered under colorblindness would be to deny a relevant aspect of what makes them a unique person, and thus, would deny them the equal dignity that due process of law and equality protect. This Article explains and defends this alternative constitutional basis for reorienting*

antidiscrimination law according to equal dignity principles that makes possible the continuation of a modified form of race-conscious university admissions programs, even if the Court were to sunset Grutter*'s diversity rationale. Reorienting constitutional doctrine under equal dignity would foreclose a strict commitment to color-blind constitutionalism, permit affirmative consideration of complete persons, and make possible a new understanding of race consciousness in official decision-making.*

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INTRODUCTION

In its 2003 opinion in *Grutter v. Bollinger*, the Supreme Court concluded that the need to maintain diversity in higher education was a compelling state interest that justified consideration of race as one criterion among others in making admission decisions.[1] *Grutter* established an equality standard good for a projected twenty-five-year period. The Court warned that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary."[2] What happens to the constitutional status of affirmative action by 2028 is thus in question, but one expectation implicit in the Court's reasoning is that American society will have sufficiently remedied past problems of racial fairness to render its continued use unnecessary.[3] As a result, government institutions that provide public goods such as educational opportunity would have no compelling need to continue using race in their decision-making practices. If there were no compelling need, then affirmative action would no longer be consistent with constitutional principles of equality. The problem, the *Grutter* majority reasoned, was that the practice of making individualized decisions that use race as an admissions criterion deviates from the overriding constitutional requirement of colorblindness.[4] Equality, the Court has reasoned, is best achieved through color-blind practices.[5] As Justice Thomas explained, "[t]he Constitution abhors classifications based on race ... because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[6] According to the Court in *Grutter*,

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1. 539 U.S. 306, 343 (2003).

2. *Id.*

3. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("The enduring hope is that race should not matter; the reality is that too often it does.").

4. For an overview of the competing views, see Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1294 (2011).

5. In *Plessy v. Ferguson*, Justice Harlan first articulated the view that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

6. *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

when the pressing need to include race as a consideration in university admissions fades because of society's success in achieving greater racial justice, diversity will likely no longer serve as an end to justify continued programmatic race-consciousness.[7]

Not only are Americans now in the last decade of *Grutter*'s proposed temporal limit, but the Court will hear two challenges to affirmative action in its October 2022 Term—a few years prior to the predicted sunset.[8] Spanning both private and public institutions with challenges to Harvard University and the University of North Carolina, these cases provide the Court with an opportunity to conduct a comprehensive review of affirmative action programs, despite its more recent reaffirmations.[9] In *Fisher v. University of Texas at Austin* (*Fisher I*), plaintiffs challenged a state's ability to layer consideration of race on top of a race-neutral state plan to guarantee admission to the top 10 percent of every high school class.[10] In *Fisher v. University of Texas at Austin* (*Fisher II*), Justice Kennedy, writing for the Court in 2016, was willing to defer to the educational institution's claims that limited use of race—on top of Texas's 10 percent plan—was narrowly tailored to achieve its

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7. *Id.* at 343.

8. The Supreme Court granted a petition for certiorari on January 24, 2022, in a challenge to Harvard University's affirmative action policies. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157 (1st Cir. 2020), *aff'g* 397 F. Supp. 3d 126 (D. Mass. 2019), *cert. granted*, 142 S. Ct. 895 (2022) (mem.) (No. 20-1199); Students for Fair Admissions, Inc. v. President of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019). The Court also granted certiorari in a challenge to the University of North Carolina's affirmative action program. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14-CV-954, 2019 WL 4773908 (M.D.N.C. Sept. 30, 2019); *see also* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/FQX6-TP58]. The suit in the Harvard case originally had the support of the Department of Justice. *See* Katie Benner, *Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html [https://perma.cc/ZMS6-97H8]. The Department of Justice has brought further suits against universities over their use of race in admissions. *See* Anemona Hartocollis, *Justice Dept. Sues Yale, Citing Illegal Race Discrimination*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2020/10/08/us/yale-discrimination.html [https://perma.cc/2EXE-KBLQ]. *See generally* Complaint, United States v. Yale Univ., No. 3:20-cv-01534 (Oct. 8, 2020). Litigation contesting the affirmative action policies at the University of North Carolina is also ongoing.

9. *See* Liptak & Hartocollis, *supra* note 8.

10. 570 U.S. 297, 305-06 (2013).

overall diversity goals.[11] What constituted a sufficiency criterion for incoming class diversity remained imprecise, and how much deference to grant university officials to decide when and how consideration of race is appropriate remained contested, generating another four-Justice dissent that motivates reconsideration of *Grutter*.[12] With the recent additions of Justices Kavanaugh and Barrett replacing Justices Kennedy and Ginsburg, there are additional reasons to think that the current challenges to affirmative action may very well follow Justice O'Connor's expectation that the Court sunset *Grutter*'s central holding.[13]

Diversity, affirmative action's critics continue to emphasize, is an ad hoc standard lacking definite measurement.[14] In *Grutter*, the

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11. 136 S. Ct. 2198, 2214 (2016).

12. *Id.* at 2215 (Thomas, J., dissenting) ("I write separately to reaffirm that 'a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause....' That constitutional imperative does not change in the face of a 'faddish theor[y]' that racial discrimination may produce 'educational benefits.'" (alteration in original) (quoting *Fisher I*, 570 U.S. at 315, 327-28 (Thomas, J., concurring))).

13. *See, e.g.*, Nicholas Lemann, *Can Affirmative Action Survive?*, NEW YORKER (July 26, 2021), https://www.newyorker.com/magazine/2021/08/02/can-affirmative-action-survive [https://perma.cc/762M-DF2P] ("And diversity in admissions is one Supreme Court decision away from being prohibited in the context of race."). Given that Justice Barrett proclaimed her legal symbiosis with Justice Scalia during her confirmation process, there is all the more reason to think that the Court will reconsider affirmative action: "I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too." Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/GC4F-54J7]. Indeed, if she adheres to Justice Scalia's judicial philosophy regarding race consciousness—which is in opposition to the view of Justice Ginsburg, whom she replaced—then she would uphold one of his last statements on the issue: "I adhere to the view I expressed in *Grutter* v. *Bollinger*: 'The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.'" *Fisher I*, 570 U.S. at 315 (Scalia, J., concurring) (quoting 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)). And although Justice Kennedy dissented in *Grutter*, he supported the limited affirmative action program at the University of Texas. *Fisher II*, 136 S. Ct. at 2214. If Justice Kavanaugh agrees with the *Grutter* dissents, he would help make a six-Justice majority for overturning *Grutter*.

14. For example, Justice Kennedy argued in dissent in *Grutter* that "the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting); *id.* at 379 (Rehnquist, C.J., dissenting) ("Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."); *id.* at 346-47 (Scalia, J., concurring in part and dissenting in part) ("[T]he University of Michigan Law School's mystical 'critical mass' justification for its

Court accepted that imprecision was built into the concept, as the University of Michigan Law School sought to achieve a "critical mass" of diverse students.[15] Such a "critical mass" avoids the constitutional taint of a quota, which the Court forbade in *Regents of the University of California v. Bakke*,[16] at the price of creating a sorites paradox.[17] How many students constitute a "critical mass"? Because the University of Michigan could not say, dissenters and critics continue to argue that diversity is a vague end to pursue in light of its purported social costs.[18] In this way, opponents continue to press the case that affirmative action violates core principles of equality

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discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."). Subsequent dissents in affirmative action cases echoed this reasoning. *See, e.g.*, *Fisher II*, 136 S. Ct. at 2222 (Alito, J., dissenting) ("UT has not explained in anything other than the vaguest terms what it means by 'critical mass....' This intentionally imprecise interest is designed to insulate UT's program from meaningful judicial review."); *see also* Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54, 62 (2017) ("Why did the concept of critical mass prove controversial? Part of the reason must be that critical mass has a numerical connotation yet defies numerical definition.").

15. *See* 539 U.S. at 329-33.

16. 438 U.S. 265, 298 (1978) (plurality opinion).

17. *See* Dominic Hyde & Diana Raffman, *Sorites Paradox*, STAN. ENCYCLOPEDIA PHIL. (Mar. 26, 2018), https://plato.stanford.edu/entries/sorites-paradox/ [https://perma.cc/59U7-ST3W] (explaining the paradox by the example that "[b]ecause the predicate 'heap' has unclear boundaries, it seems that no single grain of wheat can make the difference between a number of grains that does, and a number that does not, make a heap").

18. "Diversity" as a basis for affirmative action is beset by a number of critical concerns. Peter Schuck argues in terms of social cost, for example, that "[t]he benefits it confers are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes—its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles." Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 3 (2002); *see also* PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 142, 199-201 (2003). Other critics, however, point to the social costs of relying on diversity because of its role in furthering white privilege and failing to provide adequate benefits to students of color. *See, e.g.*, Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 433 (2014) (exploring how "the diversity rationale is bad for white people by undermining the development of antiracist white identity"); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (arguing, for example, that "[d]iversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants"); Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1810 (2000) (exploring reasons to think that diversity is insufficient as a rationale for affirmative action). For the complexity of the concept of diversity, see generally, for example, Sanford Levinson, *Diversity*, *in* WRESTLING WITH DIVERSITY (2003).

because the State must be neutral in its decision-making regarding race.[19] On this view, to fulfill a constitutional goal of colorblindness, the Court should sunset *Grutter*.

Although both motive and means are available for overturning *Grutter* and abandoning the diversity rationale for affirmative action, a line of cases that developed a doctrine of equal dignity introduce a complication—*and* an alternative. Following a constitutional rationale that runs from *Lawrence v. Texas* to *Obergefell v. Hodges*, the Court combined equal protection and due process considerations to create a doctrine of equal dignity.[20] As the Court explained in *Lawrence*, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[21] The tandem effects of due process and equal protection—a "double helix" as Professor Laurence Tribe calls them[22]—mean that in order to respect the equal dignity of individual persons, state actors must not dominate or deny central aspects of an individual's personal identity.[23] The law must grant the equality of individual persons' liberty to define and present their personal identities free from government actions that would enshrine forms of disrespect as a matter of law. Consistency would require that if law must respect a person's sexual orientation as a constitutive feature of personal identity, it must also respect a person's race as constitutive of identity too. But if race can be a constitutive feature of a person's identity, then mandating colorblindness may deny a person's equal dignity to be considered holistically for who they are. Thus, as this Article argues, equal

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19. *See, e.g.*, *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting) ("The Constitution abhors classifications based on race.... That constitutional imperative does not change in the face of a faddish theor[y] that racial discrimination may produce educational benefits." (alteration in original) (internal citations and quotations omitted)).

20. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003); Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

21. *Lawrence*, 539 U.S. at 575.

22. Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) ("I refer to such hybrid equality/liberty claims as 'dignity' claims.").

23. On the nondomination ideal, see PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 46-47, 50 (2012).

dignity introduces a complication for colorblindness and opens up an alternative constitutional framework applicable even if the Court were to abandon the central holding of *Grutter* that a state can have a compelling interest in pursuing diversity.[24]

Three broad outcomes could follow from the pending opportunity for the Court to reconsider *Grutter*. First, following cases like *Fisher II*, the Court might reaffirm its core holding and continue to accept that achieving diversity is a compelling end that justifies limited and contextual consideration of race as a factor in admissions decisions. Under this approach, the Court would likely emphasize the nature of its fact-intensive inquiry and the obligation of institutions to reevaluate their use of race as a factor in their decision processes.[25] Second, the Court might overturn *Grutter* by holding that diversity can no longer serve as a compelling state interest, and thus would no longer justify consideration of race in admissions. Under this reasoning, the Court would prohibit race-conscious admissions programs as inconsistent with principles of equality, thereby vindicating the four dissenting views in *Grutter* as well as the expectations of Justice O'Connor's proposed twenty-five-year sunset.[26]

But there is a third way, which this Article seeks to chart. This Article argues for the constitutionality of limited consideration of race in admissions programs, premised not on achieving diversity but on recognizing the equal dignity of persons. This third way becomes most relevant if the Court were tempted to overturn *Grutter* because it demonstrates how doing so will not resolve the constitutional issues that institutional consideration of race creates. This Article analyzes the tension that exists between the Supreme Court's color-blind rationale—a central pillar of the anti-affirmative-action position—and its equal dignity jurisprudence. Members of the Court claim that a color-blind principle prohibits

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24. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

25. *See* Fisher II, 136 S. Ct. 2198, 2214-15 (2016) ("The University must continue to ... scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.").

26. *See* 539 U.S. at 343 (expecting that in twenty-five years, the use of racial preferences will no longer be necessary). For an example of the *Grutter* dissenters' views, see *id.* at 350 (Thomas, J., dissenting).

consideration of race. By contrast, the Court's commitment to an equal dignity jurisprudence requires legal consideration for individuals' personal identities, which necessarily includes their sex, sexual orientation, and race. Because strict colorblindness would violate the equal dignity of persons, there is a looming tension internal to the Court's jurisprudence. This Article proposes a way to resolve this looming internal inconsistency in the Court's jurisprudence between its pull towards a colorblindness principle and its commitment to equal dignity. Even if the Court holds that diversity is no longer a compelling interest, equal dignity provides an alternative doctrinal framework within which race may be considered. The implications extend more broadly for antidiscrimination law in general.

Equal dignity would allow government actors to consider race when giving applicants affirmative consideration of their personal identities in light of their social structures and histories. As this Article introduces it, "affirmative consideration" is a process of considering the personal identities of applicants holistically in their best light, including their personal histories and constitutive features, which necessarily might include their race. To the extent that society continues to make race relevant to the lives of persons through explicit and implicit institutional practices—by direct and residual effects of past decisions and current structures—then to fail to consider an individual as a person for whom race has mattered would be to deny a relevant aspect of what makes them a unique person and thus would deny them the equal dignity that due process of law and equality protect.[27] As Justice O'Connor's opinion in *Grutter* acknowledged, "one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters," means that race matters for individual consideration.[28] In *Fisher II*, Justice Kennedy recognized that it is a continuing "challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and

27. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015). Scholars have noted the overlapping concerns of liberty and equality as well. *See, e.g.*, Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008).

28. 539 U.S. at 333.

dignity."[29] Justice Kennedy presents this constitutional promise in part as a way to avoid harming the equal treatment and dignity of whites while pursuing diversity. But this constitutional promise of equal dignity likewise can provide a way to avoid harming persons of color by denying affirmative consideration of their individual personal identities in the name of colorblindness. Thus, within the anti-affirmative-action jurisprudence of the *Grutter* dissenters lies a tension between colorblindness and equal dignity.[30]

Analyzing a related tension between colorblindness and individualism, Professor Benjamin Eidelson argues that the Court's focus on an unexamined conception of individualism does not necessarily entail a commitment to colorblindness in the way the *Grutter* dissenters believe.[31] Instead, as Eidelson argues, treating people with respect for their individuality and their autonomy *may* entail the need to respect their racial identity as well.[32] At the very least, he argues, it is a more complicated issue than the dissenters acknowledge.[33] But more than a potential conflict generated by a conception of individualism, I suggest, principles of equal dignity already embed a commitment to the constitutive features and histories of personal identity, which *is* unavoidably in tension with colorblindness. Moreover, as this Article argues, the Court's doctrinal focus on

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29. *Fisher II*, 136 S. Ct. at 2214; *see also* Kimberly Jenkins Robinson, *The Supreme Court, 2015 Term—Comment:* Fisher*'s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 188 (2016) ("*Fisher II* offers some assistance to institutions that want to employ affirmative action, but also provides a cautionary tale about the demanding evidentiary burden that [they] must carry to prevail."). *See generally* Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

30. *See* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1672-73 (2020).

31. *Id.* at 1606.

32. As he argues, the idea is to open the logical space between individualism and colorblindness. *Id.*

33. Professor Eidelson further argues that the Court has failed to appreciate the significance of its commitment to individuals, which entails a commitment to autonomy and respect, as he concludes: "[R]efusing to consider race often means refusing to treat people respectfully as individuals, because it means ignoring a factor that illuminates the significance of their choices and experiences." *Id.* at 1672. This is a valuable insight—the more the Court doubles down on protecting individuals, the more it must reckon with what it means to respect individuals as autonomous agents. And the more that the Court recognizes the need to respect autonomy, the more "attending to race will often be *necessary* to treating a person respectfully as an individual." *Id.* at 1607.

the abstract concept of "individuals" is not well grounded in the Constitution, which instead protects "persons."[34] Thus, there is a latent tension between the Court's unexamined assumptions concerning individualism and a more textually grounded conception of persons.

The Supreme Court has repeatedly emphasized the duty to consider applicants as individuals, not as members of groups. Justice Scalia, for example, concurring in *Adarand Constructors, Inc. v. Pena*, emphasized the fact that equal protection means that "*[i]ndividuals* who have been wronged by unlawful racial discrimination should be made whole."[35] On this view, the Constitution's color-blind requirement does not allow consideration of persons by virtue of their group classification because "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens *as individuals*."[36] Reliance on the concept "individual," however, is an abstraction that the Court has never explained, even though the Constitution does explicitly guarantee equality to "persons."[37] Citizens "as individuals" mark a numerical contrast with groups, which seems to be the primary object of this reasoning. By contrast, persons are not numerical abstractions but are constituted by complex identities and histories and set within social structures from which their autonomous choices emerge. Thus, an initial issue this Article analyzes is what follows from refocusing on persons rather than individuals as a constitutive feature of the Court's equal dignity jurisprudence.[38] Even in the midst of moving to strictly scrutinize race-conscious government decisions, while claiming that the Constitution focuses on "individuals," the Court also emphasized how race-based decisions infringe

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34. U.S. CONST. amend. XIV, § 1.

35. 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (emphasis added).

36. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 730 (2007) (emphasis added) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

37. *See* U.S. CONST. amend. XIV, § 1.

38. *See* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015). The concept of dignity itself has an increased constitutional salience. *See, e.g.*, Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171-72 (2011); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 679-80 (2008) (developing conception of a minimum content for "human dignity"); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1214 (2004).

"'personal rights' to be treated with equal dignity and respect."[39] The implications of this latter commitment have gone underappreciated in a doctrinal context focused on protecting individuals while permitting—at least for a limited time according to *Grutter*—race-conscious decisions pursuing diversity.[40]

Reorienting antidiscrimination law in part according to equal dignity principles would make possible the continuation of a modified form of race-conscious university admissions program, *even if* the Court were to sunset *Grutter's* diversity rationale. A constitutional principle of equal dignity that protects individual persons cannot require—under the guise of equal protection—government institutions to arbitrarily strip persons of their constitutive identities, including their race. This unexpected implication of a commitment to the equal dignity of individual persons provides a new grounding for race-conscious decision-making through affirmative consideration of an individual's personal identity and narrative history. This implication becomes most salient if the Court were to hold—or seriously consider holding—that diversity could no longer form a compelling state interest. Affirmative consideration of race as a component of personal identity would now have an alternative constitutional grounding.

This alternative grounding could have one of two effects. First, it could dampen enthusiasm for overturning *Grutter* if the consequence of doing so would *not* eliminate race-conscious decision-making under a color-blind rationale but rather alter its practice. Or, second, it could provide an entirely new analytic framework for a post-*Grutter* jurisprudence. Although the first effect is entirely speculative, the goal of this Article is to establish the constitutional basis for the second alternative. The latter alternative also requires reconsidering the basis on which institutions may continue to consider race. Affirmative consideration surprisingly preserves one

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39. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (applying strict scrutiny to a state's race-conscious remedial programs).

40. Others have provided similar internal critiques of the Court's logic, focusing on the implications of individual respect. *See* Eidelson, *supra* note 30, at 1611 (analyzing "the notion of treating people as individuals in terms of respect for their individuality"). *See generally* Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036 (2014). I am focused, relatedly but distinctively, on what it means to be both textually and morally committed to *persons* and the equal dignity they possess.

feature of the Court's doctrinal focus on individuals: it justifies official consideration of the unique identity and history of each person. It does not, however, readily ground overriding institutional goals like diversity, which only have the incidental effect of considering the equal dignity of individual personal identities. Thus, as this Article explores in Part III, there are many tantalizing questions about how the future of affirmative consideration under equal dignity principles might develop. The focus here is on establishing the constitutional basis for this alternative beyond *Grutter*.

In what follows, Part I traces a foundational commitment to individuals and examines judicial criticism of diversity as a compelling interest justifying race-conscious affirmative action programs. I argue that this commitment to focusing on individuals in the abstract is not well-grounded in either constitutional text—which refers to persons, not individuals—or in principles of equality. As a procedural abstraction, focusing on individuals is inconsistent with judicial commitments to the integrity of whole persons, who must ultimately be seen within the social settings in which their identities have meaning. This judicial focus on individuals in abstraction is also a central component of current affirmative action doctrine's requirement of strict scrutiny and commitment to a color-blind Constitution, which Part II examines. Strict scrutiny, and the logic of colorblindness, shape which constitutional harms become salient when government considers race. For the Court's affirmative action opponents, harm salience, similar to commitment to colorblindness and the asserted need for strict scrutiny, also depends on an individual-focused analysis. As this Part concludes, there are good reasons to be skeptical of this focus as well as its implications. Moreover, the Court in practice often prioritizes substantive persons and their individual identities and histories. This inconsistent appeal to the concept of individuals provides internal reasons for reconsidering how the Court's equal dignity jurisprudence, which arises within a line of cases beginning with *Lawrence v. Texas*,[41] focuses on the status and integrity of persons understood for who they are within complex social and legal contexts, not upon abstract individuals.

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41. *See generally* 539 U.S. 558 (2003); Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

As Part III argues, the combined principles of due process and equal protection—equal dignity—provide a basis on which individual persons are owed affirmative consideration of their applications in virtue of their unique personal identities and histories. Equal dignity would be denied to persons were the State forbidden by a color-blind principle from considering their race when it is relevant to understanding their personal identity. In this way, a commitment to equal dignity provides a new way of understanding how the Constitution protects the ability for individual persons to receive affirmative consideration of their holistic identities in university admissions processes. Moreover, even if the sunset of *Grutter* brought about the end of affirmative action as a means to the institutional goal of diversity, it would not augur the end of race consciousness but would allow a modified form of affirmative action—or affirmative consideration. Justice Kennedy explained in *Fisher II* that "it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[42] If this reconciliation becomes untenable, the commitment to equal dignity should prevail, shifting the focus not to abstract procedural individualism but to the status of persons with socially situated identities and histories. An institution's desire to create a diverse student body would no longer justify the use of race consciousness if the Court were to abandon *Grutter*—as *Grutter* itself predicted the Court should do. Instead, equal dignity could justify continued race consciousness to meet the demands of individual persons who seek affirmative consideration of their identities and histories as part of a holistic admissions process. So understood, equal dignity forecloses a rigid commitment to color-blind constitutionalism, permits affirmative consideration of complete persons, and makes possible a new framework for race consciousness in official decision-making. Understanding the implications of *Grutter's* approaching sunset requires first understanding its grounding in a particular conception of individuals, to which I turn in the next Part.

42. Fisher II, 136 S. Ct. 2198, 2214 (2016).

I. FROM INDIVIDUAL TO PERSON

An analysis of affirmative action's constitutionality begins with very basic questions of political and constitutional theory. Does equal protection apply strictly to individual persons or does it apply across groups of persons? Supreme Court decisions have focused on the idea that equal protection applies to individuals. But if equal protection applies only to individual persons, how should we understand the nature of individuals? Are they abstract analytic placeholders within a broader political theory, or are they concrete persons with unique life histories? These questions occur against an important backdrop of debates in political philosophy that have unfolded for centuries. Although it is beyond the scope of this Article to intervene in these debates directly, it is important to understand how a stated judicial commitment to "individuals" as a core concept is but one contestable constitutional approach to equal protection. Indeed, divergent responses to these basic questions lead to divergent approaches to affirmative action. As this Part demonstrates, the best interpretive answer to these questions is to recognize how equality applies to persons in their concrete and socio-legally situated life circumstances. This recognition in turn will shape subsequent analysis of the future of affirmative action.

A. Equal Protection and Individualism

Relying on a constitutional principle of colorblindness, Justices voting against affirmative action programs argue that the Equal Protection Clause protects individuals, not groups. For example, Justice Thomas argues that "[a]t the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."[43] Even though state actions have perpetrated harms through group racial classifications, Justices who advocate for a color-blind Constitution reason that "[i]ndividuals who have been wronged by unlawful racial discrimination should be

43. Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual."[44]

When focusing on the affirmative action program for admissions to the University of Michigan Law School, Justice O'Connor explained that "[t]o be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"[45] This "undue burden" analysis focuses on the likely harms that members of groups not afforded affirmative action might suffer.[46] According to the Court, affirmative action programs "rearrange burdens and benefits on the basis of race [that] are likely to be viewed with deep resentment by the individuals burdened."[47] When the State acts on behalf of groups for affirmative action on behalf of its members, on this reasoning, it violates the constitutional status of individuals whom the Equal Protection Clause protects.[48] By contrast, in the related context of school districting, Chief Justice Roberts wrote for a majority to explain that the Court had given its "repeated recognition that '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'"[49] As Justice Kennedy emphasized, the Constitution forbids "[r]eduction of an individual to an assigned racial identity" because "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."[50]

Such focus upon the individual instead of groups is bound up with a distinction between two possible principles that mediate the meaning of the Equal Protection Clause.[51] The antisubordination

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44. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

45. Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

46. *Id.* at 323-24.

47. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (plurality opinion).

48. *See id.*

49. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 730 (2007) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

50. *Id.* at 795, 797 (Kennedy, J., concurring in part and concurring in the judgment).

51. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107-08 (1976); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values*

principle views the harm of inequality as perpetuating social structures that subordinate minority groups relative to the interests of majorities.[52] By contrast, the anticlassification principle argues that the harm of inequality occurs from the continued classification of individuals according to racial groups.[53] On the latter view, the Constitution is "color-blind."[54] But because the forbidden classifications are based on group membership, a color-blind Constitution therefore must focus on the individual. As Justice Thomas explained regarding the use of race in school districting, "[d]isfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race," rather than on an individual, race-blind basis.[55]

B. The Constitution and the Person

Starting with the Constitution's text, so much emphasis on the distinction between group and individual raises unexamined questions. The Fourteenth Amendment provides that "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."[56] Despite the Court's numerous claims that it must uphold a constitutional duty to focus on the concept, the Constitution does not mention individuals.[57]

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in Constitutional Struggles over Brown, 117 HARV. L. REV. 1470, 1472-75 (2004). *See generally* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895 (2016).

52. *See, e.g.*, Siegel, *supra* note 51, at 1472-74. For other articulations of the antisubordination principle, see generally J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

53. *See, e.g.*, Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12; Charles Fried, *The Supreme Court, 1989 Term—Comment:* Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 HARV. L. REV. 107, 107-09 (1990) (advocating individualist approach).

54. A "color-blind" constitutional principle can trace its genealogy to Justice Harlan's dissent in *Plessy* (but so too can the antisubordination principle). Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

55. *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring).

56. U.S. CONST. amend. XIV, § 1.

57. *See id.*

At first blush, the terms "person" and "individual" would seem to be interchangeable. A person is an individual, not a group, and the Constitution protects persons as individuals. But the opponents of affirmative action do not articulate the point quite this way. The term "individual" is not simply a synonym for "person." The term "individual" is an abstraction that applies more broadly than does "person," for we can refer to all kinds of things as individuals that are not also persons. The individual collie, for example, who is to be differentiated from the breed, collie. Individuals, not groups, are an abstraction referring to number, not to the kind of thing under consideration.[58] A constitutional person is a special kind of being—a human being, or perhaps a legal fiction for an entity that has legal standing—who (or which) receives protection under the law.[59] Persons are bearers of rights who are individuated from one another, but are also capable of assembling together, for example as guaranteed by the First Amendment.[60] Persons also appear as constitutional collectives. "We the People" ordain and establish the Constitution, and the Second, Fourth, and Ninth Amendments protect the rights "of the people."[61] Nowhere does the Constitution speak of "individuals." The Fifth and Fourteenth Amendments provide that no "person" be deprived of "life, liberty, or property, without due process of law."[62] The textual bearer of rights is "person," not "individual." In both singular and plural, "person" and "people" constitute the bearers of constitutional rights that include those of equality and due process. They also constitute the self-governing political body in whom sovereignty resides and through whom republican government exists.[63]

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58. This distinction touches on deeper philosophical issues about the relation between individuation and personhood that go beyond the scope of this discussion. *See generally* DEREK PARFIT, REASONS AND PERSONS (1984); P. F. STRAWSON, INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS (1959); BERNARD WILLIAMS, PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972 (1973).

59. *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (declaring corporations are persons for purposes of the Fourteenth Amendment); *see also* L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 372 (1930).

60. U.S. CONST. amend. I.

61. U.S. CONST. pmbl.; *id.* amends. II, IV, IX.

62. *Id.* amends. V, XIV.

63. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 383 (1819). *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

But the slip from "person" to "individual" is easy to make. For example, an early case in developing a modern equal protection doctrine, *Shelley v. Kraemer*, explained that "[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."[64] Such reasoning is at least in part meant to signify more precisely the nature of who bears the right to equality—a singular person, not a group. And opposition to affirmative action on the Court is united behind the idea that "[r]ace-based assignments embody stereotypes that treat *individuals* as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."[65] Similarly, as we have seen, Justice Scalia emphasized the "individual" in his concurrence in *Adarand*, claiming: "*Individuals* who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual."[66] The appeal to credit and debt is meant to foreclose the idea that government actors might remedy past discriminatory practices perpetrated against particular individuals with future-oriented preferential programs benefitting members of groups. For such an outspoken adherent to textualism and originalism, however, Justice Scalia curiously argues that the Constitution is focused upon the "individual" rather than the term it actually uses, "person."[67] What might this mean? No doubt, Justice Scalia seems to contrast the numeric individual with the plural group. But then, "person" is singular too.

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64. 334 U.S. 1, 22 (1948) (emphasis added).

65. Fisher II, 136 S. Ct. 2198, 2221 (2016) (Thomas, J., dissenting) (emphasis added) (quoting Miller v. Johnson, 515 U.S. 900, 912 (1995)).

66. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (emphasis added). Prior to joining the Court, Scalia had similarly argued that "[affirmative action] is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need ... [and] is racist." Antonin Scalia, Commentary, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 153-54.

67. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

The numerical meaning is further evident in *Adarand*, where Justice O'Connor, writing for the Court, reasoned that any racial classification warrants the strictest scrutiny, and claimed that "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*."[68] The Court clearly is capable of making linguistic distinctions between protecting persons and protecting individuals—and therefore seems to use the terms interchangeably.[69] For example, the Court explained the meaning of equal protection in terms of a "simple command that the [g]overnment must treat citizens *as individuals*, not as simply components of a racial, religious, sexual or national class."[70] Given the seemingly easy linguistic interchangeability between the two terms, even when employing the word "person" to make the contrast with "groups" the Court might mean no more than the numeric abstraction of "individuals."[71] So in at least some usages, the Court might employ both "individual" and "person" either as numeric designations or procedural abstractions. But by using the phrase "citizens as individuals," the Court also implicitly acknowledged that there are different ways that persons or citizens can be "treated as," or "seen as"—citizens as voters, for example.[72] As a result, by using "individual" in place of "person," the Court implicitly recognized that a person is more than an opposition to a "group," but carries with it more meaningful sense of identity beyond numeric individuation or procedural abstraction.[73]

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68. 515 U.S. at 227. Note, however, that three pages prior, the Court cited favorably Justice Powell's discussion of "the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background." *Id.* at 224 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)).

69. *Id.*

70. Miller v. Johnson, 515 U.S. 900, 911 (1995) (emphasis added) (internal quotation marks omitted) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

71. *See, e.g.*, Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997) ("That the Fourteenth Amendment affords individuals, not groups, the right to demand equal protection is a fundamental first principle of 'conventional' equal protection jurisprudence.").

72. *See Miller*, 515 U.S. at 911.

73. *See id.*

C. Why Focusing on "Persons" Rather Than "Individuals" Matters

If more than a numeric designation, what then is at stake in the linguistic slip from "person" to "individual"? For given the Constitution's explicit repetition of "person" in substantive contexts with substantive meanings, a claim that the numeric individual is all that matters to equal protection logic seems unlikely. Persons are textual rights bearers, not individuals.[74] The more plausible account of this linguistic shift is that there are both theoretical and principled implications at stake.

In one tradition in political theory, the individual is the basic unit of political rights which is viewed in contrast to the collective political body.[75] For example, Professor Amy Gutmann writes: "Equal regard for individuals—not identity groups—is fundamental to democratic justice."[76]

By contrast, there is an equally broad, and metaphysically rich, philosophical tradition bound up with the determination of what it means to be a person.[77] Persons obtain and sustain their identities within thick social and political relations with others—through families, social communities, associations, professions, religious communities, and the like. They are not abstractions who easily shed their identifying features for purposes of political theory but are identifiable within thick interpersonal relations.[78] Many of these features of personhood are also objects of special constitutional protection. This difference between abstractions that evoke the atomistic individual and references to concrete particularized persons is one that also tracks a difference of approach in political theory. In the contractarian tradition, the individual is a central figure who is opposed to collectives, whereas in the Aristotelian and

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74. *See* U.S. CONST. amend. XIV, § 1.

75. *See generally* JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003) (1859); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

76. AMY GUTMANN, IDENTITY IN DEMOCRACY 7 (2003).

77. *See generally* PARFIT, *supra* note 58; CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

78. John Rawls's thought experiment implementing a "veil of ignorance" is one example of reasoning from abstract individuals. JOHN RAWLS, A THEORY OF JUSTICE 136-37 (1971).

communitarian traditions, the embedded person is the focus for political arrangements.[79]

This debate in political philosophy over individualism and community is instructive for the Supreme Court's claim that the Constitution is focused upon the individual. One significant example illustrates the stakes. The political philosopher John Rawls employs a paradigmatic version of procedural individualism in his "veil of ignorance" thought experiment.[80] Individuals stripped of all knowledge about their roles, status, place, race, gender, and relative intellectual and physical capacities within society—in short, anything that distinguishes them as distinctive and robust persons—must choose the basic principles of political morality by which to organize a system of justice.[81] Behind the veil of ignorance, individuals become procedural abstractions through which principles of justice can be chosen through an idealized procedural fairness in which no person can tilt the scales in a way that would advantage his or her position in society.[82] A Rawlsian approach to the question of affirmative action might ask whether individuals were afforded the same opportunities for university admission, for example, independent of their particular social experience of race. And from that perspective it is not at all clear that such practices would be just.[83]

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79. For an overview, see CHARLES TAYLOR, *Atomism*, *in* PHILOSOPHICAL PAPERS 2: PHILOSOPHY AND THE HUMAN SCIENCES 187-210 (1985). For contractarianism, see generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690); RAWLS, *supra* note 78. For communitarianism, see generally WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). For contrast between liberal and communitarian approaches, see generally STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM (1993).

80. RAWLS, *supra* note 78, at 136-37.

81. The agreements reached from this original position constitute a conception of justice that Rawls names "justice as fairness." *Id.* at 17. Justice as fairness does not consider the actual propensities of persons or the actual distributive outcomes of any particular social arrangement; it provides principles that regulate any given social arrangement that accepts those principles chosen from the perspective of the original position. *Id.*

82. *Id.* at 85 (explaining the "notion of pure procedural justice").

83. Peter Schuck, for instance, employs the veil of ignorance to argue that even with basic knowledge of persisting racial inequalities and past legal discrimination, one who was ignorant of her own demographic traits would not choose practices that permit allocating resources by way of racial quotas. SCHUCK, *supra* note 18, at 200. Political theory advocating more radical individualism, such as that offered by Robert Nozick, places the burden on the

This brief foray into Rawlsian liberalism illustrates how a decision to focus on individuals, rather than groups, is an idea with a history and context within political philosophy. There is a family of political theories that prioritize procedural individualism. Because a color-blind approach to equal protection emphasizes procedural fairness—no person should be made to be a component of a (favored) racial group rather than be seen as an individual—it fits within this tradition.

But does this tradition fit the Constitution? Other political theories compete for this fit, with a possible advantage that they focus on persons in social and political contexts, not upon individuals stripped of concrete social settings. Rawlsian liberalism has been widely criticized because it abstracts the "individual" in a way that no longer takes into account persons—the real focus of the law's protection.[84] Philosopher Michael Sandel, among others, has argued that law and political morality protect persons, and persons can only be understood in their rich contextual locations in a web of social and cultural practices that provide meaning to the story of their lives.[85] To be a person is already to be irreducibly imbued with shared practices that give meaning and substance to who one is. Thus, to reason over a procedural abstraction such as the "individual" is to have ceased talking about real, socially embedded persons. Sandel is not alone in his criticism as there are many other theorists who focus on the socially embedded nature of persons.[86]

My aim is not to enter this debate in political philosophy on one side but rather to note that the choice between individual and person as the object of judicial vision arises from a deeper philosophical context that also has practical consequences. Those consequences are found in the procedural abstraction of the individual as opposed to the substantive robustness of the person.

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state to justify interference with core individual rights retained in isolation and separation from political institutions and other persons. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974).

84. *See* SANDEL, *supra* note 79, at 15-17.

85. *Id.*

86. *See, e.g.*, IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 208-09 (1990); NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 5-7 (1997); ROBIN WEST, CARING FOR JUSTICE 1-9 (1997).

D. How Emphasizing the Constitution's Textual Reference to "Person" Provides a Better Interpretive Approach

A Supreme Court that sees its role as treating procedural "individuals" will respond differently to the claims brought before it than one that sees its role as treating substantively complex "persons." The latter will be more attentive to the ways in which "racial, religious, sexual or national class,"[87] for example, figure into the lives of persons.[88] Given the political theoretical context just sketched, a choice to emphasize one of these concepts reveals deeper—and rivalrous—theoretical commitments not found on the surface of the constitutional text even though they also have practical implications.[89]

To focus on an Equal Protection Clause that prioritizes individuals risks smuggling a version of procedural individualism into a Constitution that is better understood as textually committed to substantive persons.[90] This textual commitment to persons, however, does not require adherence to any particular political theory, even if it fits well with theories that emphasize the moral significance of socially situated persons. Rather, because the Court has never explained the basis for its reliance on "individuals," the textual point casts doubt on whether a commitment to individualism follows from an equal protection focused on protecting persons.

By contrast, focusing textually on the equality of "persons" invites the Court to attend to the substantive features that constitute a person. Because constitutional text and precedent recognize that persons are self-governing sovereigns who are bearers of rights

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87. Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

88. One need not be a communitarian to accept the socially and politically embedded importance of persons. *See, e.g.*, ACKERMAN, *supra* note 75, at 72.

89. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1751 (2007); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5 (1984) ("[W]hile the broad language of the Constitution delegates to judges the power to make [interpretative decisions], their major premises come from such extra-textual sources as judicial precedent and the practices and ideals of social life."); Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 2-5 (2007); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 4-8 (2008).

90. *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1000-04 (2007) (tracing the history and observing the link between individualism and colorblindness).

capable of forming collectives, the burden of argumentation is on those seeking to limit equality to abstract, procedural individuals—a burden which has not been taken up.[91] Instead, it is a more natural reading of the constitutional significance of "person" to allow that to be a substantive person means having complex group-related identities such as race.[92] One such group is "citizen," which the Fourteenth Amendment recognizes in the same section in which it protects "persons."[93] And indeed, the Court implicitly recognized this point when it explained that "[g]overnment must treat citizens *as individuals*."[94] Rather than an abstract placeholder for purposes of ascribing political rights, this substantive content aids in understanding how equal protection applies to persons who are constituted by their group identities and affiliations, as well as their social contexts and personal histories. Both text and precedent therefore support a more complex understanding of the "persons" protected by equal protection and due process than abstract individualism would seem to allow.

Even if an abstracted commitment to analyzing "individuals" rather than "persons" were a better approach, unexpected implications follow. Professor Eidelson argues that by emphasizing the equal protection of "individuals," the Court becomes committed to a principle that "respecting people as individuals should be understood to mean respecting people as *autonomous* ... [and] requires us to take their past self-definitional and self-expressive choices seriously," which includes their racial identities.[95] On this account, a central feature of focusing on individuals becomes the moral imperative to treat them with respect as fully autonomous agents capable of self-definition. A doctrine of equal protection individualism, on this view, will therefore have the unexpected consequence of requiring attention to race when relevant as a constitutive

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91. For cases on the people as sovereign and associational rights, see, for example, Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984).

92. Chief Justice John Marshall admonished that words in the Constitution should be given a natural interpretation. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819) ("Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea.").

93. U.S. CONST. amend. XIV, § 1.

94. Miller v. Johnson, 515 U.S. 900, 911 (1995) (emphasis added) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

95. Eidelson, *supra* note 30, at 1635.

feature of an individual's autonomous self.[96] If individualism is better understood to entail a substantive autonomy that opens up consideration of race, then a substantive commitment to protecting persons and their complex and situated personal identities should be even better situated—textually and conceptually—to demonstrate the inadequacy of the principle of colorblindness.[97]

These two textual points therefore converge—that individuals are persons and that persons should be understood to be the substantive bearers of constitutional rights—to explain the unexpected significance of the Court's repeated claim that the Constitution protects the equality of individuals. Although used as a way to limit the possibility of race-conscious decision-making, a constitutional commitment to "individuals" as a way of protecting "persons" also implies the necessity of race-conscious decision-making when race matters to the substantive identities of persons.[98] To foreshadow the argument in later Sections, a commitment to individual persons also implicates the correlative duty to recognize the equal dignity of complete, substantive persons who have particular identities and histories—a duty the Court has recognized in its equal dignity jurisprudence.[99]

The future of affirmative action—beyond the possibility that *Grutter v. Bollinger*'s central holding might sunset—begins with these unanticipated constitutional consequences that flow from a focus on the equal dignity of individual persons. To develop this implication, it is important to see first how the Court combines a focus on individuals with a color-blind rationale under strict scrutiny to create a rationale for a time-limited acceptance of diversity as a compelling interest for affirmative action.

The next Part explores this connection between scrutiny and procedural individualism in light of the Court's skepticism about the constitutionality of race-conscious government decisions. As the next Part examines, the Court's commitment to the equality of individuals, when viewed in its doctrinal context, also provides—

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96. *Id.* at 1672 ("[R]efusing to consider race often means refusing to treat people respectfully as individuals, because it means ignoring a factor that illuminates the significance of their choices and experiences.").

97. *See id.*

98. *See id.*

99. *See infra* Part III.A.

unexpected and unanticipated—grounds for protecting substantive personal identities, not merely abstracted individuals. The more the Court is committed to focusing on individuals, the more the Court will need to be committed to the equal dignity of persons.

II. THE LOGIC OF AFFIRMATIVE ACTION JURISPRUDENCE

The Court developed this textual distinction between individual and person within the context of affirmative action doctrine—and its competing principles—in a line of cases stretching back to *Regents of the University of California v. Bakke* and extending to government contracting cases.[100] When Chief Justice Roberts or Justice Thomas speak of antidiscrimination as a form of colorblindness, they construe the meaning of equality in light of a commitment to a particular theory that starts from a premise about individuals. Focusing on individuals avoids allowing government to create favored and disfavored groups, members of the Court reason, and raises questions of fairness and harm to majority populations said to be "disfavored" by such programs.[101] From strict scrutiny to questions about sorting "favored" groups from "disfavored," this commitment to individualism and colorblindness grounds the claim that affirmative action will be subject to future constitutional reconsideration under *Grutter*. It is therefore important to understand how this commitment to individualism is also in tension with its own values in ways that open up the possibility of unanticipated constitutional implications. As this Part argues, within existing doctrine, the Court's emphasis on protecting individuals is complicated by its protections for substantive persons. The priority of persons becomes most clear in unraveling what the Court's dissenters see as the primary harm in affirmative action and is in tension with a principle of colorblindness. As the argument unfolds, the unanticipated implications arise from emphasizing the equal dignity

100. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (plurality opinion) (affirmative action); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (city contracting).

101. *See* Grutter v. Bollinger, 539 U.S. 306, 317 (2003) ("Petitioner further alleged that her application was rejected because the Law School uses race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'").

of individual persons who cannot be abstracted from their personal—and racial—identities, thereby altering the consequences of reconsidering *Grutter*.

A. Affirmative Action Through the Lens of Strict Scrutiny

The Supreme Court's affirmative action doctrine holds that equal protection permits state actors to consider "race only as one factor" which admits of a "plus" in an applicant's file for university admissions.[102] This justification first appeared in the Court's initial affirmative action case, *Regents of the University of California v. Bakke*, which makes use of both the idea that the Fourteenth Amendment protects "individuals" and the idea that race—a group classification—can be relevant to assessing those "individuals."[103] In *Bakke*, Justice Powell described the kind of permissible admissions program as one that employs race as a "plus factor," while looking to many other factors of the individual's application relevant to an admissions decision: "[A]n admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration .... This kind of program treats each applicant as an individual."[104] Endorsing Justice Powell's reasoning, Justice O'Connor reaffirmed in *Grutter* that "[u]niversities can ... consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[105]

The idea of a "plus" is set in contrast to the system the University of California, Davis had established, which led to the decision in *Bakke*. There, California had set aside a number of seats for its medical school specifically for the recruitment and admission of minority candidates, citing the institution's own past racial discrimination in denying admission opportunities to minority applicants on an equal basis.[106] In this way, California sought both

102. *Bakke*, 438 U.S. at 317-18.
103. *Id.*
104. *Id.*
105. 539 U.S. at 334.
106. *Bakke*, 438 U.S. at 305-06.

to increase the number of minority students and to remedy its own past practices.[107] For the Court, however, a set-aside of a particular number of seats—in this case, sixteen—created a "quota," the use of which offended the Constitution because "it is a line drawn on the basis of race and ethnic status."[108] Citing favorably the claim from *Shelley v. Kraemer* that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual,"[109] the Court reasoned that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[110] All seats in the University of California Medical School must be open equally to all applicants, no matter the particular institutional history or educational goals. There cannot be separate seats assigned on the basis of race or ethnicity.

In *Grutter*, Justice O'Connor grappled with the idea that a percentage of seats in an incoming class might form a "critical mass" of minority students in order to achieve the institution's goal of admitting a diverse class across multiple criteria.[111] The University of Michigan's "critical mass" was not a quota, Justice O'Connor reasoned, because it was neither a fixed number nor an exclusive admissions track demarcated by race.[112] Rather, critical mass was "defined by reference to the educational benefits that diversity is designed to produce."[113] Moreover, the benefits of diversity are substantial, creating a compelling educational interest.[114] Noting "the overriding importance of preparing students for work and citizenship," the Court reasoned that rather than creating a roadblock to a more equal and united citizenry, limited consideration of race and ethnicity in admissions decisions furthers a shared interest in equality.[115] "Effective participation by members of all racial and

107. *See id.*
108. *Id.* at 289.
109. *Id.* (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).
110. *Id.* at 289-90.
111. 539 U.S. 306, 329-30 (2003).
112. *Id.*
113. *Id.* at 330.
114. *Id.* at 329-30.
115. *Id.* at 331.

ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[116] For a law school to provide future professional and civic leaders representative of the broader society, it must admit a diverse student body that signals the openness of America's civic and professional positions to all. To achieve this openness, therefore, the University of Michigan Law School had a compelling interest in a limited, narrowly tailored consideration of race, necessary only because of background social circumstances that continue to make race relevant. The Court reached this conclusion in *Grutter* despite its commitment to strictly scrutinize any government use of race, skeptical that legitimate uses exist.[117]

In two cases, *City of Richmond v. J. A. Croson Co.* and *Adarand Constructors, Inc. v. Pena*, the Court established a doctrine of strictly scrutinizing affirmative action programs, holding that "because classifications based on race are potentially so harmful to the entire body politic," they "are simply too pernicious to permit any but the most exact connection between justification and classification."[118] Therefore, the Court concluded in *Adarand* that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[119] Under this standard, government actors must demonstrate that they act upon compelling government interests using a means narrowly tailored to achieve that interest.[120] In one stroke, in terms of judicial analysis, the Court equated, Jim Crow and remedial affirmative action programs.[121] Government purpose—whether subordinating or facilitating—must be scrutinized for

116. *Id.* at 332.

117. *See id.* at 343.

118. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995) (citing Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). *See generally* City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (plurality opinion).

119. *Adarand*, 515 U.S. at 227.

120. *See id.*

121. This move in itself is highly suspect in that it ignores the fact that strict scrutiny has been used to "smoke out" invidious discrimination, which requires looking to purpose; and if we look at purpose, affirmative action does not have the purpose of subordinating whites in the way that segregation had with regard to Black people. *See* Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 436, 443 (1997).

whether the classification is narrowly tailored to achieve what the Court agrees is a compelling purpose.[122]

In employing strict scrutiny, the Court's presumption is against the state's use of race on the belief that there are few legitimate uses of race in official decision-making.[123] The Court requires that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[124] The Court seeks to "smoke out" potential illegitimate motive by strictly scrutinizing the reasons government actors give for their use of race.[125] And although there may be a difference between racist exclusion and antisubordination inclusion, the Court adheres to a doctrinal need for "consistency" in its standard of review, motivated by a default principle of colorblindness.[126]

Race-blind programs receive no heightened scrutiny for what social or personal harms they might overlook, or even inadvertently perpetuate. Only if officials attempt to see whether subordinating social structures are relevant to holistic decisions about individual persons do their actions warrant strict scrutiny, with its presumption of being "strict in theory, but fatal in fact."[127] Approaching equal protection through an antisubordination principle would allow government to recognize the different ways that race might factor in

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122. Hellman, *supra* note 51, at 915.

123. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1276 (2007); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 834-37 (2006).

124. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (alteration in original) (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

125. *See id.* at 326; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

126. Justice Stevens's dissent argued that consistency "does not justify treating differences as though they were similarities" because there is an important difference between a "'No Trespassing' sign and a welcome mat." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting). Of course, this is precisely the question that divides the Court. *See supra* note 51 and accompanying text. An anticaste or antisubordination equality principle focused on the motive and effects of government use of race is capable of seeing the difference between "no trespassing" and a welcome mat. The motives and effects of such "no trespassing" laws are to create a caste system based on group status, denying to some their equal standing, respect, and dignity in society. *See generally* ACKERMAN, *supra* note 63; Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002).

127. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (plurality opinion)).

official decision-making depending upon whether the effects subordinate one group to the interests of another in ways constitutive of caste structures. Absent searching analysis, subordinating structures can continue to produce inequality long after the motives of those who set them in motion have faded and despite the present intentions of those who inadvertently perpetuate them.[128] Nonetheless, because the Court reviews race-conscious affirmative action programs through the lens of strict scrutiny, the effect is to prioritize colorblindness as the default equality principle, which forecloses purposeful antisubordination action.[129]

Strict scrutiny is necessary, as the Court explains, because when government deviates from treating persons as individuals in order to recognize their racial group classification, there is a risk that decisions might be based on "illegitimate racial prejudice or stereotype."[130] *Grutter*'s likely demise is predicated on this commitment to strictly scrutinize the use of race-consciousness, no matter the potential benign antisubordination purpose. In this way, the Court engages in strict scrutiny to protect individuals and to promote a color-blind Constitution. The final piece of this analytic triad requires understanding the internal tensions inherent within a principle of colorblindness.

B. The Logic of Colorblindness

Justice Harlan provided an early articulation of colorblindness logic in *Plessy v. Ferguson*, explaining that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[131] A "color-blind" principle of equality focuses on a state's obligation not to consider race in official decisions, and thereby cuts off the epistemic route necessary to producing classes of citizens made unequal

128. *See, e.g.*, Balkin, *supra* note 52, at 2313, 2316, 2318-20; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1768 (1993); DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 108-20 (2014).

129. *See* Harris, *supra* note 128, at 1768.

130. *Grutter*, 539 U.S. at 333 (citing City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

131. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

on account of racial criteria.[132] If official decision-making cannot know a person's race, then from a state of blindness, it cannot conduct invidious discrimination.[133] This principle, the Court reasons, justifies imposing strict scrutiny on all government uses of race because the background presupposition is that race should not be a factor in government decisions.[134] As the Court explained in a non-affirmative-action discrimination case, appeals to race or ethnicity

> are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subject[ ] to strict scrutiny.[135]

As Owen Fiss commented, in conjunction with such rationales, Justice Harlan's colorblindness metaphor "has played a dominant role in the interpretation of anti-discrimination prohibitions."[136]

Colorblindness thus can have great appeal. It creates a simple imperative—do not make discriminations on the basis of race.[137] It

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132. *See generally* Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 479-80 (1997); ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

133. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 758 (2007).

134. As Justice Thomas explained, "[m]y view of the Constitution is Justice Harlan's view in *Plessy*: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" *Id.* at 772 (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

135. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

136. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971). Fiss continued, noting that "[t]he effect of blindness is to treat all colors as normative equivalents, and thus the metaphor is particularly handy in expressing an opposition to increased enforcement on the ground that such enforcement will result in preferential treatment for [B]lacks." *Id.* at 236; *see also* López, *supra* note 90, at 988 ("By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.").

137. Chief Justice Roberts summed up this view, as we have seen, by proclaiming that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748; *see also* Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir.

also aligns closely with the Court's emphasis on the individual to the exclusion of group-based reasoning. Because race is a group characteristic, colorblindness reinforces a focus upon the individual.[138] By adopting the perspective of blindness, a more equal treatment of individuals as individuated from each other only according to job-relevant, or education-relevant, merit characteristics is said to follow. As Robert Post observes, the logic is that "[b]lindness renders forbidden characteristics invisible; it requires employers to base their judgments instead upon the [supposed] deeper and more fundamental ground of 'individual merit' or 'intrinsic worth.'"[139] In this way, the logic of colorblindness works like a prophylactic, requiring individuals to be separated from constitutive aspects of their identities in order to ensure that irrelevant characteristics do not factor into official decision-making.

Blindness is also a way of avoiding constitutional harms. Discrimination harms individual persons not only by depriving them of access to education or employment but also by denying them equal standing within society. Discrimination deprives persons of their dignity, imposing a status-based harm upon their ability to conduct their public lives as equal to others.[140] If a necessary condition for imposing such status-based and dignitary

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1996) ("The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."); Posner, *supra* note 53, at 25. For further analysis of what is at stake between anticlassification and antisubordination principles, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9 (2003).

138. As Siegel explains:

> For many, the belief that anticlassification commitments are fundamental entails the view that our tradition embraces a particular conception of equality, one that is committed to individuals rather than to groups. On this account, the tradition's embrace of the anticlassification principle signifies its repudiation of an alternative conception of equal protection, the antisubordination principle: the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.

Siegel, *supra* note 51, at 1472-73. Advocates of individual-based approaches reject group-based equality. *See, e.g.*, Lawrence A. Alexander, *Equal Protection and the Irrelevance of "Groups*," *in* ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY 1, 4, 12 (2002).

139. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 11 (2000).

140. *See* Henry, *supra* note 38, at 204-05.

harms is knowledge of a person's race, then blindness is one way of cutting off the route to such harmful discrimination.[141] If government officials lack authorization to know and act upon a person's race, then they cannot deny or denigrate them on the basis of prejudicial views about group status.[142]

In both the context of university admissions and government contracts, strict adherence to the colorblindness principle entails that constitutional harm can arise from the mere use of racial classifications. Justice O'Connor puts the point like this in *Adarand*: "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[143] Such a constitutional injury arises, on this view, from the preferential treatment persons receive because of their race and from the relative disfavor others suffer based on their racial identity.[144] As Justice Powell emphasized in *Bakke*, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[145] Constitutional harm also occurs from a denial of the full benefits of individual desert or merit other applicants experience on account of their majority status.[146]

What makes *Grutter* controversial is the Court's willingness to admit that white applicants suffer a constitutional injury, but that compelling state interests override that harm.[147] In this way *Grutter* strikes a constitutional balance. A right to equal treatment is

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141. As Post observes, "[a]ntidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities." Post, *supra* note 139, at 8.

142. *See id.* at 11.

143. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995).

144. *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 184 (2016).

145. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

146. *See supra* note 101 and accompanying text.

147. Using this logic, which ignores purpose in assessing harm, Jed Rubenfeld suggests that invidious discrimination could also be justified. For example, we might imagine discriminating against Black people in an invidious manner and justifying such a practice by strong arguments about compelling state interests. Rubenfeld, *supra* note 121, at 463-64; *see also* Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

burdened, but the benefits flowing from state's compelling diversity goals outweigh the incidental individual harms.[148]

Critics claim that affirmative action imposes harms simply because particular individuals, by virtue of their group identity, receive preferential treatment at the expense of "innocent persons."[149] Beginning with Justice Powell's opinion in *Bakke*, Justices critical of affirmative action have asserted that "there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."[150] And in response to arguments about structural remedies for discriminatory social structures, the Court explained that "as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive."[151] The idea is that corrective justice conflicts with distributive considerations to prevent third parties (white applicants) who are innocent of perpetrating any racial harms from bearing the costs of remedying the negative structural effects on minorities. As Justice Stewart explained, dissenting in another affirmative action case, "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race."[152]

A fundamental idea about equality and fairness embedded in this reasoning is that innocent individuals are denied "preferential treatment."[153] Opponents of affirmative action argue that to give preference to one person on the basis of race amounts to a zero-sum tradeoff in which a member of the nonpreferred race is harmed.[154]

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148. *See Grutter*, 539 U.S. at 327.

149. *Bakke*, 438 U.S. at 298.

150. *Id.*

151. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion).

152. Fullilove v. Klutznick, 448 U.S. 448, 530 n.12 (1980) (Stewart, J., dissenting).

153. Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 705 (9th Cir. 1997) (considering California's Proposition 209 and asking "whether a burden of achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws").

154. The Ninth Circuit puts the point like this:

> Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members

Thus, the question of preferential treatment of some applicants because of their race is, from a color-blind perspective, an easy case of inequality, and thus imposes constitutional harm on those not afforded preference.[155] By contrast, no individual is harmed, according to this reasoning, when the State forbids affirmative consideration of their race.

When the State sought to remedy the effects of past social and political racial subordinations, affirmative action skeptics on the Court were not only concerned about the costs to the innocent, but also the resentment and division it could cause. Using the language of preferences, Justice Kennedy was particularly concerned about the harms of racial division that affirmative action programs can cause.[156] He suggested, "[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."[157] This divisiveness can produce not only backlash but racial conflict because of the State's use of race to classify individuals.[158] This concern has been part of the Court's reasoning

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> of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

Id. at 702.

155. Similar criticisms are leveled against the Texas plan that adds limited race-consciousness on top of its 10 percent plan. *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 292 (2001) ("[T]here is something wrong, indeed, unconstitutional, with a legislative motive to increase the percentage of one racial group in a state university at the expense of another.").

156. *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *see also* Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters.").

157. Grutter v. Bollinger, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). Justice Kennedy sounded this same note in *Parents Involved*, arguing that "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.... Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness." 551 U.S. 701, 797 (2007) (Kennedy, J., concurring). *See generally* Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

158. *See generally* Siegel, *supra* note 157.

since *Bakke*, where Justice Powell reasoned that "*[a]ll* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious."[159] Moreover, Justice Powell explained, "[o]ne should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin."[160] As Reva Siegel argues, rather than anticlassification, the theory that seems to best account for the Court's argument about division and what she labels "social cohesion" is a concern about balkanization.[161] Racial classifications are harmful because the State risks creating or exacerbating racial difference and conflict in the name of trying to remedy racially unequal social structures.[162] Resentment and division can be avoided, some Justices argue, by strictly scrutinizing even purported "benign" consideration of race.[163]

Closely related to claims that affirmative action risks harming innocent persons and producing social divisiveness is the additional claim that such practices are simply unfair. Giving some applicants extra consideration simply on account of their race would seem to violate a core idea that persons should be evaluated on the basis of their individual merits, not their group membership. Justice Powell refers to the "inherent[ ] unfair[ness]" such consideration perpetrates.[164] Justice Powell explained that this perception has broader social effects because affirmative action programs that use quotas "will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities."[165] Claims of

159. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (plurality opinion).

160. *Id.*

161. *See* Siegel, *supra* note 4, at 1300 ("Justices reasoning from this antibalkanization perspective enforce the Equal Protection Clause with attention to the forms of estrangement that both racial stratification and practices of racial remediation may engender."). Justice Kennedy, for example, argued that without strict scrutiny of university race-based decisions, "[t]he unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

162. *See* Siegel, *supra* note 4, at 1300.

163. *Id.*

164. *Bakke*, 438 U.S. at 319 n.53.

165. *Id.* Justice Kennedy echoed this reasoning, suggesting that "[p]rospective students,

unfairness arise because an individual's race cannot be grounds for a meritorious decision about the personal achievements and accomplishments on which university admissions are otherwise based.[166]

On the Court, critics of affirmative action argue that all of these harms—costs to innocents, racial division and backlash, and unfairness—can be remedied by focusing on color-blind consideration of individuals.[167] It is the very use of race—the existence of race consciousness as part of an admissions process—that color-blindness remedies.[168] If race is no longer a factor in decisions—whether invidious or affirmative—then the state cannot harm innocents, produce social division and related backlash politics, or perpetuate a perception of procedural unfairness.[169]

In a quest to avoid these constitutional harms, the Court's commitment to colorblindness entails not only blindness to race but blindness to how social context relates to personal identity. If race were nothing more than a superficial feature of a person's appearance, then colorblindness might entail no costs. But because race also has social meaning, then the logic of blindness entails a failure to see socially salient aspects of the lives of individual persons.[170] When considering the complexity of personal identity, race derives meaning from socially and historically embedded contexts that tell the story of how the status of a group affects the dignity of the person.[171] To be blind to race is to be blind to these background contexts that constitute in part the meaning and experience of

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the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

166. *See* Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 45 (2013). ("[T]he Court has devised a new body of strict scrutiny law designed to constrain the means by which government promotes diversity or pursues remedial ends that is focused on protecting expectations of fair dealing that citizens have in interacting with the government.").

167. *See Grutter*, 539 U.S. at 378 (Thomas, J., dissenting).

168. *See id.*

169. *See id.*

170. *See* Eidelson, *supra* note 30, at 1644-45.

171. That race is at least partially the product of legal and social construction is a widely accepted thesis. *See, e.g.*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 3-4, 9-10, 19 (1996). *See generally* ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES (1998). Indeed, Critical Race Theorists see one task of theory as unmasking the legal and political structures that construct, and subordinate, Black people as a race.

personal identity. When government institutions seek to counter residual social structures that perpetuate the effects of past discriminatory practices through affirmative action, for example, they rely on seeing the relevance and reality of how race functions within a complex social and historical context.[172] To be blind to race is therefore to be blind to social structure.[173]

Blindness to social structure also allows surface neutrality to hide underlying practices that have discriminatory effects.[174] In *Washington v. Davis*, the Court concluded that when a state's policy is facially color-blind, a plaintiff claiming a violation of equal protection must demonstrate that any resulting disparate racial effects were in fact intended.[175] A bad government actor can be unmasked as merely appearing to be color-blind, but absent evidence that racial discrimination was the intended effect, the Court in disparate impact cases does not look beyond the surface neutrality of a job qualification.[176] In this way, the Court's doctrine requires blindness to race insofar as race is understood in its social, cultural, and political contexts that form possible bases for differential impact.[177] It is worth noting that policing, by contrast, provides an important social structure in which race remains relevant, and in which race—as a group classification—can be used in the evaluation of individuals, with no accompanying claim of unconstitutionality by those members of the Court most wedded to a color-blind Constitution.[178]

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172. *See, e.g.*, Fiss, *supra* note 136, at 240.

173. *See id.*

174. *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

175. 426 U.S. 229, 239 (1976).

176. When social stratification is attacked for its visible effects, the Court can retreat to the realm of the "inner" intentional or purposive realm. Reva Siegel calls this kind of shift "preservation-through-transformation." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

177. *See Davis*, 426 U.S. at 245 ("[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory."); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

178. See, for example, Justice Scalia's opinion for the Court in *Whren v. United States*. 517 U.S. 806, 812 (1996) ("We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification" even if officers are motivated by racial animus); *see also* Brown v. City of Oneonta, 195 F.3d 111, 119 (2d Cir. 1999) (explaining that a suspect

Even for those committed to the principle, colorblindness is not always required.

If social structure is irrelevant to equality, then colorblindness entails seeing race as a surface phenomenon, rather than a constitutive aspect of personal identity. As a concept, the individual already requires abstracting away thicker personal identities, including classifications within racial groups. It also excludes other personal or socially relevant group identities, such as sex, thereby making consideration of broader contexts and social structures irrelevant.[179] Individuals are enumerated within a polity as political participants, but they are not articulated as bearers of social meanings.[180] The individual stripped of any place in which to be historically and socially embedded can thus only be an abstract, procedural individual. The meaning of the individual becomes a social—and constitutional—placeholder, who has rights to equal process without regard to the underlying personal substance.[181]

In this way, colorblindness and individualism are mutually reinforcing doctrinal concepts. The unresolved question is whether blind individualism is a sound basis for resolving questions of

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identification using race "is not a suspect classification, but rather a legitimate classification of suspects"); United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995) ("[W]hen officers compile several reasons before initiating an interview, as long as some of those reasons are legitimate, there is no Equal Protection violation." (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977))); United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (ruling that there is no constitutional problem if "race, when coupled with the other factors ... relied upon, was a factor in the decision" to detain and question a Black passenger); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077, 1087 (2001); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127 (2017) (arguing that Fourth Amendment law permits police interactions that have the possibility of leading to violence); Siegel, *supra* note 4, at 1361-62.

179. This view is also aligned with neoliberalism, or a new Lochnerism, subject to criticism because "in a world where racial stratification remains pervasive and tracks economic and educational inequality, this form of constitutional individualism can also be terribly unrealistic, even intellectually dishonest." Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 212 (2014) (citing DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 108-20 (2014)).

180. *Id.*

181. Robert Post asks a relevant skeptical question: "In what sense does a person without an appearance remain a person?" Post, *supra* note 139, at 12. As Post observes, the desire to achieve a fully abstracted individual is in tension with the need to protect persons from a denial of equal protection.

equality that also analytically rely on more substantive conceptions of persons and personal identity.[182] If individualism were to prove in practice to be an insufficient conceptual bearer of constitutional rights, then colorblindness would fail as the appropriate principle of equal protection.

C. Affirmative Action Jurisprudence and the Priority of Persons

By adopting blindness to both social structures and personal characteristics—both of which are relevant to race—a principle of colorblindness is in tension with constitutional protections for persons who have personal identities and histories. These protections are implicit within existing affirmative action doctrine.

Complexity and unresolved tension within the Court's commitment to procedural individualism and colorblindness provide internal doctrinal openings for the Court to move beyond the *Grutter* framework in affirmative action cases. Even within existing affirmative action doctrine, the Court makes use of a more substantive understanding of persons than its statements about the priority of individuals would suggest. A closer look at the Court's reasoning in *Grutter* and *Fisher II* reveals a more complicated story—one that recognizes the constitutional significance of persons, not simply individuals, who are embedded within complex social structures and practices.[183]

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182. Although one strategy might be to provide an internal critique of the Court's commitment to individuals, and thereby attempt to redefine what "individual" means within the doctrine, my approach is to take seriously the Court's commitment to abstract individuals as a way to highlight the tension between constitutional visibility of substantive "persons" (and their equal dignity) and doctrinal colorblindness. By contrast, see Eidelson, *supra* note 30, at 1603 ("[O]ffering a new analytical framework for understanding, and then evaluating, a central pillar in the standard case for colorblindness: the claim that race-based state action wrongfully fails to treat people *as individuals*.").

183. *See* Fisher II, 136 S. Ct. 2198 (2016); Elise C. Boddie, Response, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 39 (2016) ("[W]e should put an end to the fiction fostered by the Supreme Court for the last several decades that colorblindness is an appropriate response to our racial problems.... [W]e [should] focus on building a society that is more open, inclusive, and welcoming of racial and ethnic differences." (footnote omitted) (first citing Shaw v. Reno, 509 U.S. 630, 643 (1993); and then citing Thomas J. Sugrue, *Less Separate, Still Unequal: Diversity and Equality in "Post-Civil Rights*," *in* OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 47 (Earl Lewis & Nancy Carter eds., 2016))).

First, in response to the criticism that affirmative action harms some to benefit others, the Court in *Grutter* and *Fisher II* allowed the continued use of race because of the widely dispersed educational benefits that diversity achieves.[184] In *Fisher II*, the Court examined a University of Texas plan that overlaid a limited, holistic, race-conscious admission policy on top of the state's "race neutral" 10 percent plan whereby the top 10 percent of each high school graduating class was eligible for admission.[185] The Court explained that "the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"[186] This forward-looking rationale is consistent with Justice O'Connor's attention in *Grutter* to business and military amici who argued that higher education provided benefits to institutions downstream by educating those who could serve as future leaders.[187] Everyone gains—students of color and whites alike—from the benefits of affirmative action, including those institutions who depend upon a diverse graduate pool for employment and leadership. Correlatively, no individual loses. These gains are systemic and structural and apply to the substantive development of persons within complex social settings. Thus, even though colorblindness reasoning seeks to deny the relevance of social structure, the Court recognizes the value of affirmative action in relation to educational benefits that flow to downstream institutions.[188]

Second, in justifying affirmative action's aims in *Grutter* and *Fisher II*, the Court did not rely entirely upon a color-blind principle of equality. Instead, antisubordination reasoning allowed the Court to see how background social structures create differences on the

184. *See Fisher II*, 136 S. Ct. at 1214-15; Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

185. *See Fisher II*, 136 S. Ct. at 2209-10.

186. *Id.* at 2210 (quoting Fisher I, 570 U.S. 297, 310 (2013)).

187. *See*, 539 U.S. at 328. As Justice Kennedy explained, "enrolling a diverse student body 'promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.'" *Fisher II*, 136 S. Ct. at 2210 (quoting *Grutter*, 539 U.S. at 330). Justice Kennedy further explained: "Equally important, 'student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.'" *Id.* (quoting *Grutter*, 539 U.S. at 330).

188. *See Fisher II*, 136 S. Ct. at 2210.

basis of race that are relevant to university admissions decisions.[189] Institutional structures upstream from the university may embed distributional inequalities that downstream actors should be entitled to remedy—or at least not be obligated to perpetuate. Constitutionally mandated blindness risks reifying those unequal upstream structures within a university's own admissions practices.[190] Thus, the "educational benefits that flow from student body diversity" can be experienced not only by the students themselves, but by downstream institutions that rely on the educational achievements of those students.[191] Moreover, to justify blindness by claiming that a focus on individuals implies that there can be no creditor and debtor race—as the Court has done—risks ignoring difference under a false claim of sameness.[192] Thus, in the name of remaining blind to race, or neutral in its decision-making, an institution risks perpetuating the effects of more disparate discriminatory social structures.[193] So long as race continues to matter to the lives of persons—a proposition that Justice O'Connor's *Grutter* opinion affirmed[194]—the "neutral" equal merit admissions story embeds upstream institutional practices and histories that can have differential effects on the basis of group identity, group preferences, and group advantages.[195] In contrast to a diversity rationale, in such circumstances everyone would be made worse off through inconsistent recognition of holistic personal identities.

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189. *See id.*

190. *See generally* Thomas C. Grey, *Cover-Blindness*, 88 CALIF. L. REV. 65 (2000).

191. *Fisher II*, 136 S. Ct. at 2210 (quoting *Fisher I*, 570 U.S. at 310).

192. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *see also* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 581-84 (1982).

193. *See* Harris, *supra* note 128, at 1768 ("This protection of the property interest in whiteness is achieved by embracing the norm of colorblindness."); Neil Gotanda, *A Critique of "Our Constitution is Color-blind*," 44 STAN. L. REV. 1, 37 (1991) ("[T]he Court relies increasingly on the formal-race concept of race, a vision of race as unconnected to the historical reality of Black oppression."); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 87 (2000) (demonstrating "how color blindness discourse both constrains and legitimates practices that maintain racial stratification").

194. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (noting "one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters").

195. On the supposed neutrality of whiteness, see Harris, *supra* note 128, at 1771.

Third, by focusing on third-party harms, the Court's harm-avoidance anti-affirmative-action reasoning does not rely on abstract individualism but embeds a substantive conception of persons. In order to make sense of the purported harms to innocent, primarily white, applicants, the Court employs a social imaginary of a substantive person possessing qualities and achievements within social structures that warrant meritorious consideration.[196] The merits of any applicant will require attention to particular grades, as well as their cultivated mixture of community service, extracurricular activities, athletic endeavors, and life experiences such as semester studies abroad. As Justice O'Connor explained, "[t]o be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups'" because of the burdens it places on consideration of the merits of their full personal identities.[197] Discounting personal achievements in order to prioritize race would count as unduly burdening individuals only in light of their complex personal identities and stories that exclude reference to race.[198] This reasoning, however, relies upon a substantive conception of persons, not upon equality as procedural individualism.[199] This substantive account of merit is grounded in institutional structures and practices from which persons lay claim to achievements and activities that make them qualified for admission. In this way, a constitutional narrative that focuses on substantive persons, rather than procedural individuals, seems unavoidable even under a purported color-blind Constitution focused on individuals.[200]

The supposed "preferential treatment" afforded members of a "favored race" is likewise applied to concrete persons who have narratives of personal achievement. Because both past *de jure* and *de facto* discriminatory practices have had the effect of shaping social structures that are capable of perpetuating discriminatory effects, the story of the achievement of any applicant's life is set

196. *See* CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 24 (2004).

197. *Grutter*, 539 U.S. at 341 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

198. *See id.*

199. *See* Eidelson, *supra* note 30, at 1644-45 (discussing how considering one's race might be required to respect one's autonomy).

200. *See id.*

against the backdrop of that larger narrative.[201] Using race as a proxy for that fuller narrative allows the university to cognize the substantive narrative identity of a particular applicant without every applicant having to trace that common racial history anew in their applications. But if consideration of substantive persons and their complex identities and histories is unavoidable, then without race consciousness, the story of some persons' lives may be incomplete, and thus, in a paradoxical outcome, the individual merits valued by the focus on race-neutral criteria would be undermined.

If strict scrutiny eventually leads the Court to reject *Grutter*'s central holding, then the Court will have to confront the conflict within its own color-blind doctrine—how to reconcile a commitment to individuals with a selective blindness to personal identities and narratives that include race within a social and historical context.[202] Colorblindness would produce a new inequality of individual narrative. When racial identity is important to understanding the personal identity of some applicants, to be race-blind would deny them full consideration of who they are.[203] By contrast, other applicants for whom race is not similarly relevant would enjoy full consideration of all the relevant features of their personal identities and histories. Colorblindness is not blind to personal histories relevant to ascertaining merit within institutional and social structures that do not facially consider race but nonetheless have racial effects. To be race-blind in admissions decisions when background social structures have made race relevant in the lives of individual persons would produce disparate impacts along racial classifications and risk replicating the discriminatory social and political structures perpetuated in other institutional settings.[204]

Thus, the doctrinal rationales under which *Grutter* would sunset—relying on individualism and colorblindness—are internally inconsistent.[205] The Court's affirmative action dissenters rely on substantive consideration of persons with their complex personal

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201. *See* Siegel, *supra* note 51, at 1505; *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350-51 (1987); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 776-78.

202. *See Grutter*, 539 U.S. at 238.

203. *See* Siegel, *supra* note 193, at 87.

204. *See id.* at 106.

205. *See id.*

and social histories set within institutional frameworks in order to analyze the harm of affirmative action.[206] But when race is a component of a person's complex personal and social history, the dissenters claim that applicants must be considered as abstract individuals and, thus, institutions must remain blind to personal and social histories when it comes to considering race in a positive light as a feature of personal identity. Selective individualism as a basis for colorblindness is inconsistent with prioritizing substantive persons, and the latter concept has a firmer constitutional grounding.[207]

Having declared a constitutional emphasis on individuals, the Court must grapple with the implication of its jurisprudence that "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own ... essential qualities."[208] Persons have "essential qualities" not captured by procedural individualism.[209] If admissions decisions are about concrete persons rather than procedural individuals, then some personal history must matter.[210] As this Article will explain more fully in what follows, the Court's commitment to the Constitution's protection for the "dignity and worth of a person" provides a constitutional basis for going beyond the color-blind logic of procedural individualism.[211] It would be arbitrary, if not invidious, to suggest that race cannot be considered as part of a person's identity when social and political structures have continued to make racial classifications matter. Likewise, if social structure is relevant to an analysis of the purported harms affirmative action perpetrates, then social structure cannot be legitimately excluded as a basis for analyzing the merits of race consciousness. Thus, as this Part has examined, the logic of the Court's affirmative action jurisprudence contains internal openings more consistent with a Constitution that prioritizes substantive persons over abstract procedural individuals. And persons have

206. *See Grutter*, 539 U.S. at 353 (Thomas, J., dissenting).

207. *See* U.S. CONST. amend. XIV, § 1.

208. Rice v. Cayetano, 528 U.S. 495, 517 (2000).

209. *See id.*

210. For the related argument that a commitment to individuals entails a particular understanding of autonomous individuals as worthy of respect, see Eidelson, *supra* note 30, at 1634-40.

211. *See Rice*, 528 U.S. at 517.

personal and social histories that include their experience as members of racial minorities.

As Part III argues, there are underexplored implications of the Court's equal dignity jurisprudence that provide a way to ground a new approach to individual persons in antidiscrimination law. The promise of equal protection is that government actions should respect the status and dignity of persons. This promise is one way of articulating this principle—key to the holding of *Lawrence v. Texas*—that government may not use its laws or exercise official discretion in ways that demean or disparage others based on their status.[212] One implication of this reasoning is that government officials also have an obligation to see each person in his or her best light, not in a light colored by demeaning stereotypes or status-based classifications. If equal protection applies to "persons" and if rights of the people are held in virtue of their unique characteristics—the "dimensions of freedom" as Justice Kennedy has called them[213]—then it would seem that there is a governing obligation to see persons in their best light. What this means is that the state must treat all persons alike as equal citizens who are co-equal participants in democratic self-government. Even within a purported color-blind Constitution, aspects of personal identity that social practices continue to make relevant—such as race—cannot become factors which the state can use to demean the dignity and respect of persons. Constitutional conflict arises because affirmative action enables officials to see the personal stories of applicants in their best light, whereas colorblindness denies this ability. Such a dignity-based principle that persons should be afforded a "best light" presumption has important implications for the future of affirmative action, as the next Section explores. This future is better captured, as Part III argues, through an alternative practice of affirmative consideration.

212. 539 U.S. 558, 562 (2003); *see also* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 32, 41 (2009).

213. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

III. AFFIRMATIVE CONSIDERATION UNDER DUE PROCESS AND EQUAL PROTECTION

A primary rationale Justice O'Connor identified that would motivate a future Court to overturn *Grutter*'s central holding is the expectation that social conditions would change over time, allowing the Court to revert to a color-blind Constitution focused on protecting individuals.[214] But what does the Court mean by focusing on the equality of individuals? This Article has examined the Court's inconsistent treatment of individuals, creating an unexpected opening for new doctrinal development. Mired in what may be an unarticulated commitment to a particular form of political liberalism, members of the Court want holistic consideration of individuals and their merits in university decision processes, but also want that consideration to be blind—and thus less than holistic—to the personal, social, and historical reality of race for persons of color. How might the Court determine the future of *Grutter* if its commitment to individuals were itself inconsistent with blindness—a result that the permissibility of using race in suspect identifications also entails? This Part argues the principle of equal dignity for persons—to which the Court is also committed as a constitutional principle of equality and due process—protects individual persons while avoiding the limitations a color-blind Constitution would impose. Whereas the prior Part analyzed tension internal to the individual-focused color-blind rationale for overturning *Grutter*, this Part analyzes the tensions that exist between different, but related, doctrines of equal protection. In both cases, the internal tensions open the possibility for prioritizing the equal dignity of persons across doctrinal domains.

The future of affirmative action can be resolved, not by resisting, but by embracing and expanding a commitment to constitutional protections for individual persons. There is no need to call for a return to group-based equal protection principles.[215] If the Constitution focuses on protecting persons, then it cannot exclude government consideration of personal identity, which includes a person's

214. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

215. *See, e.g.*, Fiss, *supra* note 51, at 147.

personal, social, and historical experiences of race.[216] To this end, equal protection is not the only constitutional doctrine relevant to the antidiscrimination question of how the state may permissibly see and respond to persons in virtue of their group identity status. When it comes to status-enforcing policies and laws, the Equal Protection Clause works in tandem with the Due Process Clause to protect persons against group-based, worst-light discrimination.[217]

This constitutional combination creates new ways to incorporate group-based claims into person-focused doctrine.[218] It thereby offers a new grounding for affirmative action programs with a shift in focus.[219] Rather than permitting institutions to seek their own goals of maintaining a diverse student body, equal dignity justifies race-conscious decisions to further affirmative consideration of whole persons.[220] Affirmative consideration allows institutions to see the identities, histories, and achievements of persons in their best light without excluding their racial identities. Affirmative action has been about the goals of institutions that make the decisions, but equal dignity shifts the focus to the individual persons seeking to have decisions made based on an affirmative consideration of their full personal identities.[221] To explain the basis for this shift—and its significance for the future of affirmative action—I turn to a line of cases from *Loving v. Virginia* to *Obergefell v. Hodges*, which develop this new equal dignity jurisprudence.[222] When it comes to status-enforcing policies and laws, the Equal Protection Clause works in tandem with the Due Process Clause to protect persons against group-identity, worst-light discrimination.

Indeed, the Court's equal protection jurisprudence regarding race-conscious practices embeds the ideal of equal dignity. As Justice Kennedy explained for the Court regarding antidiscrimination, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person

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216. *See* Fiss, *supra* note 136, at 238, 244.

217. *See* Yoshino, *supra* note 22, at 749-50; Tribe, *supra* note 22, at 1902-03.

218. *See* Yoshino, *supra* note 22, at 776.

219. *See id.* at 767-68.

220. *See id.*

221. *See id.*

222. *See generally* Loving v. Virginia, 388 U.S. 1 (1967); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

to be judged by ancestry instead of by his or her own merit and essential qualities."[223] Moreover, in *Croson*, the Court argued that race-based decisions infringe "'personal rights' to be treated with equal dignity and respect."[224] This principle suggests that recognition of the value of equal dignity is at the heart of the Court's limitations on the use of race.[225] And where the Court argues that consideration of race is inherently suspect and harmful, a right to be treated with equal dignity requires consideration of a person as a whole, for government officials must accord each person "respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens."[226] Treating persons with equal dignity with respect for their unique personality would have to include affirmative consideration of their racial identity. This tension will have to be reconciled if the Court seeks to move beyond its holding in *Grutter v. Bollinger*.[227] Given the Constitution's protection for persons and the Court's equal dignity jurisprudence, the way forward is to provide affirmative consideration of the dignity of each person's identity. To do so means abandoning any strict adherence to a color-blind Constitution and to procedural individualism. In this Part, I explain how this works and why it matters.

A. Equal Dignity

Although this doctrinal tandem between due process and equal protection has a genealogy tracing back to earlier cases—most notably, *Loving v. Virginia*[228]—the contemporary emergence of due process analysis as a way of protecting individual persons in virtue of a group classification begins with *Lawrence v. Texas*.[229] A central principle of this new due process jurisprudence is that the State may not perpetrate status-based harms against homosexual persons in ways that "demean their existence or control their destiny by

223. Rice v. Cayetano, 528 U.S. 495, 517 (2000).
224. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).
225. *See id.*
226. *Rice*, 528 U.S. at 517.
227. *See* 539 U.S. 306, 343 (2003).
228. 388 U.S. 1, 12 (1967).
229. 539 U.S. 558, 578 (2003).

making their private sexual conduct a crime."[230] That is, the State may not use its power to declare particular acts criminal in order to demean or dominate individuals based upon their group status.[231] On the basis of this reasoning in *Lawrence*, Justice Kennedy argues that the State may not "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[232] Indeed, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[233] It functions, as such, as an invitation to discriminate because the State uses its power to shape how persons, in virtue of their group identities, are to be seen by the law, and by extension, by society at large.[234] This power to shape the status of persons in virtue of their personal relationships risks allowing the State to become "a dominant presence" over important "spheres of our lives and existence" in ways that are inimical to the liberty protected by the Constitution.[235] This liberty protects the equal status of individuals to be free from State domination over their personal identities and relations.

Adhering to this central equality insight, Justice O'Connor, writing in concurrence, observed that the Texas law "brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[236] Relying on an equality argument alone, however, would license the State to control aspects of personal relations so long as they do so equally for all. But, Justice Kennedy explained, equal protection is not enough because "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[237] In the case of some behaviors, facial

230. *Id.*
231. *See id.*
232. *Id.* at 567.
233. *Id.* at 575.
234. *See id.*
235. *Id.* at 562.
236. *Id.* at 581 (O'Connor, J., concurring).
237. *Id.* at 575 (majority opinion).

equality may hide deep inequality. After all, a law against sleeping under a bridge applies equally to rich and poor alike.[238] In order to combat this ability to target essential features of a person's identity through facially neutral means, such as outlawing all acts of sodomy, Justice Kennedy argued that due process serves both liberty and equality by protecting the freedom of all persons to enter into personal relations of their choice—a liberty that also provides equal standing under the law.[239] He explained that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[240] Under this majority approach, the interests of equality can be advanced through the ways that due process can protect the status of persons in virtue of their identities and relationships.[241]

One feature of the Court's reliance on due process liberty in this context is that it avoids having to confront the issue of whether to grant greater scrutiny to discrimination based on sexual orientation. It substitutes an individual dignity principle for any need to probe further a possible "group disadvantaging principle."[242] The Court explained that the state should not be able to define the meaning of personal relationships, acknowledging that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[243] By focusing upon the dignitary interests at stake in the liberty to choose a person's intimate relationships, the Court avoided the rational basis implication of equal protection doctrine. Under the Court's tiered-scrutiny approach, group-based discrimination on the basis of a person's sexual orientation would warrant only a rational basis review—a level of scrutiny that is highly deferential to any

238. The quip is Anatole France's, who wrote of "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, THE RED LILY 75 (New York, Boni & Livelight, Inc. 1894). On the idea that equality lacks substance in such a way as to perpetuate inequality, see Westen, *supra* note 192, at 575; see also Catharine A. MacKinnon, Essay, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 2 (2011).

239. *See Lawrence*, 539 U.S. at 575.

240. *Id.*

241. *See id.*

242. The latter is proposed by Fiss, *supra* note 51, at 108.

243. *Lawrence*, 539 U.S. at 567.

legitimate state interest.[244] Instead, the Court is able to recognize how focusing on the individual person provides a way of protecting equality.[245] Such a strategy draws on precedent, utilizing an approach developed in earlier civil rights cases. In *Loving*, for example, the Court recognized both that equality was at issue in Virginia's antimiscegenation law and that the State's claim that it honored formal equality—insofar as neither Black people nor white people could marry each other—was not enough to overcome the dignitary nondomination interests involved in the liberty to choose a marital partner.[246] By combining liberty and equality claims in a manner that Professor Laurence Tribe refers to as a "legal double helix,"[247] the *Lawrence* Court protected the integrity of groups by protecting the dignity of persons.[248]

Combining the concerns in *Lawrence* and *Loving*, the Court extended due process protections against government laws that have the purpose and effect of stigmatizing individuals on the basis of their choice of marital partner. Justice Kennedy reasoned that this stigma impacts the dignity of persons that both liberty and equality protect.[249] The Defense of Marriage Act (DOMA) sought to deny federal recognition of same-sex marriages that an increasing number of states sought to legitimate.[250] As the Court reasoned, "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[251] By recognizing that the "purpose

244. *See id.* at 594 (Scalia, J., dissenting).

245. *See id.* at 578 (majority opinion).

246. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.").

247. Tribe, *supra* note 22, at 1898. As Tribe further explains, *Lawrence* is an "unfolding tale of equal liberty and increasingly universal dignity." *Id.*

248. Others have examined the Court's shift from equality to liberty in earlier cases. *See, e.g.*, Brown, *supra* note 27, at 1541; William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000).

249. *See* Siegel, *supra* note 27, at 1696 (explaining how due process provides "constitutional protections for dignity").

250. Defense of Marriage Act, 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

251. *Windsor*, 570 U.S. at 770.

and practical effect" of DOMA was to impose a stigma that disrespected the "equal dignity of same-sex marriages,"[252] Justice Kennedy's reasoning again prioritized personal liberty as a way of protecting equality. Using *Lawrence*'s logic, Justice Kennedy explained how protecting due process liberty advances the interests of equality as well.[253] Stigma that undermines personal dignity imposes harms through how it affects the many dimensions of personal life that both due process and equality protect. These protections go beyond ensuring that the law addresses abstract individuals through formal procedural processes. Rather, these protections are aimed at the substantive capabilities and possibilities of the whole person within social and legal structures that have the power to shape their self-understandings.

By protecting liberty as a way of providing equality, the Court focused upon the effects to persons within same-sex marriages as a way of considering same-sex couples as a group.[254] Congress's "purpose and effect to disparage and to injure" persons on the basis of their choice of marital partner, the Court concluded, had no legitimate purpose in denying the legal status of marriages that states "sought to protect in personhood and dignity."[255] Part of the harm wrought by DOMA, the Court explained, was that "it tells [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal *recognition*."[256] Under DOMA, same-sex couples were to be seen under the law as unequal, having a status inferior to others.[257] The federal objective was to shape a way of seeing same-sex marital relations by failing to recognize them at all—a form of marital blindness. By creating differential marriage regimes under federal law, it placed same-sex couples in a "second-tier marriage," and it "demean[ed] the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify."[258] Moreover, its effects were felt by other family members because it "humiliate[d] tens of

252. *Id.*
253. *Id.* at 774.
254. *Id.*
255. *Id.* at 775.
256. *Id.* at 772 (emphasis added).
257. *See id.*
258. *Id.* (internal citation omitted).

thousands of children now being raised by same-sex couples."[259] As the Court explained, DOMA produced these harms to the personal identities of those who make choices about their intimate relationships within social and legal structures that have the power to define their status in ways that can demean, dominate, and humiliate (or validate and celebrate).[260] Using this political and legal power to define groups as comprised of subordinate relationships demeans the persons who constitute the group classification. By intertwining due process with equal protection, the Court is able to protect persons by virtue of their group status by scrutinizing the effects of government recognition or blindness. It is also able to empower advocates to bring about both political and legal change on the basis of constitutional meanings implemented in individual state practice with national consequences.[261]

Utilizing this reasoning, the Court in *Obergefell v. Hodges* took the next step in declaring that no unit of government—states included—could violate a fundamental right to marry by withholding marriage licenses from same-sex couples.[262] In concluding that the Constitution grants same-sex couples a right to "equal dignity in the eyes of the law,"[263] the Court further entrenched the due process right to equal dignity in constitutional law.[264] Even in articulating the scope of due process protections in a case about unequal treatment between same-sex and opposite-sex couples, Justice Kennedy explained that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and

259. *Id.*

260. *Id.*

261. *See* Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 610 (2015) (describing how *Windsor* "cleared the channel for political change"). The Court's opinion might also depend upon its contingent historical setting. *See* Michael J. Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 130 (2013). On the role of state law in shaping rights claims, see generally Ernest A. Young, United States v. Windsor *and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39 (2013).

262. 135 S. Ct. 2584, 2608 (2015).

263. *Id.*

264. *See, e.g.*, Tribe, *supra* note 38, at 17 (*Obergefell* "tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* ... [and] lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality"); *see also* Robinson, *supra* note 144, at 158.

beliefs."[265] The social and personal role of marriage is one that the Court has consistently protected in recognition of the fact that "[c]hoices about marriage shape an individual's destiny."[266] Due process focuses attention on individual persons—their choices and the social and political meanings law confers upon those choices.[267] But autonomous choice by itself does not capture the further ways laws administered unequally based upon group status harm personal dignity. It is worth quoting at length the Court's explanation of how due process and equal protection interact:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[268]

When government action impacts personal decisions and the identity from which they flow and which they form, the Due Process Clause can protect "freedom in all of its dimensions" even if not explicitly enumerated, such as the right to marry.[269] But the full meaning of that right requires recognition of the way that equality protects those personal decisions against status-based laws that demean and disparage them. The Court concluded this articulation of the "interlocking nature of these constitutional safeguards"[270] by explaining that "[t]his interrelation of the two principles furthers our understanding of what freedom is and must become."[271] When a state seeks to perpetuate its own judgments about the social

265. *See Obergefell*, 135 S. Ct. at 2597 (first citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); and then citing Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965)).

266. *Id.* at 2599; *see also* Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1739-41 (2016). *See generally* Kerry Abrams, *The Rights of Marriage:* Obergefell, Din, *and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501 (2018).

267. *See Obergefell*, 135 S. Ct. at 2602-03.

268. *Id.*

269. *Id.* at 2598.

270. *Id.* at 2604.

271. *Id.* at 2603.

meaning and status of same-sex relationships in ways that create social hierarchy by depriving them of access to marital recognition, "[t]he imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry."[272]

In the parlance of equal protection theory, Justice Kennedy is clearly relying on an antisubordination rationale.[273] A state may not use its laws and procedures to impose a subordinate status on persons by virtue of their sexual orientation—their group classification.[274] But the opinion ultimately concluded that there is a fundamental right to marry applicable to same-sex couples on the same basis, and without stigma, to opposite-sex couples.[275] Such a fundamental right resides in personal liberty, not in group classification.[276] In addition to protecting due process liberty, the Constitution protects equal dignity in the personal bond that marriage represents.[277]

By protecting the dignitary interests in personal relationships, the Court also fulfills a preference for focusing constitutional protection on individual persons, not groups. To hold that individual persons are entitled to heightened scrutiny under equal protection would have the effect of making available more group-based civil rights litigation to protect the status of persons on the basis of their sexual orientation. As in the case of *Loving*, although state laws that seek to disadvantage persons on the basis of their group status are at issue (race or sexual orientation), the presence of individual decisions focuses constitutional protection on the particular narratives of how states can shape the personal lives of those it demeans through its inequality. In this way, the Due Process Clause provides a constitutional basis for prioritizing the ways that law and legal

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272. *Id.* at 2604 (first citing Zablocki v. Redhail, 434 U.S. 374, 383-88 (1978); and then citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

273. *See* Siegel, *supra* note 27, at 1704.

274. Kenji Yoshino calls this "antisubordination liberty." Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015).

275. *See Obergefell*, 135 S. Ct. at 2604-05.

276. *See id.* at 2597-2605.

277. *See id.* at 2597-98.

actors perceive the status of those who apply for benefits the state provides, such as the granting of marriage licenses.

B. Equal Dignity, Dimensions of Freedom, and Affirmative Consideration

In the *Lawrence* to *Obergefell* line of cases, the Court through Justice Kennedy not only developed and enriched the constitutional meanings of due process and equality but provided a structure and logic for how to relate questions about individual persons with those about group identities. By examining how the intersection of liberty and equality have effects on personal dignity, the Court explained how the Constitution protects individual persons in virtue of their group status.[278] Same-sex couples as a group must be treated equally because of the way that discriminatory state action dominates both their liberty of choice and their personal dignity.[279] Individual persons, not groups, experience the stigmatic harms states perpetuate by discriminating against same-sex couples.

Although seemingly disparate doctrinal areas, the same argument structure should also apply to university admissions processes that seek to engage in a form of affirmative action. The interaction of equality and due process in the line of cases from *Lawrence* to *Obergefell* provides a new way to explain how race-conscious admissions programs can be consistent with the Constitution—even if the practice of affirmative action requires a new constitutional grounding and a modified orientation. Not simply a matter of intratextual analysis, nor merely an argument about consistency across doctrinal domains,[280] the Court's focus on individuals and equal dignity makes available a new foundation for affirmative action. Here is how.

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278. *See generally id.*; Lawrence v. Texas, 539 U.S. 558 (2003).

279. *See Obergefell*, 135 S. Ct. at 2604.

280. On intratextualism, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 796 (1999) [hereinafter *Intratextualism*]; *see also* Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 45 (2000). On the ideal of interpretive consistency, see RONALD DWORKIN, LAW'S EMPIRE 130-35 (1986); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 83 (1996).

Focusing on liberty allows individual persons to make claims about how the State should view their group identity—as homosexual persons, for example—in ways that both exemplify a best-light obligation and provide a model for affirmative consideration of race. When it comes to marriage, the Court held that state arguments for maintaining the traditional status quo by not extending positive recognition to same-sex marriages were insufficient in light of the dignitary costs borne by individual persons.[281] If applied to university admissions, by analogy, any argument that color-blind admissions reflect a neutral evaluation of a social structure status quo would be insufficient in light of the distributive costs imposed on individual persons. The status quo distributes social benefits and burdens in ways that may include unfair procedures, stigma, stereotypes, and other forms of social harms persons of color may suffer. State action that reflected a social structure perpetuating unequal group status, as the Court argued in *Lawrence*, would violate a substantive liberty interest by embedding a subordinating social structure through law.[282] For that reason, Justice Kennedy's opinion rejected Justice O'Connor's proposed equal protection approach in *Lawrence* as insufficient by itself.[283] Treating persons of unequal social standing as if they were equal risks perpetuating stigmatizing social structures. By analogy, if universities make admissions decisions under a color-blind law which does not examine the substance of the underlying social structure, deprivations of liberty and dominating practices might nonetheless remain even if formal equal protection exists.[284]

Due process deprivations would remain when the social structure embeds differential status—economic, social, and political—that offends the dignitary interests of persons who are seeking recognition of their application in its best light. It would offend the dignity of individuals to have social structure make their race relevant to their institutional and everyday experiences but then deny that their race is relevant to an assessment of those very experiences in favor of the status quo reflected in test scores, grades, and the

281. *See Obergefell*, 135 S. Ct. at 2597-2605.
282. *See* 539 U.S. at 575-76.
283. *See id.* at 581 (O'Connor, J., concurring).
284. *See* Eidelson, *supra* note 30, at 1644-45.

like.[285] Race as a social fact would matter to the personal experiences that compose a person's identity, but that same identity would then face constitutional denial for the sake of a supposed neutral, formal equality pursuant to a principle of colorblindness. Such denials of identity—whether through criminal subordination, as in *Lawrence*, or blind erasure—can offend the dignity of individuals. The Due Process Clause protects the liberty of individuals to make choices and pursue personal projects on an equal standing with others. Blindness can become a tool for dominating a person's identity by imposing limits on who persons can present themselves as being in their best light.

In the case of DOMA or a state's refusal to recognize same-sex marriage, the state action occurs when a person is denied equal liberty in their choice of marital partner.[286] In this respect, there is no similar state action in the affirmative action context. In fact, states like Michigan and Texas defended the legitimacy of considering race as a positive factor in a multifactor decision process aimed at achieving diversity.[287] White applicants who challenge affirmative action cannot legitimately argue that any harms they suffer are stigmatic or subordinating. The claimed constitutional harm of affirmative action occurs because state actors consider the race of others in the best light.[288] Thus, when the Court foretells the future doctrinal demise of affirmative action, it contemplates replacing an ability to see individual applicants in light of their complex personal and social histories with blindness.[289] Such blindness, however, would not produce substantive equality but *would* risk offending equal dignity by failing to focus on substantive persons.

In this way, blind individualism may itself constitute state action that denies the equal dignity of each person to tell her story in its best light.[290] Judicially enforced blindness would create a doctrinal

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285. *See, e.g.*, Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 319 (1999).

286. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 763-69 (2013).

287. *See* Grutter v. Bollinger, 539 U.S. 306, 314 (2003); Fisher I, 570 U.S. 297, 305-06 (2013); Fisher II, 136 S. Ct. 2198, 2211 (2016).

288. *See Grutter*, 539 U.S. at 317; *Fisher II*, 136 S. Ct. at 2207.

289. *See Fisher II*, 136 S. Ct. at 2207.

290. *See* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 130-31 (arguing the related point that the State might be required to practice affirmative action).

paradox. By doctrinal rule, states would be forbidden from seeing applicants in their best light—in a light that tells a story about who a person is and how race matters to a person's individual self-identity. Such a result would mandate a particular way of seeing race (or rather, not seeing race) that paradoxically would undermine equal dignity by erasing the very individualism that the Court's conservative majority has prioritized since *Croson*.[291] States would be required to focus on individuals, not groups, but would be forbidden from affirmative consideration of constitutive features of individual experiences and identities. Under this approach, the Court would construct the Constitution paradoxically both to protect individuals and to be blind to individuals. Such a result would produce inconsistent application of equal dignity across related doctrinal areas.

Resolving this doctrinal paradox leads to a new way of understanding the constitutional status of race-conscious admissions programs. By foregrounding the equal dignity of substantive persons, judicial doctrine can realize the Constitution's protections for individuals, while avoiding turning colorblindness into a means of entrenching racially distributed social structures.

Affirmative action programs can promote equal dignity by refusing to entrench background social structures that have the effect of producing continuing inequality on the basis of race. An appropriately designed admissions process that is race conscious can afford individual persons the ability to tell their stories in a way that includes the shared story of race in American society and can commit state actors to seeing race as a feature of a person's life worthy of consideration in its best light. If the Supreme Court were to prioritize color-blind equal protection over protection for equal dignity, these stories would be censored and individual persons would be denied full recognition.[292] In the name of protecting

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291. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 508 (1989) (plurality opinion) (reasoning that government must treat "all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration").

292. This reasoning was important to Judge Burroughs's opinion holding that there is no unconstitutional racial bias against Asian Americans in Harvard's admissions program. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 194-95 (D. Mass. 2019). Judge Burroughs reasoned:

> [I]t is vital that Asian Americans and other racial minorities be able to discuss

individuals against groups, colorblindness would undermine actual persons in the name of abstract individualism.

Because opposition to the constitutionality of affirmative action programs arises from abstract individualism, then its paradoxical failure means that the Court does not have good grounds for abandoning *Grutter*'s holding that limited race-conscious decision-making is consistent with equality. The question then becomes how to understand this limited race consciousness in light of its new constitutional foundation under an equal dignity principle.

Where affirmative action is susceptible to the problems of third-party harms and white backlash under equal protection alone, following the reasoning of *Lawrence* and its progeny, these problems do not arise under a principle of equal dignity. Seeing individual applicants in their best light, which includes their race as a constitutive feature of their personal identities, does not deny any other person of positive consideration, and as a result forecloses backlash claims to inequality.[293] All applicants are entitled to consideration of constitutive features of their personal identities on the basis of their equal dignity as individual persons.

Equal dignity is nonexclusive (it applies to all), and it is nonrivalrous (one person's best-light consideration does not deprive other persons of their best-light consideration).[294] Because of these

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> their racial identities in their applications. As the Court has seen and heard, race can profoundly influence applicants' sense of self and outward perspective. Removing considerations of race and ethnicity from Harvard's admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.

Id. (citations omitted).

293. On the importance of making race a less salient category through greater consideration of the individual person, see Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74 (2003); Siegel, *supra* note 157, at 787; Siegel, *supra* note 4, at 1354-59.

294. In this way, affirmative consideration in light of equal dignity meets the definition of a public good. *See* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954) (defining a public good as one that "all enjoy in common in the sense that each individual's consumption of such a good leads to no subtractions from any other individual's consumption of that good"); *see also* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 159 (1993) ("Some goods can be secured only through a form of democratic provision that is nonexclusive, principle- and need-regarding, and regulated primarily through

features, equal dignity undercuts white majority claims to procedural unfairness to which the Court has been particularly attuned.[295] No person gives up anything while applicants whose racial identity matters within social structures are assured the possibility of their being seen in their best light.

Due process is a way to avoid alienating individual persons on the basis of their group status. Government is not allowed to denigrate persons, choosing for them the components of what can form an acceptable and recognized personal identity.[296] Thus, if the Court is concerned with the perceived unfairness of affirmative benefit programs to third-party whites, then by the same reasoning it should also be concerned with the actual unfairness of "blindness" to the whole person that ignoring race can impose. An enforced rule of colorblindness in a non-color-blind world would be unfair to those for whom their race has been a socially significant factor to their personal identities and histories.[297] In other words, even if there are costs on either side from an equality perspective, from a due process perspective, these costs can be minimized, for all are treated equally to respect and dignity of their personal identities—where persons are understood in their multifaceted, complex whole, including their race. And no person is subject to State domination by prescribing the acceptable limits to presenting their personal identities within holistic admissions programs.[298]

If institutions that choose affirmative action programs are denied the ability to consider race on the basis of a judicial doctrine of colorblind equal protection, they may at the same time violate the dignitary protections to liberty that due process affords. Blindness

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voice. To attempt to provide these goods through market mechanisms is to undermine our capacity to value and realize ourselves as fraternal democratic citizens.").

295. *See, e.g.*, Siegel, *supra* note 166, at 45 ("[T]he Court has devised a new body of strict scrutiny law designed to constrain the means by which government promotes diversity or pursues remedial ends that is focused on protecting expectations of fair dealing."). For an example of how the issue of fairness manifests in public debate, see Jenni Fink, *0 Percent of Republican College Students Think Affirmative Action is 'Very Fair,' but 7 Percent Say Legacy Admissions Are*, NEWSWEEK (Oct. 21, 2019, 9:29 AM), https://www.newsweek.com/affirmative-action-legacy-admissions-very-unfair-college-poll-1466652 [https://perma.cc/B23H-7KPJ].

296. *See* Lawrence v. Texas, 539 U.S. 558, 581 (2003) (O'Connor, J., concurring); Crocker, *supra* note 212, at 21.

297. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 240-41 (rev. ed. 2012).

298. *See id.* at 246.

would entrench background social inequities as constitutional practice.[299] But entrenching inequality under supposed neutral blindness within a decision-making process designed to consider persons neither advances the interests of individual persons nor achieves any discernable constitutional end.[300]

What constitutional purpose could be served by requiring universities or other institutions to ignore both facts and personal identities in order to sustain a fiction of blind fairness? It does not produce equality, and it violates equal dignity.[301] Constitutional principles aim for consistency across doctrinal domains, particularly as applied to the same state action.[302] Thus, one of these doctrines—equal protection and equal dignity as applied to affirmative action—must be made to conform to the other. In this way, the status quo reflected in *Grutter* and *Fisher* maintains greater consistency across the Court's equal protection and equal dignity jurisprudence. Only by bringing affirmative action to an end by claiming that *all* affirmative consideration of race violates the Constitution would the paradox emerge.

It is worth clarifying how the argument has unfolded so far. *Lawrence* and its progeny provide a model for how to think about the due process component of equality at stake here.[303] Due process attends to persons, not merely the procedural process due to individuals.[304] It is about the identity, status, and dignity of persons.[305] In addition, due process allows state actors to examine the structural effects of status denial that procedural blindness does not.[306] Even if equality were understood by a future Court to require blindness, due process requires seeing how laws create meaning that affects the status of individual persons both in society and in relation to government.[307] Due process seeks to avoid perpetuating

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299. There are plenty of such inequalities without adding to them. *See, e.g.*, *id.* at 240-43.

300. *See id.* at 249.

301. *See* Eidelson, *supra* note 30, at 1607.

302. *See, e.g.*, *Intratextualism*, *supra* note 280, at 748, 792-94; *see also* Ackerman, *supra* note 89, at 1751 ("The challenge is to understand the constitutional achievements of *all* of the generations since 1776, including Americans who lived in the twentieth century.").

303. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003).

304. *See id.* at 567.

305. *See id.*

306. *See id.* at 565.

307. *See id.* at 575.

dominating social structures by arbitrarily redefining a person's identity through enforced blindness.[308] Moreover, the combined effect of equal protection and due process under *Obergefell* can highlight a convergence upon a personal right to be seen in the best light when the state decides to confer benefits.[309]

A "best light" right precludes a state from replicating negative stereotypes or locking in place social disadvantages through status-reinforcing decision processes.[310] Such affirmative consideration allows the state to see how its laws and decision-making processes either perpetuate or break down social structures that sustain the subordinating effects of past *de jure* discrimination.[311] In this way, due process supports affirmative consideration of race in ways that differ from the current goals of affirmative action.

Affirmative consideration focuses on the individual person, whereas affirmative action is focused on institutions and groups.[312] By licensing state practices that see applicants in their best light, the Court avoids a doctrinal paradox that would require focusing on individual persons but forbid considering individual identity in the full social and political context in which a person lives.[313] And unlike contexts such as suspect identification, equal dignity focuses on ways state actors view persons in their best light.[314]

Whether equal dignity might *require* a state to adopt an affirmative action program is a bigger question.[315] Enforced blindness would violate equal dignity by foreclosing an institution's ability to accurately recognize the effects of social structure on its own decision-making.[316] But it would require further argument to establish an affirmative duty upon states to adopt processes for implementing

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308. *See id.* at 578-79.

309. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593-94 (2015).

310. *See id.* at 2600-02.

311. *See id.* at 2598-2602.

312. *See* Kyneshawau Hurd & Victoria C. Plaut, *Diversity Entitlement: Does Diversity-Benefits Ideology Undermine Inclusion?*, 112 NW. U. L. REV. 1605, 1607 (2018).

313. *See* Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1765-66 (2001).

314. *See id.* at 1757.

315. *See* Strauss, *supra* note 290, at 127-32. *See generally* Harris, *supra* note 313, at 1772-74.

316. *See* Harris, *supra* note 313, at 1767.

a best-light principle.[317] The argument here is thus focused on how a principle of equal dignity forecloses prioritizing a principle of colorblindness and a focus on abstract individuals in such a way as to forbid altogether an institution's consideration of race as one factor in its decision-making process. Equal dignity should define the future of antidiscrimination law beyond *Grutter*. But such a prospect also implicates a reconsideration of the goals of affirmative action.

If equal dignity means that the Constitution cannot forbid states from considering a person's race in a best light, then the goal of diversity changes as well. The doctrinal focus would no longer be on the institutional decision-making prerogative to create a diverse class.[318] Rather, the focus of equal dignity shifts the compelling end to an interest in vindicating the unique integrity of personal identity.[319] By focusing on the recognition of substantive persons by state actors, the combined effect of due process and equality reinforces a principle that government cannot impose a subordinate status on some individuals through a negative or blind assessment of their identity.[320]

One important and surprising consequence of this constitutional reorientation of priorities under equal dignity is that the goal of diversity cannot be independently sustained by equal dignity.[321] Diversity may be a secondary effect of a program of affirmative consideration, but it cannot be its goal.[322]

C. How Does Affirmative Consideration Change Affirmative Action?—Supply-Side and Demand-Side Reasoning

If *Grutter* were to sunset on (or ahead of) schedule, then universities would be forbidden from relying on diversity as a compelling interest that justifies consideration of race. But under the tandem

317. *See* Strauss, *supra* note 290, at 106-07.

318. *See* Harris, *supra* note 313, at 1768 (discussing the diverse class focus); Bell, *supra* note 18, at 1623.

319. *See* Tribe, *supra* note 38, at 22.

320. *See* Yoshino, *supra* note 22, at 748-50; Tribe, *supra* note 38, at 22.

321. *See, e.g.*, Yoshino, *supra* note 22, at 775.

322. *See* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1033 (2001).

application of the Due Process and Equal Protection Clauses, an alternative approach is available.[323] The new goal would be to consider individuals as persons, affording them affirmative consideration for their unique personal identities, histories, and accomplishments. But in order to consider individuals holistically as persons when individuals are members of socially significant groups, then a decision maker has to be able to consider their race when race is salient to personal identity.[324] To do otherwise would be to deny them an essential feature of their personhood.[325] Thus, to sunset *Grutter*'s diversity rationale would not preclude race-conscious admissions programs justified according to equal dignity principles aimed at providing affirmative consideration to individual persons.[326]

The goal of affirmative consideration practices, however, would be to see persons in their best light, not to achieve institutional diversity. Nonetheless, through a version of the doctrine of double effect, universities could achieve diversity without making it the overriding goal.[327] By affirmatively considering individual applicants on the basis of their personal identities, which include race, institutions could still recruit diverse student bodies through seeking to ensure equal dignity in the treatment of all applications.[328] By focusing on the distinctive merits of individual applicants and their personal identities—which unavoidably include race—achieving diversity becomes a secondary effect of the primary goal of affording equal dignity to individual persons through consideration of their applications as whole persons.[329]

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323. *See* Tribe, *supra* note 38, at 22.

324. *See, e.g.*, Yoshino, *supra* note 22, at 795-96.

325. By focusing more precisely on the meaning of persons and personal identity, consideration of race in a holistic conception of the person is consistent with Justice Thomas's claim that the Constitution embeds a "principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

326. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

327. *See* G.E.M. Anscombe, *War and Murder*, *in* MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS 289, 293-95 (James Rachels ed., 2d ed. 1975) (introducing idea of "double effect" in moral reasoning).

328. *See* Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, 111 (2019).

329. Such an approach also affords greater equal opportunity with diversity as a possible outcome, but not as the overriding goal. *See, e.g.*, *id.* at 79-80, 109-10 (arguing for an equal

Under an equality approach, the constitutional issue concerns institutional goals like diversity, which as the Court warns, keeps racial identity at the forefront of decision-making.[330] Their goal is to achieve an outcome that is "made," not "grown," organically.[331] The university's interest is supply-side.[332] They have a good to distribute—university admission—with the goal of obtaining a diverse student body.[333] To achieve diversity, the university must remain race conscious, measuring their admissions for whether metrics such as Michigan's "critical mass" have been met.[334]

By contrast, under a due process equal dignity approach, the constitutional issue concerns individual interests. Applicants seek admission through affirmative consideration of the features of their applications that put them in their best light.[335] Their interest is demand-side.[336] Such individual affirmative consideration may coincide with institutional goals of diversity, but for different reasons. Individual applicants do not seek to "promote diversity" through seeking consideration of how their racial background matters to them and their admissions application.[337] Rather, individual applicants seek to present their qualifications and personal experiences with the hope that the institution sees them in the best light possible.[338] Individual applicants simply seek admission and in doing so benefit from an institution's affirmative consideration of their application as a whole.[339]

Diversity is a supply-side rationale, focused on the institutional needs of universities.[340] Diversity only incidentally aligns with the

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opportunity conception of diversity).

330. *See id.* at 114.

331. *See* F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 37 (1998).

332. *See id.* at 76.

333. *But see* Hurd & Plaut, *supra* note 312, at 1622-23, 1628 (arguing that diversity benefits disproportionately consider the benefits to whites).

334. *See* Grutter v. Bollinger, 539 U.S. 306, 318-20 (2003).

335. *See* Eidelson, *supra* note 30, at 1607.

336. *See* HAYEK, *supra* note 331, at 76.

337. *See* Ford, *supra* note 18, at 1809.

338. *See* Eidelson, *supra* note 30, at 1607.

339. *See* Hurd & Plaut, *supra* note 312, at 1607.

340. The effects may be demonstrably positive, though the objective remains institutionally focused. *See, e.g.*, Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 358 (2022).

broader need to provide affirmative consideration of individual applicants by virtue of their race because those individuals may have suffered from the direct or lingering effects of racially discriminatory political and social structures.[341] Taken in its own terms, diversity is about the composition of a student body for the institution's own ends, which may have the secondary effect of aligning with the interests of persons of color upon whose applications the institution takes affirmative action.[342] But diversity is an institutional education goal, or, even viewed more skeptically as Justice Thomas dismissively argues in his *Grutter* dissent, a goal about "[c]lassroom aesthetics," not an end that seeks to overcome lingering effects of racial subordination.[343] To end supply-side diversity as a race-plus institutional admissions procedure would not end demand-side diversity as a call for affirmative consideration of the equal dignity of each applicant.

Equal dignity in considering applicants is a demand-side rationale, focused on the claims persons make about their identities.[344] Individuals seek admission by presenting their socially embedded personal histories and accomplishments in their best light.[345] Persons who are members of disadvantaged groups have a particular interest in ensuring their applications are treated with equal dignity.[346] By focusing on individual persons, an educational institution may achieve diversity indirectly as the secondary effect of pursuing the equal dignity of applicants.[347] In this way, the diversity goals of affirmative action can no longer provide the rationale for race-conscious decision procedures. Diversity no longer would need to be a compelling state interest under an equal

341. *See* Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) ("I am concerned that liberal supporters of affirmative action have used the diversity argument to defend affirmative action at elite universities and law schools without questioning the ways that traditional admissions criteria continue to perpetuate race and class privilege.").

342. *See* Hurd & Plaut, *supra* note 312, at 1611-13, 1622.

343. Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting); *see also* Lawrence, *supra* note 341, at 958; Bell, *supra* note 18, at 1625.

344. *See* Tribe, *supra* note 38, at 17, 20-22.

345. *See* Eidelson, *supra* note 30, at 1623-24.

346. *See id.* at 1625.

347. *See* Banks, *supra* note 322, at 1033.

protection rationale.[348] Instead, the goal of equal dignity would provide the rationale for race-conscious admissions programs.

Ironically, under an equal dignity doctrine, the future sunset of *Grutter* would not be the end to race-conscious admissions processes—as the *Grutter* dissents foretell[349]—because the Constitution would continue to allow universities to consider race as a means to protect the equal dignity of all persons who seek admission. Affirmative action as an institutional supply-side goal focused on diversity would be displaced by affirmative consideration as an individual demand-side end focused on individual persons. To achieve the latter, educational institutions would still be the principal actors, just as they would under a colorblindness principle.[350] But the goal would no longer depend upon the institutional commitment to diversity but upon the integrity of holistic affirmative consideration processes that would have the secondary effect of promoting diversity.

A number of practical advantages would flow from this doctrinal reorientation. This shift would satisfy the skeptical worry that the more institutions entrench conceptions of race, the more they reproduce them as socially salient categories.[351] By shifting the constitutional focus away from diversity, a future Court can guide institutional actors towards holistic assessment that does not necessarily foreground and entrench race as a distinctively salient category. In addition, institutional entrenchment of racial categories does more than keep race relevant, as the Court has warned, but also means that members of a group lose some of their own authority over self-definition.[352] Instead, the authority granted by equal dignity would allow individual persons more control over their self-

348. *See, e.g.*, Ford, *supra* note 18, at 1809.

349. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting).

350. *See* Chilton et al., *supra* note 340, at 347.

351. *See, e.g.*, Harris, *supra* note 313, at 1765-66. Scholars have analyzed this dynamic of raising the salience of a group classification in other settings. *See, e.g.*, Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1457-58, 1461, 1470 (2002); *see also* FRASER, *supra* note 86, at 26.

352. *See* RICHARD THOMPSON FORD, RACIAL CULTURE 90-104 (2005); Yoshino, *supra* note 22, at 795-96. There is a persistent problem as well in the way that courts recognize or fail to recognize race in judicial opinions. *See* Justin Driver, Essay, *Recognizing Race*, 112 COLUM. L. REV. 404, 457 (2012) ("The contemporary racial climate demands that courts approach racial matters with nuance and reflection and—perhaps, above all—explanation.").

definitions about which institutions could then adapt practices of affirmative consideration.

Barriers to educational access do not depend upon race alone. As others have argued, income inequality is a principal driver of structural barriers to a genuine meritorious access to competitive educational institutions.[353] Because a supply-side focus on diversity makes recognition of racial categories easier than socioeconomic status, institutions have struggled to find ways to avoid entrenching social structures of economic exclusion. In some ways, focus on race leaves institutions blind to class.[354] Shifting the end of affirmative action away from the supply-side focus on diversity to the demand-side interest in affirmative consideration of individual experiences would promote constitutional principles of equal dignity while avoiding real or apparent inequality regarding both economic status and race.

Moreover, because all applicants are similarly situated, the backlash charge of racial unfairness first articulated by Justice Powell in *Bakke*, and reinforced through dissents by Justices Kennedy, Thomas, and Scalia, would not apply.[355] Indeed, by shifting attention to affirmative consideration, the appearance of procedural fairness can be matched with race-conscious decision processes. Where colorblindness is blind to more than race, an equal dignity principle attends to both social meanings and social structures in which a number of factors, including race, may be present. All applicants will be seen in their best light, and none will get an automatic advantage over another. No doubt, an applicant who has benefitted from a social structure that has imposed harms on third

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353. *See, e.g.*, Catharine B. Hill, *American Higher Education and Income Inequality*, *in* 11 EDUCATION FINANCE & POLICY 325, 326 (2016); Caroline Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low-Income Students*, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 2 (2013); Banks, *supra* note 322, at 1052-53.

354. *See, e.g.*, Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 450 (2019) ("[I]f white privilege is not enjoyed by poor white people, then it may make little sense to call it *white* privilege—inasmuch as *white* privilege implies that the privilege flows from being a member of the white race.").

355. 438 U.S. 265, 294 n.34 (1978) ("*All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened."); Grutter v. Bollinger, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies.").

parties will not receive further benefits from institutions being blind to those third-party harms when considering the personal histories of those who have suffered them. But the inability to benefit from social structures that unfairly distribute public goods is not a propitious basis on which to make a constitutional claim of inequality. There is no constitutional right to entrench social advantage through mandatory state blindness.[356]

If a process of affirmative consideration were applied to a race-conscious program like the one used by the University of Texas at issue in *Fisher I* and *Fisher II*, the university would be allowed to examine the intake from a race-neutral process to see how it might ensure that the remaining applications were reviewed in their best light.[357] This process would allow consideration of race, but might also require considering other forms of social structure—such as economic status—as a way of affording affirmative consideration to each individual person as a whole.[358] In this regard, an institution that focused on race alone to the potential exclusion of other sources of social structure might run afoul of the equal dignity principle by failing to consider the personal identities of those whose lives are entwined in these structures. Although race remains highly relevant, any social structure that is meaningful to a person's identity—such as those related to sexual orientation or sex identity—should also be relevant to affirmative consideration of persons under equal dignity principles. This consequence can dampen any perceived conflict between race and class (or any other social category), opening up new avenues for individuals to present their personal histories in their best light with an expectation that institutions will give them affirmative consideration.[359] By establishing a process that will be perceived as fair to all applicants, this approach would promote what Professor Siegel identifies as "social

356. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970) (rejecting argument that Maryland's method of calculating welfare benefits denied equal protection of the law to those who received less or no benefit).

357. Fisher I, 570 U.S. 297, 304 (2013); Fisher II, 136 S. Ct. 2198, 2206-07 (2016).

358. *But see* Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1052-53 (2017) (arguing that class-based affirmative action would only benefit white people who are societally viewed as "deserving poor").

359. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (discussing the importance of protecting rights that are "inherent in the concept of individual autonomy").

cohesion."[360] Rather than subdividing Americans along classifications reified in law and implemented by educational institutions, a best-light approach is available to all and need not involve entrenching institutionally defined categories as social reality.

Moreover, affirmative consideration need not foreclose the future sunset of *Grutter*, even though it is fully consistent with its reaffirmation. But, unlike a diversity-based affirmative action rationale, an equal dignity approach is not beholden to the Court's position that race consciousness has a decaying lifespan under a color-blind Equal Protection Clause in which diversity might fail to remain compelling.[361] In this way, the compelling interest in diversity can sunset, but race-consciousness will continue under an equal dignity rationale. And under the fairness concerns of equal dignity, universities will be permitted not only to focus upon race but encouraged to accord affirmative consideration to the social status of other applicants who might similarly suffer structural disadvantage in ways that contribute to their own personal identities. Even if the Court were to sunset *Grutter* as promised, the core of affirmative action will persist.

Although both diversity and equal dignity can ground race-conscious admissions programs, differences of principle—even if overlapping—can produce different effects. For example, through an equal dignity approach, consideration of race in university admissions returns to its pre-*Bakke* roots. Before *Bakke*, the central justification for race consciousness was that it provided a remedial means to address the continuing effects of past *de jure* racial discrimination.[362] After *Bakke*, the justification shifted to claims about providing a diverse student body for institutional purposes under a holistic approach.[363] This latter justification took root in the life of American educational institutions and became disconnected

360. *See* Siegel, *supra* note 166, at 42 ("[G]overnment classification by race poses risks to social cohesion, threatening balkanization and racial conflict."); Siegel, *supra* note 4, at 1298-1300.

361. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary.").

362. *See* Fiss, *supra* note 51, at 144; Brian Leiter, *Academic Ethics: Is 'Diversity' the Best Reason for Affirmative Action?*, CHRON. HIGHER EDUC. (Sept. 20, 2017), https://www.chronicle.com/article/academic-ethics-is-diversity-the-best-reason-for-affirmative-action/ [https://perma.cc/WFV9-8UH8]; Lawrence, *supra* note 341, at 931.

363. *See* Lawrence, *supra* note 341, at 928, 931.

from the remedial grounding from which it first sprang.[364] Diversity became an end unto itself.[365]

With an equal dignity approach, affirmative consideration of all applicants invites institutions to consider the effects of social structures that might perpetuate forms of subordination. By considering personal attributes as a whole—including an individual's race—universities can recognize the effects of social structures in the personal lives of applicants. And though not programmatically remedial, by affirmatively considering structural effects, decision makers can confer remedial benefits as secondary effects. Moreover, diversity need no longer be a yardstick by which individual persons get measured for the role they might play in achieving it for institutional ends. Rather, equal dignity in considering substantive persons becomes an end in itself whereby institutions can also achieve secondary goals like student diversity and remedial benefits. The goal of affirmative consideration is unlikely to have a group-based external measure such as diversity or critical mass. Rather, affirmative consideration is focused on the individual person, thereby satisfying one of the background principles to which the Court is committed.[366]

From the educational institution's perspective, especially as the *Grutter* dissenters understand affirmative action, holistic applicant assessment aimed at diversity was never about holism, but about the particularism of considering race.[367] A person's race is the controversial particular that really mattered to affirmative action programs such as Michigan's, even within a purported holistic assessment.[368] Under an equal dignity approach, institutions would no longer be able to pursue this kind of race particularism as a means to an institutional end. Rather, an institution would need to consider any number of additional factors that serve as indicia for forms of social disadvantage presented as relevant by the applicant. No longer "race plus," but rather whole person complete. The outcomes in terms of achieving racial diversity may be very much

364. *See id.*

365. *See id.*

366. *See* Eidelson, *supra* note 30, at 1607 ("[I]n a society characterized by racial bias, attending to race will often be *necessary* to treating a person respectfully as an individual.").

367. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 355-56 (2003) (Thomas, J., dissenting).

368. *See* Lawrence, *supra* note 341, at 934.

the same, but the appearance and reality of the decision-making process comports with constitutional values of fairness with regard to individual persons—the perceived failure of which, the Court claimed, was a basis for backlash.[369] And even if the decision-making outcomes remain similar—and the secondary goal of diversity remains achievable—the equal dignity approach has the added benefit of avoiding constitutional backlash, while enriching any conception of diversity an institution may seek to achieve. Issues such as income inequality, for example, may be relevant in a way that the focus on racial diversity made invisible.[370] In this way, the ends shift away from entrenched conceptions of group classifications to allow room for more dynamic understandings of how social structures, such as income inequality, in addition to racism and racial subordination, provide meaning and context for individual personal identities and histories.[371]

In these ways, equal dignity shifts the doctrinal focus from the institution to individual persons.[372] Institutions will not define the categories of diversity, but rather individuals will drive the terms by which personal identity can be articulated for affirmative consideration.[373] This demand-side orientation has a future potential, allowing for a more democratic and organic expectation to be placed on institutions to engage in self-evaluation about how they might best provide affirmative consideration to realize the equal dignity of all applicants.

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369. *See* Siegel, *supra* note 166, at 42-43; James, *supra* note 18, at 501-02.

370. *See, e.g.*, WALTER BENN MICHAELS, THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY 86-88, 95-99 (2006); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1061 (1996); Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 291-98 (2004). *But see* Cheryl I. Harris, Fisher*'s Foibles: From Race and Class to Class Not Race*, UCLA L. REV. DISCOURSE (Nov. 16, 2017), https://www.uclalawreview.org/fishers-foibles-race-class-class-not-race/ [https://perma.cc/SP3Z-Z272].

371. *See* Liu, *supra* note 370, at 291 (discussing some of the entrenched conceptions of group classifications).

372. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (marking the importance of individual autonomy).

373. On the narrative aspects of personal identity, see ALASDAIR MACINTYRE, AFTER VIRTUE 200-03 (Univ. Notre Dame Press 1981); Seamus Barker, *Paul Ricoeur and Narrative Identity: Why We Are Our Story*, PSYCH. TODAY (Apr. 13, 2016), https://www.psychologytoday.com/us/blog/post-clinical/201604/paul-ricoeur-and-narrative-identity [https://perma.cc/5WLN-C6V2].

CONCLUSION

Grutter v. Bollinger grounds the constitutional justification for public institutional consideration of race based upon the compelling interest in pursuing a diverse student body and faculty. By its own terms, however, its days are numbered.[374] The Court will again hear anti-affirmative-action arguments aimed at fulfilling *Grutter*'s promise to end affirmative action within twenty-five years.[375] As the argument here has unfolded, the key components of this argument—colorblindness grounded in a conception of individualism—contain internal tensions as well as intratextual inconsistencies that make the end of race consciousness contemplated by those seeking to overturn *Grutter* far more complicated. Abstract individualism cannot withstand scrutiny as a principle of constitutional law, and the more textually salient conception of persons with socially complex identities undermines strict colorblindness. As a combined principle of equal protection and due process, equal dignity protects the power of persons to define their identities to include a racial component and the ability for institutions to give them affirmative consideration for their unique identities taken as a whole.

As we have seen, there is substantial overlap between equality and liberty in both the case law and conceptually, but there is also an interesting difference. Equality requires examination of the government interest in seeking to provide benefits to particular individuals by virtue of their racial background. Equal dignity, as a component of liberty, by contrast, requires removing constitutional barriers to individual claims to be viewed in light of their personal identities and histories when the state distributes scarce resources through assessment of individual merit. Equal dignity does not require government actors to justify why they are considering persons as having complex identities; rather, it allows them to afford individual persons equal respect and dignity for the persons

374. *See* 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary.").

375. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 163-64, 204 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.) (No. 20-1199).

they are.[376] Claims about equal protection implicate decisions regarding group membership, whereas claims about equal dignity focus on the individual person. In this way, a properly reoriented commitment to individuals, as a commitment to fully constituted persons textually protected by the Constitution, is a way of realizing an antidiscrimination jurisprudence of equality and equal dignity on terms more consistent with text and precedent.[377] The Court's premise that the Constitution protects the equality of individuals leads to the unexpected outcome that in order to respect individuals, the Court must focus on persons who have complex personal identities. Focusing on persons means that government actors cannot be blind to socially significant components of personal identity, such as race. Therefore, as this Article argues, overturning *Grutter*'s diversity rationale for consideration of race—as the Court has the opportunity to do—would not resolve the question of the constitutionality of considering race under equal dignity principles.

Confronting the same general question about the constitutionality of considering race in university admissions, equal protection, standing alone, and an equal dignity approach lead to different inquiries. However, equal dignity has the added benefit of providing a means of reconciling competing constitutional values. Equal dignity provides a way for states to pursue affirmative consideration of applicants in ways that promote both their individuality and their complex identities and histories, which necessarily include their group memberships. Under equal dignity, individual applicants may urge affirmative consideration of their race—and other features—as constitutive aspects of their personal identity, asserting constitutional harm from doctrines that would mandate institutional blindness to them. Equal dignity provides a doctrinal basis for realizing a more nuanced form of the Court's bedrock premise that the Constitution protects individuals, not groups. Thus, taking individual persons seriously—as the Court urges—has the unexpected implication that government institutions cannot be foreclosed from taking a person's racial identity seriously as well. The Court's commitment to individual persons as the bearers of constitutional rights

376. *See Obergefell*, 135 S. Ct. at 2608 ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

377. *See* U.S. CONST. amend. XIV, § 1.

entails a constitutional commitment to persons who can be seen holistically in ways that do not deny their racial identity. Equal dignity therefore also forecloses commitment to color-blind constitutionalism if that means denying the reality of an individual's personal identity by imposing race-blind processes on university admissions. Thus, even if the Court were to seize the opportunity to sunset *Grutter* as scheduled, the reorientation of race consciousness in official decisions opens up the possibility of a new way to provide affirmative consideration of a person's racial identity under equal dignity.[378]

378. *See Students for Fair Admissions, Inc.*, 980 F.3d at 163-64, 204.