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THE INDIGNITIES OF COLOR BLINDNESS

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*66 INTRODUCTION

Imagine an applicant to a public university who is an accomplished pianist, grew up in a rural town in central Texas, and is African American. Each of these aspects of her background has played a formative role in shaping her identity. Now imagine that the university's admissions office, which is reviewing her application, has been directed not to consider her race or the race of any other applicant. The university used to take race into account in evaluating the entirety of each individual candidate in order to promote student diversity, but is now under a court order that bars racial considerations. Admissions officers may deliberate on our applicant's experiences playing the piano and coming of age in a rural town.¹ But because the university has been compelled by the court to adopt a colorblind admissions process, her race is off limits.

Colorblindness² defines the rules of equal protection. It manifests in the strict scrutiny standard that treats racial classifications as presumptively unconstitutional,³ on the assumption that they “promote notions of racial inferiority” and *67 are inherently stigmatizing.⁴ Taking away the state's authority to make decisions on the basis of race, the thinking goes, will eliminate these corrosive effects.⁵

This Essay takes a different view. It argues that colorblindness itself stigmatizes and demeans the dignity of individuals who identify by race.⁶ Colorblindness does this in two, related ways--one narrow and one broad. First, it treats racial identity as inferior to the extent that it excludes race from consideration of an individual's background while considering other forms of social identity. In the above example, the state is forced to ignore the race of our hypothetical applicant,⁷ even as it takes account of other aspects of her personal history. Second, by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity. Because the race of our applicant is officially invisible, the state is prohibited from recognizing her as she sees and defines herself.⁸ Colorblindness, therefore, demeans persons who embrace racial identity by denying them agency over how they present themselves to--and consequently are understood by--the state.

*68 In *Grutter v. Bollinger*,⁹ the Court upheld racial considerations in university admissions as part of a “holistic” assessment of each applicant's characteristics and experiences.¹⁰ The question of whether and how racial identity matters for these purposes is at the heart of *Fisher v. University of Texas at Austin (Fisher II)*, which as of this writing is pending before the U.S. Supreme Court.¹¹ The case could determine whether the University of Texas may explicitly consider the race of individual applicants as

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part of its college admissions process in order to supplement the level of racial diversity achieved under the state's race-neutral Top Ten Percent Law.¹² A decision to reject the University's individualized consideration of race would lead to the compulsory colorblindness problem described in the opening hypothetical.

This Essay draws upon “whole-person”¹³ rationales in the Supreme Court's dignity jurisprudence¹⁴ to bolster the diversity justification established in *Grutter*. I contend that the Court has advanced these rationales to strike down laws that prevent persons from expressing, or the state from recognizing, *69 core social identities.¹⁵ I define “core social identity” to refer to a biological or physical characteristic, status, or condition that limits access to opportunity and that has been subject to some form of social sanction, such as discrimination, prejudice, or stereotype. In such a context, I argue, the compelled disregard of identity in higher education admissions is not neutral, but rather can have the subordinating effect of coercing a disfavored group into a state of social invisibility.¹⁶ The state's failure to consider a core social identity, therefore, burdens individual dignity, raising constitutional concerns.¹⁷

The holistic emphasis of diversity-based admissions aligns with the Court's whole-person considerations in other constitutional contexts.¹⁸ In each of the cases described in this Essay, the Court has rejected--either on equal protection or substantive due process grounds--government policies that are perceived as diminishing a core social identity, thereby denying the whole person state recognition. I contend that the failure to consider race in higher education admissions, along with other individual experiences and perspectives, similarly degrades persons who have chosen to racially self-identify.¹⁹

*70 The Court's recent marriage equality decision in *Obergefell v. Hodges*²⁰ raised whole-person rationales to a new constitutional plane, creating a path for reimagining constitutional controversies in the area of race. Although *Obergefell's* meaning and significance may be debated for some time, this Essay argues that it advances equality-based conceptions of liberty that should be applied to diversity-based considerations of race.²¹ Building on *Obergefell*,²² I contend that disregarding racial identity is analogous to discrimination against gays and lesbians²³ who have been denied their “distinctive human experience”²⁴ through laws that forbid marriage equality or that inhibit sexual autonomy. I focus in particular on the Court's conclusion that these laws constitutionally infringe the dignity of gays and lesbians. My point here is that both race and sexual orientation are core social identities. The compelled invisibility of racial identity, therefore, comparably demeans those who have chosen to express themselves through race. By this logic, states not only should be allowed to consider racial identity in admissions policies, but the exclusion of race from an array of otherwise permissible background considerations, should itself violate equal protection.

Because Justice Kennedy has been the swing vote on affirmative action, I focus some attention on how to reconcile his equal protection opinions in this area with the dignity concerns he has expressed outside the context of race. A practical reading of Kennedy suggests that his concerns about stigma extend to those *71 classifications that are imposed by the state²⁵ and that the dignity principles he advances elsewhere should lead him to embrace voluntary racial identities. For the sake of consistency, if nothing else, he should reject constitutional rules that compel states to disregard an applicant's self-declared race in higher education admissions.

At bottom, I contend that the Court should extend the same generous interpretation of dignity in cases involving matters of sexual orientation and other core social identities to race cases, where dignity rationales are virtually absent.²⁶ *Fisher II*, however, threatens to entrench colorblindness and racial identity's quasi-illicit status.²⁷ By making it prohibitively difficult to consider race, the case could incentivize social practices and customs that seek to drive race underground,²⁸ delegitimizing it as a subject of inquiry, exploration, and understanding and forcing racial identity further into the shadows.²⁹

*72 There are other harms as well. Because colorblindness obscures the existence and complexity of racial difference, it perpetuates whiteness as a social norm. For example, in the absence of any explicit reference in the above hypothetical to the applicant's race, the university's admissions officers may assume that she is white, based on stereotypes that people who are accomplished pianists are white, as are people who grow up in rural, central Texas. Colorblindness in this scenario reinforces,

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rather than reduces, racial stereotypes by denying our applicant the opportunity to frame her identity in a narrative that challenges both racial conventions about whiteness³⁰ and the presumed sameness of individuals of color.³¹

Part I discusses dignity as it relates to whole-person considerations in the Court's individual rights jurisprudence. Here I contend that the Court's treatment of dignity in other constitutional realms is inconsistent with colorblindness doctrine and that the same dignity considerations--which have long been at the center of the struggle for racial justice and freedom³²--should be available on the basis of race. Part II unpacks the dignity harms of compelled invisibility. Part III applies these lessons to argue for race-conscious admissions in higher education.

At first blush, diversity-based affirmative action and marriage equality may appear to have little to do with each other. Yet both acknowledge an individual's expressed identity in ways that advance institutional inclusion. In diversity-based affirmative action, universities recognize the race of individual applicants in admissions as a means for assembling a student body with varied backgrounds and experiences in order to enhance the educational environment.³³ Marriage equality requires states to recognize the marital choices of same-sex couples on the same terms as opposite-sex couples, allowing gays and lesbians who choose to define themselves through marriage the same opportunities as heterosexuals. As *73 the Court has observed in separate cases, affirmative action and marriage equality promote access for persons from historically subordinated groups to the institutions of marriage³⁴ and higher education,³⁵ respectively, enhancing the possibilities for social and civic inclusion.³⁶

My project here is purposely narrow, but as both Kenji Yoshino³⁷ and Laurence Tribe have argued,³⁸ *Obergefell* potentially opens new horizons in individual rights jurisprudence, far beyond the realm of university affirmative action.³⁹ It remains to be seen how willing the Court is to develop equal dignity to expand opportunities for people of color. There is much territory to explore. This Essay only dips its toe into these waters.

I. DIGNITY AND THE WHOLE PERSON

Outside the burdening confines of equal protection, colorblindness presents a constitutional puzzle. Most notably, it conflicts directly with the Court's emphasis on whole-person considerations in other constitutional venues. The best and most recent example of this is the Court's 2015 decision in *Obergefell v. Hodges*, which struck down state laws that refused to recognize the marriages of same-sex couples.⁴⁰ As Justice Kennedy observed in his majority opinion, these laws deny gays and lesbians the ability "to define and express their identity"⁴¹ in the same ways as heterosexual couples.

*74 Justice Kennedy's majority opinion lends itself to both broad and narrow interpretations of dignity. Respect for the institution of marriage--and what he describes as its foundational role in society⁴²--is key to the opinion and animates much of its sweeping language. He refers to marriage as a decision that is "among life's momentous acts of self-definition,"⁴³ a vehicle for realizing one's "own distinct identity"⁴⁴ and for "shap[ing] an individual's destiny."⁴⁵ It is possible, therefore, that the dignity concerns in *Obergefell* apply to exclusion from the institution of marriage and nothing more.⁴⁶

Yet, other parts of the *Obergefell* opinion suggest a more expansive understanding. Under this reading, dignity concerns extend beyond recognition of one's choice to enter into marriage to embrace broader notions of freedom.⁴⁷ Liberty traditionally has encompassed freedom from state interference, but *Obergefell* suggests that freedom also embraces a positive right to be recognized consistent with one's declared self.⁴⁸ My point here is that racial identity should be entitled to the same positive recognition.

A broad interpretation of the interest identified in *Obergefell* follows from the Court's decision to emphasize liberty, rather than equality, in striking down state laws that denied marriage to same-sex couples. As Kenji Yoshino has observed, the Court could have opted for a narrower holding, but its decision charted a broader path, "deliberately eliding the negative/positive liberty distinction" that traditionally distinguishes equal protection from substantive due process jurisprudence.⁴⁹ Had it chosen to focus on equal protection, the Court simply *75 could have held that states could not constitutionally distinguish between

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opposite-sex and same-sex couples in affording the right to marry.⁵⁰ But in concluding that there was a fundamental right⁵¹ that required recognition of same-sex marriages by the state,⁵² the Court chose a more expansive framework. By stressing that the state cannot encroach on an individual's ability to define⁵³ herself through (lawful) choices, the Court situated identity concerns on a constitutional plane.⁵⁴ On this theory of *Obergefell*, the decision to marry matters because it is an instrument of self-expression, the denial of which infringed the core social identity of sexual orientation. The constitutional lesson here is that the state must recognize individuals as they recognize themselves and that dignity concerns are paramount when the state's failure to do so demeans a core aspect of one's personhood.

Similar identity considerations are evident in other areas of the Court's jurisprudence, involving reproductive and sexual autonomy and the punishment of individuals with diminished mental capacity. Dignity concerns surface when the state refuses to recognize core social identities that define the whole person.⁵⁵

We can see the same dignity rationales in reproductive rights and jurisprudence on sexual autonomy. In *Planned Parenthood v. Casey*,⁵⁶ the Court considered the constitutionality of a state law that limited a woman's ability to elect to terminate her pregnancy,⁵⁷ concluding that dignitary considerations extended to a woman's freedom to choose whether to carry to term and that the state could not unduly burden that choice.⁵⁸ Justice Kennedy elaborated further:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and *76 autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁵⁹

In *Lawrence v. Texas*, which struck down state sodomy laws that criminalized consensual sexual relations in the privacy of the home,⁶⁰ Justice Kennedy invoked the same sweeping language from *Casey*.⁶¹ In both cases, Kennedy located dignity harms in state action that denies individuals full recognition of their personhood, either by limiting autonomy over reproductive freedom or over the freedom to express one's sexual orientation.⁶²

This same whole-person principle exists in Eighth Amendment jurisprudence. In *Hall v. Florida*,⁶³ for example, the Court declared unconstitutional a state rule that prohibited consideration of a capital defendant's intellectual disabilities if his IQ score exceeded seventy. The Court determined that such a prohibition created an “unacceptable risk” that persons with disabilities would be executed. As Justice Kennedy explained, “[n]o legitimate penological purpose is served by executing a person” with such a disability and doing so “violates his or her inherent dignity as a human being.”⁶⁴ Neither deterrence nor retribution, Kennedy wrote, are served by punishing persons with “diminished capacity,” which “lessens moral culpability.”⁶⁵ The Court has adopted similar rationales in banning both capital punishment⁶⁶ and mandatory life without parole sentences for juvenile offenders.⁶⁷

Each of these cases implicates core social identities because they involve individual characteristics that limit opportunity and that have been subject in one *77 form or another to social sanction or discrimination. They emphasize the constitutional harms of government action that fails to recognize the entirety of one's personhood.⁶⁸ Part II below connects these dignitary harms to colorblindness under the law.

II. THE DIGNITARY HARMS OF COMPELLED INVISIBILITY

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As discussed in Part I, Justice Kennedy has raised dignity concerns across the constitutional spectrum in cases in which he has cast a deciding vote⁶⁹ to reject laws that refuse to recognize the choices of gays and lesbians to enter into marriage or that deny them sexual autonomy, that infringe women's reproductive autonomy,⁷⁰ and which impose criminal penalties that fail to account for a person's diminished capacity to understand the nature of her crime.⁷¹ In each of these cases, the Court has limited state action that subverts or disregards core social identities.

Race may be as meaningful to a person's identity as her sexual orientation, reproductive status, or mental capabilities. The Court's equal protection opinions, however, treat racial considerations as if they are external to--and perhaps even undermine--one's personhood and individuality. As discussed in Part I, this one-dimensional approach to racial identity is inconsistent with the Court's more nuanced treatment of identity in other constitutional realms. It also perpetuates a false dichotomy between the social realm and the individual. Under the colorblindness rubric, the state is compelled to disregard an individual's racial identity, despite the continued social salience of race. As a result of this dynamic, the state fails to treat the racially-identified person in a manner that is consistent with how she defines and sees herself.⁷²

***78** We can see this problem unfold in the example of our hypothetical applicant in the opening of this Essay: Because race is no longer a legitimate consideration as a result of the court order, the applicant's race ceases to be a part of her narrative. Consequently, she can no longer differentiate herself in the university's application process. Having been denied the opportunity to represent herself at least in part by her race, admissions officers may be more likely to assume that she is white, particularly if her rural town is predominantly white. Her accomplished status as a pianist indicates that she may have some class advantages, which also correlates more strongly with the experiences of white candidates. Thus her unconventional profile as a Black candidate makes it easier to erase her real racial identity. As Devon Carbado, Kaytee Turetsky, and Valerie Purdie-Vaughns's Essay in this online volume powerfully explains, however, our hypothetical applicant's experience is no less relevant because it is racially atypical.⁷³ Indeed, by virtue of having to navigate a predominantly white environment, her racial identity may in fact be very personally salient.⁷⁴ Her official story, however, no longer comports with her actual story. Under the rubric of colorblind university admissions, she has become a different person and assumes an identity before the state that to her is unrecognizable.

This Part explores the indignities of colorblindness as a predicate for my argument that equal protection, at the very least, should reject colorblindness doctrine as it applies to persons who self-identify by race. Colorblindness stigmatizes when it precludes, or limits, the state from acting, for inclusionary purposes, upon an individual's declared racial identity. It also impedes healthy interracial connections and the kind of social growth and understanding celebrated by Justice Kennedy in *Obergefell*.⁷⁵ Disabling these social connections has negative consequences for all individuals, but particularly for people of color who bear the greater burdens of institutional isolation.

***79** To appreciate these points, we first have to understand that colorblindness is not race-neutral, as the Court's equal protection decisions imply.⁷⁶ Rather, research shows that colorblindness not only fails to eliminate our race consciousness, but that it can actually entrench racial bias.⁷⁷ Suppressing race, in other words, can do more harm than good.⁷⁸

For example, in a study of the effects of colorblindness, participants were asked to read one statement representing a colorblind perspective and another displaying a multicultural perspective.⁷⁹ Each person was then asked to name five reasons why her designated perspective would promote positive interracial interactions. Afterwards, the participants were tested for implicit and explicit racial bias. Compared to the multicultural respondents, colorblind participants showed a "significantly larger" pattern of implicit "pro-White" responses as well as notable indicia of explicit bias.⁸⁰

***80** Studies show that colorblindness also inhibits positive cross-racial interactions.⁸¹ People expend so much energy "trying to ignore social categories"⁸² that in the process they actually hinder interracial contact and unwittingly degrade any contact that does take place.⁸³ Ironically, whites who adopt colorblind norms also tend to be perceived as unfriendly and more prejudiced, even when they are highly motivated to avoid appearances of racial bias.⁸⁴ Persons of color report experiencing greater racial

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hostility under so-called colorblind conditions than in conditions where race can be openly acknowledged and discussed.⁸⁵ These dynamics discourage interracial interactions and the possibility for forging closer connections across racial groupings. As racial encounters become increasingly fraught, fewer people are likely to engage in them. The fewer who engage, the greater the social distance between racial groups, which in turn inhibits the growth and understanding necessary to bridge racial divides. All people bear the costs of diminished social ties, but people of color are more likely to suffer the impact of the resulting racial isolation and exclusion and limited access to social and economic resources and opportunities.

Colorblindness also demeans and stigmatizes people of color by privileging whiteness.⁸⁶ Drawing on Ruth Frankenberg's scholarship, Martha Mahoney describes whiteness as a set of "cultural practices that are usually unmarked and unnamed."⁸⁷ Mahoney has called for the interrogation of whiteness to make it "visible and cognizable to those within its sphere."⁸⁸ Colorblindness, however, makes such a project difficult for people of color because it subordinates personal narratives and denies opportunities to unpack and explore contrasting racial experiences. As Mahoney contends, whites have a "[p]rivileged identity" that "protect[s them] [from] seeing the mechanisms that socially reproduce and maintain privilege."⁸⁹ Colorblindness limits the sociopsychological and institutional tools for surfacing and addressing these dynamics.⁹⁰ Removing race from *81 the conversation--even as it lurks in our collective social psyches-- leaves whiteness and its attendant harms both unidentified and unexamined.

To illustrate, consider a student at a public university who wants to discuss Black Lives Matter and the movement to increase police accountability in communities of color. Assume that this university is the same institution described in the opening of this Essay and that it remains subject to a federal order eliminating the use of race in admissions. With race having assumed a quasi-illicit status under the law, let us further assume that the university has responded by cultivating a culture and ethos of colorblindness. Although the court's mandate extends only to admissions--which leaves the university theoretically free to nurture racial awareness in other ways--instead it has internalized law's message that race does not matter. It routinely conveys this message to its students and faculty that race is either irrelevant or off-limits.

In this environment, the student may feel stifled and unsure about how, or even whether, to have such a discussion. Although race is a part of the student's social and internal awareness, the process of making sense of it has been stigmatized due to colorblindness mandates that law force-fed into the university's admissions process, which were then replicated by the university in other areas of its institutional life. In the absence of dialogue about, and examination of, the lives and conditions of people of color, our student experiences herself as having been thrust into a status of university-enforced invisibility.⁹¹ Race, therefore, becomes the elephant in the room that the university has directed everyone to ignore. By denying individuals a mechanism for asserting racial difference--and for exploring and diagnosing interracial interactions in relation to that difference--colorblindness reinforces whiteness.⁹² Whiteness, therefore, remains the settled mean for institutional conversation, culture, and understanding. Law jumpstarted this process by legitimizing colorblindness, which freed the university to force race further underground.

Equal protection instructs that the state's recognition of racial identity is inherently stigmatizing. Yet, as the above example illustrates, colorblindness--and the pain of state-mandated invisibility--is itself a source of racial stigma.⁹³ Colorblindness compels persons of color to assume a "virtual social identity" in matters of decision-making by the state that differs from how one's self-understanding.⁹⁴ As R.A. Lenhardt explains, outlawing racial identity in this way *82 "dishonor[s]"⁹⁵ people of color, "reduc[ing us] in our minds from a whole and usual person to a tainted, discounted one."⁹⁶

No social identity, other than racial identity, is so burdened with constitutional scrutiny and presumptive illegitimacy.⁹⁷ Here I have emphasized the burdens associated with the state's suppression of one's declared racial identity. Other more nefarious, dignitary harms, however, result from the Court's prohibition of racial classifications to redress racial subordination.⁹⁸ Race is continuously produced, reinforced, and regenerated through practices that consign people of color to an unequal status.⁹⁹ Against this history of racial oppression, colorblindness heaps upon persons of color the further indignity of invisibility. These indignities are no less significant than those that have been decried by the Court elsewhere in its individual rights jurisprudence.

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Because of its demeaning and exclusionary consequences, colorblindness should give anyone pause who cares about individual liberty and freedom.

***83 III. EQUAL DIGNITY IN HIGHER EDUCATION AFFIRMATIVE ACTION**

How might we parlay the whole-person rationales discussed earlier, along with the insights about the socially destructive impact of colorblindness, into constitutional arguments that advance race-conscious admissions in higher education? Drawing on the “equal dignity” principle in *Obergefell*,¹⁰⁰ this Part argues that racial identity, at a minimum, should be placed on the same plane as other forms of social identity in higher education admissions. I explore these points in the context of *Fisher II*.

Fisher II concerns the constitutionality of the University of Texas's use of race in a supplemental admissions process that evaluates a broad range of personal characteristics and experiences to promote student diversity, including diversity among students of color. Individual characteristics, in addition to race, that are evaluated in this process run the gamut. For example, they might include class, family status, whether the applicant speaks English as a primary language, among other aspects of her background.¹⁰¹ Excluding race from the array of social identities that are recognized in the admissions process, as urged by the plaintiff in *Fisher II*, demeans those applicants who want to be identified by race.¹⁰²

As discussed earlier, Justice Kennedy's decision in *Obergefell* to analyze the constitutional right primarily under substantive due process, rather than equal protection, argues for an even broader right to recognition. Laurence Tribe describes *Obergefell* as embracing the “idea that *all individuals* are deserving in equal *84 measure of personal autonomy and freedom to ‘define [their] own concept of existence.’”¹⁰³ Both he and Kenji Yoshino have argued that the Court has endorsed a positive liberty right and not simply a negative right to be free from state encroachment on one's intimate relationships.¹⁰⁴ As Yoshino further emphasizes, the Court grounded the right to marriage equality in the context of the historical subordination and marginalization of gays and lesbians.¹⁰⁵ This was not simply some passing acknowledgment of difference, but rather was rooted in a deeper consideration of what it means to be a gay or lesbian person who has been locked out of an established social institution.

Under this logic, one might argue that self-declared racial identity is entitled to affirmative recognition under the logic of *Obergefell*. We need not go that far, however, for purposes of *Fisher II*. At a minimum, *Obergefell* suggests that racial identity should be recognized on the same constitutional plane as other core social identities. The thrust of equal dignity is that the state should not be compelled as a matter of law to disregard race, where other kinds of identities are acknowledged in the admissions process.

How might this play out in practice? For instance, what if a student wrote in her application that “race was an essential part of my childhood growing up and has made me the person I am today”? Does that student suffer an Obergefellian-type harm if the university discredits her assertion after reviewing her application? The answer is no, though understanding this point may require some additional clarification. My claim is that colorblindness imposes the dignitary harm. Here the University is not being colorblind where it is simply unpersuaded by the applicant's statement or elects--based on its goal of promoting student diversity--to focus instead on other aspects of her application. To do as much is not to disregard her race but only to make a judgment that her racial identity is less compelling, relative to other applicants, or less interesting perhaps than other parts of her personhood.

Some might object that asking the state to evaluate the relative worth or merit of an individual's racial identity is also demeaning. As indicated in the example above, one might say that inviting the state into this process creates the risk that the state will value race less, or more, than the individual herself. Both excessive race and de minimis considerations--that fail to align with the individual's own self-conception--are also stigmatizing, the argument goes, perhaps even more so than failing to acknowledge race altogether.

*85 Acknowledging for the sake of argument that the state might misunderstand an applicant, is that possibility any worse than excluding race altogether or the attendant risks of asking the state to judge the relevance of one's family status, language background, income, music abilities, etc.? One could contend that the history of racial discrimination makes racial considerations

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particularly fraught and that university misfires in matters of racial identity, therefore, carry greater weight. But where a person has declared her racial identity and specifically invites the state to consider it, I argue that the risk of Obergefellian-level dignitary harms¹⁰⁶ are less than the risk of a diminished social identity--a sort of "skim milk" identity¹⁰⁷--under a regime of state-mandated invisibility.

The stigmatic harms of colorblindness extend beyond curtailed individual identity to its racially exclusionary and isolating impact. As the Court recognized in *Grutter*, these harms have special force in the context of higher education institutions,¹⁰⁸ but also resonate more broadly in our national community.¹⁰⁹ Justice Kennedy's open-ended language in *Obergefell*--in which he refers to the "yearnings for security, safe haven, and connection that express our common humanity"¹¹⁰--reveals a similar concern for community and dialogue,¹¹¹ against the perils of "loneliness."¹¹² As with marriage, we can conceive higher education as creating opportunities for interpersonal connection, engagement, inclusion, and belonging.¹¹³ Although the relationships that one develops in college and graduate school are not necessarily as intimate as marriage, they also can open new experiences and pathways that are comparably life-changing.

*86 At this point, one might invoke Justice Kennedy's dissent in *Grutter*¹¹⁴ as well as other opinions in which he has inveighed against racial classifications that are used to burden or benefit individuals on the basis of race.¹¹⁵ There is no denying Kennedy's general hostility in race cases. A closer reading of his opinions, however, indicates that he principally objects to racial classifications that are imposed by the state. His clearest articulation of this point is in *Parents Involved v. Seattle School District No. 1*, where school districts described race in terms of white/nonwhite and black/"other"¹¹⁶ and relied on fixed numerical ranges, to promote racial integration in public schools.¹¹⁷ Kennedy explained his objection to "state-mandated racial label[s]," which "an individual is powerless to change," as being "inconsistent with the dignity of individuals in our society."¹¹⁸ The harm was that such racial classifications detracted from the students' ability to express themselves.

There is another important point here. Although Kennedy dissented in *Grutter*, he did not reject the constitutional legitimacy of diversity itself,¹¹⁹ nor did he do so in *Parents Involved*¹²⁰ or, more recently, in *Fisher v. University of Texas at Austin (Fisher I)*.¹²¹ In addition, unlike in *Parents Involved*, which involved blanketed racial classifications, Kennedy never invoked dignity as a constitutional concern in *Grutter*.¹²² Instead he focused on the perceived failures of the *87 university to protect the individualized assessment of applicants by ensuring that race did not predominate in admissions.¹²³ In other words, consistent with the whole-person narrative that undergirds his conception of individual dignity, Kennedy should have no constitutional quarrel with racial identities that are declared by individuals themselves, as long as the state provides some process assurances that it will not emphasize that identity beyond other considerations.

There are two wrinkles to this argument. First, in *Schuette v. Coalition to Defend Affirmative Action*¹²⁴ the Court rejected an equal protection challenge to a state constitutional amendment that barred racial considerations in admissions.¹²⁵ Although the Court stated clearly that its decision did not bear on "the constitutionality, or the merits, of race-conscious admissions policies in higher education,"¹²⁶ its decision potentially weakens the constitutional justification for dignity-based racial considerations in that forum.

Finally, there is the additional possibility that Kennedy could continue to object to racial classifications on other grounds, such as their presumed social divisiveness.¹²⁷ There may be no getting past Kennedy's perception that racial classifications are balkanizing.¹²⁸ He rejected, however, the dissent's analogous concerns in *Obergefell*--that the social controversy over same-sex marriage favored letting the states decide the issue on their own. At some point, Kennedy concluded, one can have too much democratic deliberation, particularly where an individual's dignity is at stake.¹²⁹ *Obergefell*, therefore, may have some persuasive power where state universities' voluntary use of race in admissions is subject to state review and approval. Perhaps Kennedy might be more amenable to racial *88 considerations where he can be persuaded that they have been approved by democratic majorities.¹³⁰

CONCLUSION

Much has been lost under colorblindness. This Essay has sought to frame some of the possibilities for imagining a more robust constitutional order, which provides the state room to acknowledge and act upon individual racial identity in ways that are more faithful to the promises of our Constitution. It points to the Court's dignity jurisprudence--most notably in *Obergefell*--which has rejected laws and policies that fail to recognize individuals as whole persons and that otherwise subvert core social identities. Over the long run, these liberty and equality themes may be the key to a more racially inclusive constitutional order that rejects colorblindness and instead embraces a more robust vision of dignity and freedom.

Footnotes

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¹ The university might also consider her gender. At least one federal district court, however, has concluded that gender-based classifications also trigger strict scrutiny. See  [Johnson v. Bd. of Regents of Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1367 \(S.D. Ga. 2000\)](#) (concluding that university's consideration of gender triggers strict scrutiny).

² “Colorblindness” refers to the view “that racial categories do not matter and should not be considered when making decisions such as hiring and school admissions[,] ... that social categories should be dismantled and disregarded, and [that] everyone should be treated as an individual.” Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCH. 417,417 (2004) (citation omitted).

³ See  [City of Richmond v. J.A. Croson Co., 488 U.S. 469,493 \(1989\)](#) (concluding that strict scrutiny applies regardless of state purpose); see also Reva B. Siegel, [Equality Talk Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown](#), 117 HARV. L. REV. 1470, 1473 (2004) (“The fundamentality of the anticlassification principle thus explains various features of our equal protection tradition, foremost among them its commitment to protect individuals against all forms of racial classification, including ‘benign’ or ‘reverse’ discrimination.”). The courts, however, have continued to tolerate racial considerations in some contexts, most notably in the field of criminal justice. See, e.g.,  [Brown v. City of Oneonta, 221 F.3d 329 \(2d Cir. 1999\)](#) (dismissing equal protection claim challenging police sweep of black residents based on victim's description that focused primarily on alleged perpetrator's race); Devon W. Carbado & Cheryl I. Harris, [Undocumented Criminal Procedure](#), 58 UCLA L. REV. 1543, 1550 (2011) (arguing that Fourth Amendment doctrine “enables and legitimizes racial profiling against Latinos”).

⁴ See  [J.A. Croson, 488 U.S. at 493](#) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, [racial classifications] may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”). The Court has also identified a concern about social divisiveness and balkanization as a harm of racial classifications. See generally Reva B. Siegel, [From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases](#), 120 YALE L.J. 1278 (2011) (discussing balkanization as equal protection concern).

⁵ See  [J.A. Croson, 488 U.S. at 493](#).

⁶ I define persons having a “racial identity” or who “identify by race” as those who declare or express their race. By “declared” or “expressed” identity, I mean to refer to characteristics or features of a person that are made apparent

by the person herself, in contrast with passive identities that may be visible or known, but are not explicitly assumed by that person. I do not mean here to suggest that identity is either one-dimensional or that it is necessarily fixed. As Devon Carbado and Mitu Gulati have argued, racial identity is a complex, contextual, and situational phenomenon. *See generally* DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013). Ian Haney Lopez has also observed that “racial identity is formed on multiple, sometimes contradictory levels” and that “[s]elf-identification, group perception, and external classification all constitute axes of racial construction” that “in turn ... encompass myriad criteria for determining racial identity.” Ian Haney Lopez, *White Latinos*, 6 HARV. LATINO L. REV. 1, 1 (2003). Russell Robinson has advanced similar arguments with respect to sexual orientation. *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 220 (2016) (“[S]exuality scholars and members of the LGBT community have long debated whether some people have a degree of choice in their sexual orientation.”).

⁷ *But see* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1152-62 (2008) (exploring the practical difficulties of excising race from an applicant's personal statement).

⁸ *Cf.* R.A. Lenhardt, *Understanding the Mark Race, Stigma, and Equality in Context*, 79 N.Y.U.L. REV. 803, 818 (2004) (observing that stigma results in part from the “large discrepancy” between a person's “actual and virtual identities”); Carbado & Harris, *supra* note 7, at 1147-48 (“Colorblind admissions regimes that require applicants to exclude references to race in order to preclude institutions from considering them on the basis of race create an incentive for applicants to suppress their racial identity and to adopt the position that race does not matter in their lives.”).

⁹  [539 U.S. 306 \(2003\)](#).

¹⁰  *Id.* at 337 (approving a “highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment”).

¹¹ *See* Brief for Respondents, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (U.S. Oct. 26, 2015). This is the second time the Court has heard the *Fisher* case. *See*  [Fisher v. Univ. of Tex. at Austin \(Fisher I\)](#), 133 S.Ct. 2411 (2013). *Fisher I* affirmed *Grutter's* conclusion that the educational benefits of diversity are a compelling state interest.  *Id.* at 2419 (observing that *Grutter* calls for “deference” to a university's conclusion that “a diverse student body would serve its educational goals”). The Court, however, remanded the case to the Fifth Circuit Court of Appeals on the question of narrow tailoring.  *Id.* at 2422. Additional court challenges seek to test *Grutter's* limits, indicating the need for continued attentiveness to the constitutional basis for race-conscious affirmative action. Other plaintiffs have recently filed two other higher education cases to challenge the use of race in admissions and to overturn *Grutter*. *See* Philip Marcelo, *Harvard and UNC Sued Over Race-Based Admissions Policies*, HUFFINGTON POST, (Nov. 17, 2014, 5:41 PM), http://www.huffingtonpost.com/2014/11/17/harvard-unc-admission-lawsuit_n_6174288.html [<https://perma.cc/4UHS-2S7B>].

¹²  [Fisher I](#), 133 S.Ct. at 2416 (describing the University's decision to couple the “explicit consideration of race” with the Top Ten Percent Law, which “grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards” in order to enhance the educational environment by creating a critical mass of minority students).

¹³ I credit Kenneth Karst with the term “whole person.” *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 286 (1995) (“The harm of stigma is that a single perceived characteristic is seen as ‘disqualifying’ the whole person, excluding him or her from membership in the community that calls itself the ‘normals.’”).

¹⁴ I borrow this phrase from Leslie Meltzer Henry. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011). I should be clear that my purpose here is not to wade into broader debates about the meaning of “dignity,” *see id.* (observing that dignity's “importance, meaning, and function are commonly presupposed

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but rarely articulated”); which is largely ill-defined, [id. at 176-77](#) (describing the “conceptual chaos surrounding dignity’s complicated usage”).

[15](#) See *infra* Part I.

[16](#) Cf. [Schuette v. Coal. to Defend Affirmative Action](#), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (“Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, ‘No, where are you *really* from?’, regardless of how many generations her family has been in the country.”).

[17](#) In making these claims, I do not mean to imply that the expression of racial identity is associated with a particular perspective or ideology. Cf. Lauren Sudeall Lucas, Essay, [Identity as Proxy](#), 115 COLUM. L. REV. 1605, 1609 (2015) (contesting the “us[e of] identity as a proxy to represent or vindicate ... substantive” values). My point is that the expression or declaration of that identity--regardless of *how* identity is exercised or manifested in practice--is itself constitutionally meaningful. Because racial identities were suppressed as a tool for racial subordination, these identities merit special constitutional protection.

[18](#) The diversity rationale in *Grutter* emerged from Justice Powell’s opinion in [Regents of the University of California v. Bakke](#), 438 U.S. 265 (1978). See [Grutter v. Bollinger](#), 539 U.S. 306, 325 (2003) (“[W]e endorse Justice Powell’s view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). The Court in *Bakke* struck down the challenged policy on the grounds that race was too decisive a factor in the admissions process. [Id. at 324](#) (“Justice Powell was, however, careful to emphasize that in his view race ‘is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.’”) (quoting [Regents of the Univ. of Cal. v. Bakke](#), 438 U.S. 265, 312, 314 (1978)). Both *Grutter* and *Bakke* link to my broader point: Just as race cannot be considered in a way that reduces an applicant to race alone, the state cannot be compelled to exclude race when it is demonstrably important to an applicant’s identity.

[19](#) One might ask whether the state’s decision to disregard an applicant’s self-declared identity as “white” would raise the same constitutional concerns. A full answer to this question is beyond the scope of this Essay. A couple of points, however, bear mentioning. First, the question is deceptive because it suggests a symmetry between white identity and the identity of a person of color. As a threshold matter, one must be careful to distinguish between an applicant who merely describes herself as white and an applicant who is intentionally claiming an association with an identity that is historically rooted in exclusionary power and racial oppression. See John A. Powell & Caitlin Watt, [Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment](#), 32 CARDOZO L. REV. 885, 900 (2011) (“[W]hite identity is largely based on domination, and has always been so. The very essence of whiteness is a power differential.”); Lopez, *supra* note 6, at 6 (“Asserting a white identity ... solidifies the root structures of racial hierarchy and ensures the continued subordination of others.”). Because the constitutional project that I describe here is intended to disrupt such a claim, a university’s decision to disregard an applicant’s self-declared “white identity” in the vein that I have just described would not trigger any dignity concerns. On the other hand, the decision to disregard the race of a white applicant who demonstrates an awareness of whiteness and white privilege *would* implicate such concerns. Although in both cases, the applicant is white, the valence of racial identity is very different. Further, I posit that a white student who has such distinctive qualities would also advance the educational benefits of diversity because of the likely different experiences and perspectives that she would contribute to the university environment.

[20](#) [135 S. Ct. 2584 \(2015\)](#).

[21](#) See *infra* Part I.

[22](#) [135 S. Ct. 2584](#).

- [23](#) See Robinson, *supra* note 6, at 215-26 (critiquing the Court's failure to recognize parallels between discrimination on the basis of sexual orientation and anti-affirmative action laws that bar consideration of race).
- [24](#) See Tobias Barrington Wolff, [Political Representation and Accountability Under Don't Ask, Don't Tell](#), 89 IOWA L. REV. 1633,1640 (2004).
- [25](#) Cf. Robinson, *supra* note 6, at 217 (noting Justice Kennedy's discomfort with constitutional interpretations that require the Court to "define racial groups and their interests, which might trigger 'impermissible racial stereotyp[ing]' and risk 'demeaning' minorities") (quoting [Schuette v. Coal. to Defend Affirmative Action](#), 134 S. Ct. 1623,1634-35 (2014)).
- [26](#) See Robinson, *supra* note 6, at 199-200 (observing the "clear divergence" between Justice Kennedy's votes in constitutional race and sexual orientation cases, with Kennedy casting more conservative votes in race cases and more liberal votes in sexual orientation cases). Although I do not develop the point here, one might analogize racial identity expression to a form of free speech. See Wolf, *supra* note 24, at 1638-39 (framing the harms of "Don't Ask, Don't Tell" as a policy that limited the ability of gay and lesbian servicemembers to convey their identity). I should note here that the diversity rationale in higher education admissions, which informs the discussion in this Essay, is rooted in First Amendment freedoms. See [Grutter v. Bollinger](#), 539 U.S. 306, 324 (2003) (describing the "attainment of a diverse student body" as being grounded in "academic freedom" as a "special concern of the First Amendment" (quoting [Regents of the Univ. of Cal. v. Bakke](#), 438 U.S. 265, 312, 314 (1978))). As conceptualized in the doctrine, however, these freedoms belong to the university itself, rather than to the applicant. *Id.*
- [27](#) See Carbado & Harris, *supra* note 7, at 1164 (observing that a "race-positive applicant" who operates in an "ostensibly colorblind institutional settings" must accept that "his race-conscious identity is quasi-illegal-- something that must remain undocumented").
- [28](#) See *infra* Part II.
- [29](#) This dynamic is especially debilitating for people of color in non-racially diverse environments. See Elise C. Boddie, [Critical Mass and the Paradox of Colorblind Individualism in Equal Protection](#), 17 U. PA. J. CONST. L. 781, 794 (2015) (discussing a "study of racial perceptions of a corporate environment [which] showed that having less employee diversity reduced African Americans' level of trust toward 'colorblind' policies," but that an institution's diversity philosophy mattered less "where minority representation was high"). There are other harms as well. See Carbado & Harris, *supra* note 7, at 1164 ("[I]f a race-positive applicant determines that he is not able to re-imagine himself in colorblind terms ... he must accept the notion that there is something about his racial experiences and sense of identity that is negative."); cf. Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCH. INQUIRY 77, 90 (2010) (noting that whites who oppose multiculturalism may embrace colorblindness as an ideology that "legitimiz[es]" their views); Robinson, *supra* note 6, at 223 (discussing the Court's "erasure" of racial injuries in [Schuette v. Coalition to Defend Affirmative Action](#), 134 S. Ct. 1623 (2014), which affirmed the constitutionality of a state constitutional amendment that bars affirmative action).
- [30](#) A white person might also define themselves against whiteness norms. One extreme example might be Rachel Dolezal, a white woman who generated an outcry after she was revealed for passing as black. See Allison Samuels, *Rachel Dolezal's True Lies*, VANITY FAIR (July 19, 2015), <http://www.vanityfair.com/Vnews/2015/07/rachel-dolezal-new-interview-pictures-exclusive> [<https://perma.cc/6MCF-RNRY>] (in which Dolezal describes her "awareness and connection with the black experience" and her experiences working as head of a local NAACP chapter). Another example might be Tim Wise, a white social commentator, who has critiqued whiteness norms. See generally TIM WISE, WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON (2005).
- [31](#) See Boddie, *supra* note 31, at 806 (observing that colorblindness denies opportunity to "[d]raw[] distinctions among people of color[, which] promotes the individualization of their identity.").

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- [32](#) See Christopher A. Bracey, [Dignity in Race Jurisprudence](#), 7 U. PA. J. CONST. L. 669, 669 (2005) (“Dignity remains the core aspirational value in the struggle for racial justice.”).
- [33](#) See  [Fisher v. Univ. of Tex. at Austin](#), 133 S. Ct. 2411,2419-20 (2013) (observing that race may be considered for purposes of assembling a diverse student body, in service of a university's educational mission, provided its use of race satisfies strict scrutiny).
- [34](#) See  [Obergefell v. Hodges](#), 135 S. Ct. 2584, 2602 (2015) (“It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.”).
- [35](#) See  [Grutter v. Bollinger](#), 539 U.S. 306, 308 (2003) (“[T]he path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.”).
- [36](#) I am not endorsing the *Obergefell* Court's emphasis on marriage as a social norm or its exclusionary implications for those who choose not to marry. See generally Yuvraj Joshi, [The Respectable Dignity of Obergefell v. Hodges](#), 6 CAL. L. REV. CIRCUIT 117 (2015) (critiquing *Obergefell*'s implied “respectability” rationale); R.A. Lenhardt, [Race, Dignity, and the Right to Marry](#), 84 FORDHAM L. REV. 53 (2015) (“Even as it secures rights for LGBT Americans, *Obergefell* crafts a whitewashed version of marriage and dignity inconsistent with the actual experience of African Americans and other minorities with marriage.”).
- [37](#) See Kenji Yoshino, [A New Birth of Freedom?: Obergefell v. Hodges](#), 129 HARV. L. REV. 147, 179 (2015) (observing that *Obergefell* “could serve to close as well as to open new channels of liberty” and “underscored and amplified the role antisubordination concerns have played in due process analysis”).
- [38](#) See Laurence H. Tribe, [Equal Dignity: Speaking Its Name](#), 129 HARV. L. REV. F. 16,22 (describing “*equaldignity* as the very foundation of individual human rights”).
- [39](#) [Id. at 19](#) (“*Obergefell* may well have laid the foundation for reexamining a longstanding but always controversial obstacle, embodied in decisions like *Washington v. Davis*”).
- [40](#)  [Obergefell v. Hodges](#), 135 S. Ct. 2584 (2015).
- [41](#)  [Id. at 2593](#).
- [42](#)  [Id. at 2601](#) (describing marriage as “a keystone of our social order”).
- [43](#) [Id. at 2599](#) (quoting  [Goodridge v. Dep't of Pub. Health](#), 798 N.E.2d 941, 955 (Mass. 2003)).
- [44](#) [Id. at 2596](#).
- [45](#) [Id. at 2599](#).
- [46](#) See Yoshino, *supra* note 39, at 168 (observing that *Obergefell* may simply be a case about “marriage exceptionalism”). Indeed, Clare Huntington and R.A. Lenhardt have criticized *Obergefell* for reifying marital norms that neglect nontraditional families. See Clare Huntington, [Obergefell's Conservatism: Reifying Familial Fronts](#), 84 FORDHAM L. REV. 23, 29 (2015) (“[T]he opinion in *Obergefell* reified the social front of family as the marital family. By basing the opinion on the Due Process Clause, Justice Kennedy had to glorify marriage. And he did, choosing very traditional language.”); Lenhardt, *supra* note 36, at 54-58 (arguing that Kennedy's opinion advances a “[c]olor-[b]lind [d]ignity” that willfully ignores the history of race to the institution of marriage); see also R.A. Lenhardt, [Integrating Equal Marriage](#), 81 FORDHAM L. REV. 761, 765-68 (2012) (contending that emphasis on marriage could be racially stigmatizing for African Americans who as a group are less likely to marry).

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- [47](#) See, e.g.,  [Obergefell, 135 S. Ct. at 2599](#) (“The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.”).
- [48](#) See Yoshino, *supra* note 39, at 168-69; cf. Neomi Rao, [The Trouble With Dignity and Rights of Recognition, 99 VA. L. REV. ONLINE 29, 30 \(2013\)](#) (arguing that *Windsor* adopted a “novel constitutional right to recognition unconnected to any substantive right”).
- [49](#) See Yoshino, *supra* note 379, at 168.
- [50](#) See *id.*; see also Huntington, *supra* note 468, at 27-28 (critiquing the Court for its failure to adopt an alternative equal protection analysis that emphasized “equal access” to marriage and instead selecting a substantive due process analysis that required it to “choos[e] between contested social fronts” in ways that potentially stigmatize other family arrangements).
- [51](#)  [Obergefell, 135 S. Ct. at 2604](#) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty”).
- [52](#)  [Id. at 2611](#) (Roberts, C.J., dissenting) (observing that the Court has taken “the extraordinary step of ordering every State to license and recognize same-sex marriage”).
- [53](#)  [Id. at 2597](#) (observing that fundamental, constitutionally protected liberties “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”).
- [54](#) *Id.* at 2593 (“The Constitution promises ... liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”).
- [55](#) One could argue that dignity is capable of more specific meaning in each of these cases. Cf. Joshi, *supra* note 38 (arguing that dignity shifted meaning from *Casey* to *Obergefell*).
- [56](#)  [Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 \(1992\)](#).
- [57](#) See Joshi, *supra* note 38, at 120.
- [58](#) *Id.*
- [59](#)  [Casey, 505 U.S. at 851](#).
- [60](#) See  [Lawrence v. Texas, 539 U.S. 558,567 \(2003\)](#).
- [61](#)  [Id. at 574](#).
- [62](#) See Pamela S. Karlan, [Foreword: Loving Lawrence, 102 MICH. L. REV. 1447, 1452-53 \(2004\)](#) (describing the “positive conceptions of liberty” throughout the opinion). As Pamela Karlan observes, *Lawrence* can also be understood not only in terms of autonomy, also as a case about equality. [Id. at 1452](#).
- [63](#)  [134 S. Ct. 1986 \(2014\)](#).
- [64](#)  [Id. at 1992](#).

65  [Id. at 1993.](#)

66 See  [Roper v. Simmons, 543 U.S. 551, 572-73 \(2005\)](#) (barring the death penalty for persons who were under the age of eighteen at the time of their crimes were committed on grounds that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability”).

67 See  [Miller v. Alabama, 132 S. Ct. 2455, 2463-67 \(2012\)](#) (striking down a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide defenders based on diminished culpability).

68 I am assuming that these cases also touch on recognition of a declared identity because one's diminished capacity would have to be identified by the capital defendant, most likely (though not necessarily) by and through her attorney.

69 *But see* Joshi, *supra* note 38, at 117 (suggesting that Kennedy's dignity jurisprudence has shifted and is not uniform).

70 See  [Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 \(1992\)](#) (describing intimate family choices as “central to personal dignity and autonomy”).

71 See  [Hall v. Florida, 134 S. Ct. 1986, 1992 \(2014\)](#) (concluding that “[n]o legitimate penological purpose is served by executing a person with intellectual disability” and that doing so “violates his or her inherent dignity as a human being”).

72 *Cf.* Tribe, *supra* note 40, at 30 (observing that “*Obergefell's* promise extends beyond same-sex couples to ensure that all individuals are protected against the specter of coerced conformity”); see also RALPH ELLISON, *THE INVISIBLE MAN* 3 (1990 ed.) [MAN 3 \(1990 ed.\)](#) (“I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination--indeed, indeed, everything and anything except me.”).

73 See Devon W. Carbado et al., [Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate](#), 64 UCLA L. REV. DISCOURSE 174 (2016) (discussing the racial challenges faced by higher-income African Americans).

74 See *id.*, (discussing the racial traps faced by black children in predominantly white schools); see also Liliana M. Garces, [Fisher v. Texas II: Lessons From Social Science on the Harm of Further Restricting the Consideration of Race in Admissions](#), 64 UCLA L. REV. DISCOURSE 18 (2016) (describing the sense of exclusion and negative racial experiences for students of color on less diverse campuses); Boddie, *supra* note 31, at 794 (discussing salience of racial identity in less diverse environments).

75 See  [Obergefell v. Hodges, 135 S. Ct. 2584, 2605 \(2015\)](#) (discussing the “enhanced understanding” of marriage equality as a result of societal discussion and deliberation); see also Boddie, *supra* note 31, at 790-99 (describing the balkanizing impact of colorblindness).

76 See Plaut, *supra* note 31, at 90 (describing colorblindness as an ideology that majority group members deploy to “legitimiz[e]” “antiegaltarian” views);  [Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 \(2007\)](#) (Roberts, C.J.) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

77 See Plaut, *supra* note 31, at 87 (observing that “a large literature in social psychology supports the notion that race perception cannot simply be turned ‘on’ and ‘off’” and discussing studies which show that “color blindness can actually lead to greater, not weaker, racial bias”).

[78](#)

Cf. [Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1676 \(2014\)](#) (Sotomayor, J., dissenting) (“The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”).

[79](#)

See Richeson & Nussbaum, *supra* note 2, at 419. The Richeson and Nussbaum study used statements that “were identical” to those used in another study by researchers at the University of Colorado at Boulder. *Id.* In that study, participants were asked to read an essay, which they were told represented the consensus view of various social science disciplines about the importance of “resolv[ing] existing and potential conflicts between different groups.” See Christopher Wolsko et al., *Framing Interethnic Ideology: Effects of Multicultural and Color-Blind Perspectives on Judgments of Groups and Individuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 635, 638 (2000). One set of participants was then exposed to the colorblind condition where “it was suggested that intergroup harmony can be achieved if we recognize that at our core we are all the same, that all men and women are created equal, and that we are first and foremost a nation of individuals.” *Id.* Conversely, “[i]n the *multicultural* condition, it was suggested that intergroup harmony can be achieved if we better appreciate our diversity and recognize and accept each group’s positive and negative qualities.” *Id.*

[80](#)

See Plaut, *supra* note 31, at 87. The “pro-White” responses were identified through a test that evaluates the extent to which a participant implicitly associates “pleasant concepts” with white people and “unpleasant concepts” with black people. See Richeson & Nussbaum, *supra* note 2, at 419-20. The test showed that “participants exposed to the color-blind prompt revealed a larger pro-white bias compared to participants in the multicultural prompt condition.” *Id.* at 420; see also *id.* at 421 (“Taken together, the present results lend support to the hypothesis that exposure to a color-blind ideology regarding inter-ethnic relations generates greater racial bias than exposure to a multicultural ideology.”).

[81](#)

Id.

[82](#)

Id.

[83](#)

Id.

[84](#)

Id.

[85](#)

See *Id.*

[86](#)

See Lenhardt, *supra* note 8, at 817-19.

[87](#)

See Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1665 (1995).

[88](#)

Id. at 1663.

[89](#)

Id. at 1665.

[90](#)

See, e.g., John Eligon, *At University of Missouri, Black Students See a Campus Riven by Race*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/us/university-of-missouri-protests.html?_r=0 [<https://perma.cc/N3ZS-UEZ4>].

[91](#)

See Mahoney, *supra* note 89, at 1665.

[92](#)

See *id.* (observing that whiteness defines the norm).

[93](#)

See Lenhardt, *supra* note 8, at 818.

[94](#)

Id. (quoting ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2 (1963)).

[95](#)

Id. (quoting ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 79 (1982)).

- 96 *Id.* (quoting ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963)).
- 97 See  [Grutter v. Bollinger, 539 U.S. 306, 379 \(2003\)](#) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” (citing  [Fullilove v. Klutznick, 448 U.S. 448, 537 \(1980\)](#) (Stevens, J., dissenting))). The one exception here would be classifications on “national origin,” which also triggers strict scrutiny because of its close association. See Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 905-19 (2007) (discussing, but also critiquing the assumed relationship between “national origin” and race claims). The Court also justifies colorblindness doctrine on grounds that racial classifications are socially divisive and generate white resentment. See, e.g.,  [City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 \(1989\)](#) (asserting that affirmative action “lead[s] to a politics of racial hostility”);   [Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 \(1978\)](#) (“All state classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.”). Yet these concerns have not extended much beyond race. Indeed, the Court in *Obergefell* clearly rejected social hostility to same-sex marriage as a relevant consideration in its interpretation of substantive due process and equal protection.  [Obergefell v. Hodges, 135 S. Ct. 2584, 2605-06 \(2015\)](#) (“The idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’” (quoting  [W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 \(1943\)](#)); see also Joshi, *supra* note 38, at 120 (describing the “dignity” in *Casey* as respecting women's freedom to “make a choice that a large segment of American society would condemn”); Tribe, *supra* note 40, at 25-26 (describing the limits on democratic discourse in relation to LGBT rights set by the Court in *Obergefell*). Yet the Court time and again subjects race to a different standard.
- 98 See   [Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 \(1978\)](#) (rejecting racial classifications as a constitutional means for redressing “societal discrimination”).
- 99 Cf. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715 (1993) (“Whiteness as property has taken on more subtle forms, but retains its core characteristic—the legal legitimization of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination.”).
- 100 The strands of equal protection and substantive due process have long been intertwined. See, e.g.,  [Boiling v. Sharpe, 347 U.S. 497, 498-99 \(1954\)](#) (connecting concepts of equal protection and due process); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 790-91 (noting the “equality dimensions of liberty claims under the ‘rights’ strand of equal protection doctrine”). The “equal dignity” principle in *Obergefell*, however, has been described as a “concept of great analytic strength and political power,” that has become “the very foundation of individual human rights.” See Tribe, *supra* note 40, at 21, 22.
- 101 See  [Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415-16 \(2013\)](#) (describing characteristics considered during the admissions process).
- 102 Cf.  [Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1676 \(2014\)](#) (Sotomayor, J., dissenting) (discussing the relevance of race to personal identity). For my purposes, it matters that the University of Texas is pursuing the educational benefits associated with student diversity, rather than considering race for an invidious, exclusionary objective. The Court, however, has long concluded that strict scrutiny applies to the use of racial classifications regardless of their purpose. See  [J.A. Croson, 488 U.S. at 493](#) (concluding that strict scrutiny applies regardless of state purpose). State uses of race, even in the inclusionary realm of diversity-based admissions must be justified by a compelling governmental purpose and must be narrowly tailored to that purpose. The Court has concluded that even minimal uses of race may be excessive if they generate too few justificatory benefits. See  [Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733 \(2007\)](#) (“The minimal effect these classifications have on student assignments,

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however, suggests that other means would be effective.”). This issue is also in play in *Fisher*. See Brief for Respondents, *supra* note 11, at 46 (countering Petitioner’s “minimal impact” argument).

[103](#) See Tribe, *supra* note 40, at 22.

[104](#) *Id.*; see Yoshino, *supra* note 39, at 167-69.

[105](#) *Id.*

[106](#) I recognize that one’s identity is not fixed and may change as a result of her experiences in the setting of higher education. Presumably, the kinds of conversations that student diversity promotes in the classroom and elsewhere on campus would give any student a chance to redefine herself.

[107](#) See Dale Carpenter, [Windsor Products: Equal Protection From Animus, 2013 S. CT. REV. 183, 220 n.148 \(2013\)](#) (describing Justice Ginsburg’s famous reference to “second-tier” marriages as “skim milk marriages” during oral argument in *Windsor v. United States*).

[108](#) See  [Grutter v. Bollinger, 539 U.S. 306, 329 \(2003\)](#) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”).

[109](#)  [Id. at 324](#) (emphasizing that the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation” (quoting   [Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265,313 \(1978\)](#))).

[110](#) See  [Obergefell v. Hodges, 135 S. Ct. 2584, 2599 \(2015\)](#) (quoting  [Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941,955 \(Mass. 2003\)](#)).

[111](#) See Tribe, *supra* note 40, at 23-28.

[112](#)  [Obergefell, 135 S. Ct. at 2608](#) (describing the “hope” of gay and lesbian couples “not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions”).

[113](#) See Devon W. Carbado & Mitu Gulati, [What Exactly Is Racial Diversity?, 91 CALIF. L. REV. 1149, 1154 \(2003\)](#) (reviewing ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002)) (describing functions of diversity to include “inclusion” and “belonging”).

[114](#) See  [Grutter, 539 U.S. at 387](#) (Kennedy, J., dissenting).

[115](#) See, e.g.,  [Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 \(2007\)](#) (Kennedy, J., concurring in part and concurring in the judgment) (criticizing racial classifications, which “tell[] each student he or she is to be defined by race”).

[116](#)  [Id. at 709](#).

[117](#)  [Id. at 726](#) (observing that in Seattle the district sought “white enrollment of between 31 and 51 percent;” in Jefferson County, the district sought “black enrollment of no less than 15 or more than 50 percent”).

[118](#) *Id.* at 797. It appears that the school district identified students by race and that students did not self-identify. See  [Parents Involved, 551 U.S. at 724](#) (observing that “under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify

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as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not.”); *cf.* Joint Stipulation of Facts at 13, [McFarland v. Jefferson Cty. Bd. of Educ., No. 3:02cv00620, 2002 WL 33768543 \(W.D. Ky. 2002\)](#) (“For purposes of the JCPS student assignment plan described in paragraph 134 of this Stipulation, JCPS records the race of students as Black (African-American) and Other (all students who are not African-American).”).

[119](#)

 [Id. at 793](#) (Kennedy, J., concurring in part and concurring in the judgment) (describing the *Grutter* Court as having “sustained a system that, it found, was flexible enough to take into account ‘all pertinent elements of diversity,’ and considered race as only one factor among many” (citation omitted)).

[120](#)

 [Id. at 788](#) (acknowledging the importance of reducing racial isolation through race-conscious means).

[121](#)

See  [Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418 \(2013\)](#) (affirming constitutional legitimacy of diversity as a compelling interest).

[122](#)

See  [Grutter v. Bollinger, 539 U.S. 306, 387-95 \(2003\)](#) (Kennedy, J., dissenting).

[123](#)

 [Id. at 388](#) (Kennedy, J., dissenting) (criticizing the majority for “confus[ing] deference to a university's definition of its educational objective with deference to the implementation of this goal”).

[124](#)

 [134 S. Ct. 1623 \(2014\)](#).

[125](#)

 [Id. at 1648](#).

[126](#)

 [Id. at 1630](#).

[127](#)

See  [Parents Involved in Cmty. Sch., 551 U.S. at 797](#) (Kennedy, J., concurring in part and concurring in the judgment) (“Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.”).

[128](#)

See generally Siegel, *supra* note 4 (discussing balkanization as equal protection concern).

[129](#)

See  [Obergefell v. Hodges, 135 S. Ct. 2584, 2605-06 \(2015\)](#) (“The idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’” (quoting  [W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 \(1943\)](#));  [id. at 2606](#) (“Dignitary wounds cannot always be healed with the stroke of a pen.”).

[130](#)

Cf.  [Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637 \(2014\)](#) (extolling virtues of the democratic process in rejecting challenge to constitutional amendment that banned affirmative action).

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