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Undoing Race? Reconciling Multiracial Identity with Equal Protection

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The number of multiracial individuals in America, many of whom define their racial identity in different ways, has grown dramatically in recent years and continues to increase. From this demographic shift a movement seeking unique racial status for multiracial individuals has emerged. The multiracial movement is distinguishable from other race-based movements in that it is primarily driven by identity rather than the quest for political, social, or economic equality. It is not clear how equal protection doctrine, which is concerned primarily with state-created racial classifications, will or should accommodate multiracialism. Nor is it clear how to best reconcile the recognition of individual identity with the continuing need to address group-based racial discrimination and subordination. In this Essay, I explore the potential impact of multiracialism—and multiracial identity in particular—on the future of racial classifications under equal protection doctrine.

As a framework for its analysis, the Essay invokes two theories used to interpret the meaning of equal protection: antisubordination and anticlassification. Viewed solely through the lens of multiracial identity, the common normative understanding of these two approaches contorts. While antisubordination is often perceived as more beneficial for groups battling entrenched racial hierarchy, it

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may facilitate unique harms for multiracial individuals seeking to carve out a racial identity distinct from traditionally defined racial categories. And although anticlassification is often viewed by progressives as detrimental to the pursuit of true racial equality, it may lend more support to policies of racial self-identification and the recognition of a unique multiracial identity. A looming danger, therefore, is that anticlassification advocates wishing to dismantle frameworks rooted in traditional notions of race may exploit multiracialism to "undo" race and to undermine the use of racial classifications altogether.

In response to that possibility, this Essay argues that although law and identity inevitably inform and impact one another, they also serve distinct purposes that should not be improperly conflated in the context of multiracialism. The construction of identity is ultimately a very personal endeavor, and although legal recognition may be one aspect of identity, in the area of race, the law has a more powerful function to play in preventing racial subordination. Where possible, the law should accommodate multiracial individuals who wish to define their own racial identity, but as long as it remains more aspirational than realistic, the individual's perception of race should not be used or manipulated to undermine the use of racial classifications to counter societal race discrimination.

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INTRODUCTION

During oral argument in *Fisher v. University of Texas at Austin*,[1] the future of race-based affirmative action appeared to hang in the balance. Aside from asking predictable questions about whether and when the state can employ racial classifications, several of the Justices appeared interested in whether and when someone should be able to identify as a member of a specific race. Chief Justice John G. Roberts, Jr. queried whether someone who is one-quarter or one-eighth Hispanic should check the "Hispanic" box, and Justice Antonin Scalia inquired skeptically whether someone who is one thirty-second Hispanic would be considered "Hispanic" by the University of Texas.[2] Counsel for the University explained that there is a multiracial box that applicants may select and that applicants are allowed to self-identify as to their racial or ethnic background. His response evoked some skepticism from the bench about whether a policy of self-identification would provide the University with an accurate representation of each applicant's race or enable the University to meet its goal of student body diversity.[3] Based on their questioning, some Justices seemed to imply that as the concept of diversity becomes more nuanced—in part because the notion of "race" has become more complex—the diversity rationale supporting affirmative action is weakened. Although in *Fisher* the Court ultimately left a narrow window for the use of race-based classifications in the context of higher education admissions, it left wholly untouched the issue of how multiracialism could or should bear on the questions presented.

While not central to the Court's holding in *Fisher*, the above-referenced exchange simultaneously allowed conservative Justices to advance ideas of racial fluidity by suggesting that affirmative action policies improperly draw meaningless distinctions (for example, between the student who is one thirty-second Hispanic and the student who is not Hispanic); raise the specter of racial fraud; and suggest that state institutions err when they attempt to classify individuals or collect racial data in an era where race is neither static nor clear-cut. Multiracialism's growing presence, and the related quest for its legal recognition,[4] risks injecting these same ideas into broader discourse about race.

Multiracialism may negatively impact discussions of race and racial equality in several other ways. First, an increased focus on the status of multiracial individuals, and what some understand to be their signaling of our transition to a post-racial society, might overshadow or crowd out necessary

1. 133 S. Ct. 2411 (2013).

2. Transcript of Oral Argument at 32–35, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

3. *Id.*

4. *See infra* Part I.B.

discussions about the continued realities of racism.[5] Second, it may lead to the emergence and entrenchment of a more complex racial hierarchy in which multiracials form an intermediary layer between whites and darker-skinned people of color.[6] Last, the multiplicity of new racial categories and blurring of existing racial categories may make it difficult for the state to collect meaningful racial statistics that can be used to prove racial disparities or to enforce civil rights statutes.

As demonstrated by the *Fisher* colloquy, multiracial identity in particular poses another challenge to dominant understandings of race: the idea that self-identification should be the primary driver for racial classification. Social science research demonstrates that multiracial individuals may assume a host of different racial identities, and that the prerogative to identify in a specific manner may depend on the point in time or the context. Through the lens of multiracial identity, therefore, race is a fluid and socially constructed concept, capable of changing over time and assuming many different forms.[7] In contrast, equal protection doctrine is rooted in historical understandings of race, which cast racial identity as fixed and driven primarily by external perception rather than by individual conception.[8] The understanding of race in the context of multiracial identity is thus very different from that which forms the basis of equal protection doctrine.

Increased rates of racial intermixing, changing notions of how racial identity is constructed, and a corresponding shift in the underlying nature of race all have the potential to fuel the ideology of colorblindness and, more

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5. This concern is similar to that expressed by Tanya Hernández in her discussion of the "multiracial matrix" in other societies like Cuba and Puerto Rico: some may use racial mixture and fluid racial identity to "discard or devalue race as a unit of critical analysis and transformative action." Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1098–99 (2002). According to Hernández, the "matrix" dictates what is reality and "thereby convinc[es] all those harmed by its construction of reality that their experience is natural and sometimes even desirable." *Id.* at 1098–99. Hernández views the growing popularity of colorblindness and increasing hostility toward racial classifications as fertile ground for the multiracial matrix in the United States. *See id.* at 1162 ("[T]he United States remains enraptured with the sheen of humanitarianism that multiracial discourse uses to veil and maintain racial hierarchy.").

6. In *Racism Without Racists*, Eduardo Bonilla-Silva describes a new "triracial" order, consisting of a "white" group, an intermediate "honorary whites" racial group that would include most multiracials, and the "collective black" group at the bottom of the hierarchy. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 227–28 (2014). Bonilla-Silva suggests that this new order would both be more pluralistic and more fluid, but would also "serve as a formidable fortress for white supremacy" and "may even eclipse the space for talking about race altogether." *Id.*

7. Camille Gear Rich refers to this phenomenon as "the era of elective race," in which racial self-identification is paramount and there are many different bases on which racial self-designation may rely. *See generally* Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179 (2013).

8. *See* Natasha J. Silber, Note, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1879 (2013) (arguing that "contemporary equal protection doctrine requires the existence of fixed identity groups."); *see also id.* at 1883–91.

specifically, a view of equal protection that discourages racial classification by the state. The more racial boundaries are blurred and the more racial identity is viewed as something that is internally constructed, the more difficult it may be for the state to classify individuals on the basis of race. As a result, the law's ability to manage racial dynamics, and thus eradicate racial subordination through affirmative action policies and antidiscrimination laws, may be diminished.[9] As Tanya Hernández explains: "[T]he instability of fluid racial categories calls into question the utility of any racial classification scheme. This is how fluidity converges with colorblindness . . . [a]nd indeed, the public excitement about fluidity rests in part on its trajectory towards the eradication of all racial classification schemes."[10] Ultimately, the fear is that by "undoing race" as we have known it, and weakening the state's ability to label individuals by race or to collect racial data, an increasing focus on multiracial identity will frustrate the quest for legal and social racial equality.

In legal debates about race and equal protection, commentators have spent little time discussing the role of multiracialism and how it meshes with a body of doctrine that has been organized along traditionally rigid racial lines.[11] Although multiracialism itself is not a new phenomenon, it has taken on increasing legal significance in the context of a growing multiracial demographic and the accompanying "movement"[12] striving to carve out a distinct niche for multiracial individuals. Multiracialism has the potential to fundamentally alter equal protection jurisprudence and, in particular, the anticlassification-antisubordination binary that has dominated the interpretation of the Equal Protection Clause. Depending on how and whether multiracialism changes our understanding of the role race plays in society, it may counsel against the state's use of traditionally defined racial classifications

9. *Cf.* Hernández, *supra* note 5, at 1096, 1169 (describing how the "humanistic cast" of the new race ideology emerging in the United States—characterized in part by the government's decision to allow people to claim multiple racial designations on the census—veils its power of racial subordination).

10. Hernández, *supra* note 5, at 1114.

11. *See, e.g.*, Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM. L.J. 1, 2 (2007) (noting that the relationship between multiracial students and affirmative action programs "has almost entirely escaped notice in the scholarly literature"); *see also* Shalini R. Deo, Comment, *Where Have All the Lovings Gone?: The Continuing Relevance of the Movement for a Multiracial Category and Racial Classification After* Parents Involved in Community Schools v. Seattle School District No. 1, 11 J. GENDER RACE & JUST. 409, 412 (2008) ("[T]he implications and consequences of this option [to 'check all that apply' rather than a 'multiracial' box] have not been adequately examined. In particular, the practical effects of using and choosing this new option, both personal and social, impact preconceived notions of race that demand attention and further conversation."); Scot Rives, Comment, *Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1309 (2011) ("Thus far, multiracial discourse has focused on the concept of separate categorization in data gathering, while ignoring ongoing experiences, problems, and harms created by social perception as mixed race.").

12. For purposes of this piece, I use the term "movement" to describe the conglomeration of individuals and organizations pushing for the recognition of multiracial identity, either by the state or by other members of society. *See also infra* Part I.B.2.

(anticlassification) or support the continued use of racial classifications as necessary to counter racial subordination (antisubordination). The multiracial movement's salience in the legal realm is still in its nascent stages, but given its size and its impact on the discourse of race more broadly, its jurisprudential impact is inevitable.

The relationship between multiracialism and equal protection is complex and cannot be addressed in its entirety here. This Essay attempts to take on just one aspect of this larger debate: How can the legal framework of equal protection honor the individual's ability to define his or her own racial identity, while not simultaneously undermining the larger, group-based project of dismantling racial discrimination and achieving racial equality? I suggest that the key to reconciling multiracial identity and equal protection is an understanding of the ways in which identity and the law overlap, but are also distinct. Recognizing that the law, on the one hand, and individual racial identity, on the other, may each serve different purposes, this Essay warns against conflating the two prematurely and, in doing so, improperly stunting their development.

There are two caveats as to the scope of this piece. First, the Essay distinguishes between "external" racial classification—the race of an individual as perceived by others—and "internal" racial classification—self-identification by race. This piece is not focused on those situations in which only "external" classifications are salient (such as invidious racial discrimination). Instead the Essay examines those situations where it is unclear whether "internal" or "external" classifications should be salient (for example, affirmative action, where it is unclear whether phenotypic appearance or lived experience is more relevant) or where only "internal" classifications are salient (such as choosing a box to check on an application or census form).

Second, the Essay draws a distinction between the "means" used to classify individuals by their race and the "ends" toward which such classifications are used. In applying the lens of multiracial identity, this piece is concerned primarily with the "means" (how racial classifications are defined) and with the "ends" (how the state uses racial classifications) only to the extent that the "ends" affect the "means." In other words, this Essay does not purport to address whether the University of Texas should ultimately admit the applicant who is one thirty-second Hispanic under its admissions policy, but instead speaks to whether the existence of such a policy should dictate how that individual is classified and whether the applicant's ability to self-identify racially undermines the policy's existence.

Part I provides a brief account of the historical treatment of multiracialism, including the multiracial movement, which in its more organized form sought to create a multiracial category on the U.S. Census. Drawing on social science literature, which contains extensive studies on the issue, Part I then delves into the nature of multiracial identity, including the

different ways in which multiracial individuals may racially identify, the factors that may influence their choice to identify in one way or another, and the possible emotional and psychological consequences that flow from that choice.

Part II introduces two competing theories of equal protection—anticlassification and antisubordination—and explores how viewing equal protection doctrine solely through the lens of multiracial identity (as described in Part I) may alter normative understandings of how equal protection best protects the values at stake. Anticlassification strongly disfavors all racial classifications, while antisubordination disparages only the use of racial classifications that serve to subordinate, or oppress, a particular racial group. Many progressive scholars have characterized anticlassification as hostile, or at least insensitive, to the plight of racial minority groups. On the other hand, the antisubordination approach is often viewed as more sympathetic to the oppressive dynamics that continue to face people of color. For multiracial individuals concerned primarily with the freedom to define their own racial identity, the anticlassification approach—deeply rooted in individualism and hostility towards state intervention into matters of race—may offer more forceful arguments in support of self-identification and against state-created or imposed definitions of race. In contrast, the antisubordination approach—concerned primarily with structural racism and the subordination of racial groups—may work unexpected harms in the context of multiracial identity, feeding a group-centric mentality that discourages self-definition of identity. We are thus left with the lingering question: Are the interests of multiracial identity incompatible with the notion that some use of traditional race-based classification is necessary to achieve racial equality for society as a whole?

Part III suggests that recognition of multiracial identity need not lead to the undoing of race in the context of equal protection. It first explores in further detail the attractiveness of anticlassification and explains why that option is perhaps more pragmatic in light of anticlassification's recent dominance, but also shortsighted, even as to the ultimate vindication of identity concerns. The subsequent proposal, presented as the preferable approach, cautions against conflating issues of identity with the purposes of legal doctrine and argues that doing so in this context does a disservice to both. While the state can and should be supportive of identity in its relationship with the individual—for example, allowing individuals to self-describe their own racial identity—the state also has a distinct role to play with regard to structural racism. To that end, it should not be confined by any one individual's conception of race.

Law and identity share a symbiotic relationship through which each affects and informs the other; however, they also serve distinct purposes. Although it does not function in isolation, identity is in many ways a self-oriented project, which may not always comport with societal perceptions. In contrast, the law not only functions as a vehicle to vindicate individual

interests, but in the area of race, also serves an important role in regulating societal relationships and protecting against hierarchy. To assume that identity and the law must serve the same ends may unfairly stunt identity formation and, perhaps more importantly, prevent the law from fulfilling an important function on behalf of subordinated racial groups. Once the two interests are untangled, it is possible to provide some recognition of multiracial identity while ensuring that it can peaceably co-exist with a doctrinal framework that does not reject state-based racial classification altogether.

Ultimately, this Essay is intended to be part of a conversation that will reach beyond its scope. It suggests that we be thoughtful about incorporating social science research into legal scholarship around issues of identity and respect the fact that individual conceptions of identity may sometimes be constricted by the legal landscape. Yet it also cautions us to refrain from being overly responsive to such findings or from allowing such information to be used in a manipulative fashion, to the extent that they relate more to an aspirational ideal than to the realities of the role that race plays in today's society. It is hopeful that society can honor multiracial identity without allowing it to undermine a body of law that has enabled countless other individuals to function beyond the confines of racial caste.

I.
MULTIRACIALISM AND MULTIRACIAL IDENTITY

Multiracialism and multiracial identity cannot be easily distilled into a matter of pages; here, I attempt only to provide a very broad overview of how multiracialism has functioned as a part of the traditional racial order and how that relationship has changed over time. Drawing on social science research, I then delve further into the nature of multiracial identity in an attempt to articulate its core values. Thus, Part I provides the factual groundwork about the multiracial movement necessary to Part II's evaluation of anticlassification and antisubordination theory.

For purposes of this Essay, "multiracial" is used primarily to refer to those individuals who have two parents of different races.[13] Although I often refer to multiracialism as a general concept, where I have drilled down further, I have chosen to focus primarily on black and white mixed-race individuals—those individuals with one parent who is black (for example, someone with a significant amount of black or African ancestry) and one that is white.[14] I

13. As in much of the social science research on the topic, for purposes of this Essay, "multiracial" and "mixed-race" are used interchangeably to refer to individuals with multiple racial backgrounds (including, for example, those with parents of different races), as defined by socially constructed criteria, including U.S. Census categories. By way of personal disclaimer, I am myself a black and white multiracial individual who has identified both as "black" and as "multiracial."

14. Although I recognize that much has been written and could be written about the meaning and problematic use of terms such as "white" and "black," I begin with standard racial terms to make the argument set forth in this piece. I also acknowledge that the definition of "multiracialism" set forth

acknowledge, as Juan Perea has argued, that the pervasiveness of the black-white paradigm in legal scholarship has served to exclude other groups from racial discourse and suppress other narratives of race discrimination.[15] There are, however, valid reasons for focusing on black-white multiracials in this context. First, the definition of "blackness" in the United States is unique, as is the type of racial subordination that has been experienced by black Americans.[16] Second, racial discrimination doctrine and equal protection doctrine are largely premised on the historical perception and treatment of African Americans.[17] Third, in the context of intermarriage and mixed-race heritage, black-white families and children have occupied a distinct niche, informing the multiracialism movement to a great degree.[18] Last, as a related

above risks the reification of such monoracial classifications. While I do not mean to minimize those arguments, I use this terminology in the interest of providing an adequate starting point to understanding the concept of multiracialism and thus a foundation for the arguments made herein.

15. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1213–15 (1997); *see also id.* at 1221 ("[R]eliance on the binary paradigm leads to the exclusion and marginalization of other racialized people who also suffer from racism.").

16. David L. Brunsma & Kerry Ann Rockquemore, *What Does "Black" Mean? Exploring the Epistemological Stranglehold of Racial Categorization*, 28 CRITICAL SOC. 101, 102 (2002) ("Th[e] debate [surrounding racial classification] is most intense over the category 'black' because of the historically unique way that blackness has been defined."); *see also* Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107, 110 (2010) (explaining why the historic focus on black-white relations "provides important context in the ongoing political and academic discourse on race, and does not diminish the very real and important needs and experiences of other subordinated groups."); Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm to Build Racial Coalitions*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 81, 86 (2005) ("The Black/White Paradigm . . . offers a unique instrumentality to understand race-based domination and subordination."); Rachel F. Moran, *The Mixed Promise of Multiracialism*, 17 HARV. BLACKLETTER L.J. 47, 54–55 (2001) ("[T]he current debate over census categories is most relevant for groups historically subject to restrictions on intermarriage that clearly marked them as racial."); *see id.* at 49 (explaining that African Americans, who remain the most segregated and have the lowest rates of intermarriage with whites, stand to gain the least from the creation of a multiracial category).

17. Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 11–21 (1977) (providing an overview of the history of the Fourteenth Amendment, born out of the transition from slavery and the Reconstruction era). Much in the way that racial discrimination doctrine evolved to accommodate other races, changes in treatment of black-white individuals will likely bleed over into the treatment of other mixed-race individuals.

18. *See* KIM M. WILLIAMS, MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA 32 (2006) ("Black isolation stands out conspicuously amid countervailing trends [regarding intermarriage]."); *see also* ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS 13, 20–21 (2013); WILLIAMS, *supra*, at 125 ("People joined these [multiracial advocacy] groups in order to shield themselves and their children from intolerance, which, they said, came from all sides. The pressure of this intolerance was much greater for black-white families . . . who were attuned to the difficulties of bigotry in very personal ways."); *id.* at 127–28 ("While the contemporary politics of racial fluidity are not rooted exclusively in the interests or experiences of one community—to think that any one group 'owns' the debate over multiracialism is illogical and demonstrably untrue—blacks' connection to it has been more harrowing than most. . . . No other racial or ethnic group has a history as tightly bound to state-sanctioned and state-enforced racial separation.").

and pragmatic point, the social science research relating to multiracialism focuses primarily on black-white individuals, providing the most relevant data for my own research.

A. Historical Treatment of Multiracialism

The story of race in America is a long and troubled one into which the story of multiracialism is deeply interwoven. Here, as background, I attempt to provide only a cursory overview of how multiracials' attempts to self-identify racially have been historically resisted by the state. The focus throughout this piece on identity challenges faced by multiracials should not be taken to imply that monoracials do not face similar identity challenges or that multiracials do not experience the same type of racial discrimination faced by minority monoracials. Nor should it be taken as making any comparative statement about the importance of identity harms vis-à-vis the harms combated by civil rights movements, which were grounded in more traditional notions of race. The latter harms are important and their history is well documented; this piece merely intends to shine a light on the former.

In the United States, the treatment of multiracial individuals, and black-white individuals in particular, has been dominated throughout the twentieth century by the one-drop rule,[19] which "deems individuals with any black ancestry whatsoever (regardless of their physical appearance) as members of the black race."[20] Strict application of the one-drop rule resulted in what social scientists have labeled "hypodescent," meaning that "mixed-race individuals—no matter how far removed from black ancestry—have had the same position as the lower-status parent group."[21] Prior to the near universal adoption of the one-drop rule, states employed and courts relied upon a range of methods to determine an individual's race, including blood fractions, appearance, and personal associations.[22] Given the nation's history with slavery and the turmoil that existed before the emergence of legal racial equality, it is perhaps unsurprising that the one-drop rule has rarely been challenged and has instead been widely embraced by the courts and society as a whole.[23]

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19. Arnold K. Ho et al., *Evidence for Hypodescent and Racial Hierarchy in the Categorization and Perception of Biracial Individuals*, 100 J. OF PERSONALITY & SOC. PSYCHOL. 492, 493 (2011).

20. Brunsma & Rockquemore, *supra* note 16, at 106; *see also, e.g.*, Ho et al., *supra* note 19, at 493 (describing Alabama's policy that "one drop of 'Negro' blood" would render someone black).

21. Brunsma & Rockquemore, *supra* note 16, at 106.

22. FRANK W. SWEET, LEGAL HISTORY OF THE COLOR LINE: THE RISE AND TRIUMPH OF THE ONE-DROP RULE 169 (2005) (explaining that prior to the advent of the one-drop rule, courts relied primarily on three methods to determine if someone was black or white: physical appearance, blood fraction, and association); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1738–40 (1993) (providing an overview of blood-fraction rules used throughout the nineteenth and twentieth centuries); *see also, e.g.*, Ho et al., *supra* note 19, at 493 (describing Missouri's use of "fractions such as one eighth to define Black-White biracials as Black.").

23. *See* ONWUACHI-WILLIG, *supra* note 18, at 13 ("Today, despite the gains of the civil rights movement, both the social and legal power behind the one-drop rule remains strong."); Brunsma &

For most of our nation's history, the focus of racial classification has been external,[24] relying on how the state or certain classes of people wish to define racial classifications for their own ends, without any regard for how an individual might perceive his or her racial identity. The fact that race has primarily existed as a socially-ascribed characteristic explains why it has rarely been challenged.[25] Indeed, during the time of slavery and for centuries following, it would likely have been a foreign concept to think that one could have any input on how his or her race was defined.[26]

One of the more prominent examples of state-defined race was plaintiff Homer Plessy's treatment in the infamous case of *Plessy v. Ferguson*.[27] Plessy was reportedly seven-eighths white and his African ancestry was hardly discernable, yet he was deemed "colored" under the law.[28] His subsequent exclusion from a whites-only train car in Louisiana formed the basis for a Supreme Court case upholding racial segregation and declaring that separate was indeed equal.[29] The story of Susie Phipps, a more recent example than one might think, serves as a modern-era manifestation of the same phenomenon. In 1985, a Louisiana state court ruled that Phipps, the great-great-great-great-granddaughter of a white French planter and his Black mistress, could not

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Rockquemore, *supra* note 16, at 108 ("Despite the fact that the one-drop rule has no basis in biological reality, and has been continually used as an ideological weapon to support the continued exploitation of African Americans, it has enjoyed near universal social acceptance.").

Although taken from a very different context—the Indian Child Welfare Act—it is interesting to note Justice Alito's opening observation in *Adoptive Couple v. Baby Girl*, which is also from this past term: "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee." 133 S. Ct. 2552, 2556 (2013).

24. *Cf.* D. Wendy Greene, *Determining the (In)determinable: Race in Brazil and the United States*, 14 MICH. J. RACE & L. 143 (2009) (arguing that, in the United States, physical appearance has become the primary factor used in determining an individual's race).

25. *Compare* Amara S. Chaudhry, *Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from America's History with Racial Classification Categories*, 18 TEMP. POL. & CIV. RTS. L. REV. 505, 513 (2009) ("In the era of Jim Crow, self-identification had no role in the classification process used to identify race. Instead, relevance was given to the perception of others, usually by visual inspection, or to so-called 'empirical' evidence, such as attempts to identify ancestry."), *with id.* ("[N]ew multi-racial philosophies focus on an individual's self-identification and deem the perception of others wholly irrelevant.").

26. Chaudhry, *supra* note 25, at 508 ("Despite the variance in 'racial decisionmakers,' there always remained one constant: an individual could never determine his or her own race.").

While the phenomenon of 'passing' may have allowed those who were not white but whose physical appearance appeared white to deceptively adopt a different racial identity, see Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001), it is distinct from the individual's ability to actually control one's racial categorization. *See also* Hernández, *supra* note 5, at 1122–23 (distinguishing between passing, which "entails the private and individuated decision to deny one's African ancestry for personal gain or survival" and fluidity as it has manifested in Latin America, which equates to "public endorsement of a national preference for Whiteness.").

27. 163 U.S. 537 (1896) (holding that segregation did not violate the Fourteenth Amendment's guarantee of equal protection).

28. *Id.* at 541, 552.

29. *Id.* at 541–42, 550–51.

identify herself as white.[30] The court held that regardless of how Phipps wished to racially identify—and despite the fact that she had spent her entire life believing she was white (she was only three thirty-seconds black)[31]—the official designation of her race had been recorded correctly and could not be changed. The Louisiana Supreme Court refused to review the decision and the United States Supreme Court subsequently dismissed the appeal.[32]

The case of the Malone brothers, decided by the Massachusetts Supreme Judicial Court in 1989, illustrates another approach to the legal determination of racial identity. The issue before the court in *Malone v. Haley*[33] was whether two twins, Paul and Philip Malone, had fairly self-identified themselves as black in a 1977 test application to complete for civil service jobs within the Boston Fire Department (in a previous application, filed in 1975, they had identified as white).[34] At the time, the Boston Fire Department was subject to a court-ordered affirmative action program under which the twins' test scores would not have qualified them for the jobs as white candidates. As black candidates, however, they were hired and served for ten years.[35] In deciding the case, the Massachusetts court applied a three-part test used for adjudicating racial identity claims:

> [T]he Malones might have supported their claim to be Black[:] (1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community.[36]

The court ultimately found that the brothers did not satisfy the above criteria: both appeared upon visual observation to be white;[37] the Malone family had consistently reported as white for three generations;[38] and there was "no evidence that the Malones identified themselves personally or socially as Blacks," other than for the purpose of securing jobs within the Fire Department.[39] Of more relevance to this Essay than the court's ultimate holding, however, is its articulation of a test for assessing the credibility of an

30. *Doe v. Louisiana*, 479 So. 2d 369, 371 (La. Ct. App. 1985); Phipps's U.S. passport application was denied because she indicated that she was white, while her birth certificate stated that she was "colored." Ho et al., *supra* note 19, at 493.

31. ONWUACHI-WILLIG, *supra* note 18, at 13.

32. Ho et al., *supra* note 19, at 493.

33. No. 88-339 (Mass. July 25, 1989).

34. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1232 (1994).

35. *Id.* at 1232–33.

36. *Malone*, slip op. at 16.

37. The court explained that both brothers had "fair skin, fair hair coloring, and Caucasian facial features." *Malone*, slip op. at 17. In addition, the personnel administrator concluded that "they do not appear to be Black." *Id.* (internal quotation marks omitted).

38. The birth certificates of the Malone brothers and their parents identified both brothers, their parents and the brothers' grandparents as white. *Malone*, slip op. at 18.

39. Ford, *supra* note 34, at 1233 (citing *Malone*, slip op. at 19–20).

individual's racial self-identification. In fashioning such a test, the court evinced a hesitance to rely solely on self-identification and echoed the same concerns about racial fraud voiced by Chief Justice Roberts and Justice Scalia during the *Fisher* argument.[40]

B. The Emergence of Multiracial Identity

In recent years, the one-drop rule has loosened its intense grip on both society and the state. Two factors have contributed to the subsequent emergence of the option to identify as biracial or multiracial rather than monoracial: (1) changes in the demographic reality regarding mixed-race individuals, and (2) increased demand from advocates within the multiracial movement for recognition of their unique multiracial status.[41]

1. The Numbers: Measuring Multiracials

The number of multiracial children, as classified by the government,[42] is increasing year by year and becoming a sizeable segment of the U.S. population. According to the U.S. Census Bureau, the number of multiracial children in the United States grew from approximately 46 thousand in 1970 to nearly 1 million in 1980 and almost 2 million in 1990.[43] In the 2000 census, 6.8 million people—or 2.4 percent—chose to identify themselves with two racial categories,[44] and by 2010, that number had risen to 9 million, or 2.9 percent.[45]

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40. The *Malone* court found that the brothers "did not claim Black status honestly or in good faith." *Malone*, slip op. at 20. Although this was not considered "fraud" per se, the court found that the brothers claimed black status only to take advantage of the Fire Department's affirmative action program. Ford, *supra* note 34, at 1233–34 (citing *Malone*, slip op. at 14); *see also* Chaudhry, *supra* note 25, at 510 ("While the Malone holding appears to have acknowledged the relevance of an individual's self-identification, it also emphasized the importance of third-party perceptions of an individual.").

41. Sarah S. M. Townsend et al., *Being Mixed: Who Claims a Biracial Identity?*, *in* 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 91, 91 (2012). Others have suggested that immigration, and an increasingly diverse population, has led to the attenuation of the one-drop rule. Kevin D. Brown, *The Rise and Fall of the One-Drop Rule: How the Importance of Color Came to Eclipse Race*, *in* COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POSTRACIAL AMERICA 78–79 (Kimberly Jade Norwood ed., 2013).

42. Given that it is primarily parents who provide information to the government, many multiracial children are being categorized as such by their parents—at least as an initial matter. Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1762 (2003).

43. Julie M. AhnAllen et al., *Relationship Between Physical Appearance, Sense of Belonging and Exclusion, and Racial/Ethnic Self-Identification Among Multiracial Japanese European Americans*, 12 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 673, 674 (2006); Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 222 (2004) (observing that one in forty people currently identify as multiracial and that current trends suggest that by 2050, one in five will describe themselves as multiracial).

44. AhnAllen et al., *supra* note 43, at 674.

45. Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3.

The number of people who identified as both black and white—the most common racial combination—rose 134 percent from 2000 to 2010, totaling 1.8 million.[46]

Aside from serving as a numeric tool, the census has presented an interesting context in which to observe the changing face of racial identity. From 1850 to 1920, "mulatto" was still included as a term in the census, and "quadroons" and "octoroons" were included in the 1890 Census.[47] The use of these terms was not to foster freedom of self-identity, but rather to support arguments that freedom for blacks and intermixing of the races were to be avoided.[48] Until 1960, the census relied on an enumerator to visually survey and identify each individual's race.[49] In 1960, however, the head of the household was instead instructed to self-identify his or her race as well as the race of other family members.[50] Although individuals were allowed to self-identify, they were instructed to select only one racial category. In 1990, the census still instructed individuals to choose only one race, yet over half a million people disobeyed those instructions, instead identifying themselves as a member of two or more races.[51]

In the 2000 census, which marked the first time in history that individuals were given the option of selecting more than one racial category ("mark one or more"),[52] 6.8 million people—2.4 percent of the population—reported

46. *Id.*; *see also* SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010 4–5, Table 2 (2011).

47. Nathan Glazer, *Reflections on Race, Hispanicity, and Ancestry in the U.S. Census*, *in* THE NEW RACE QUESTION 324 (Joel Perlmann & Mary C. Waters eds., 2002).

48. *Id.*; *see also* Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 128–29 (1998) ("The U.S. use of the 'multiracial-type' categories of octoroon, quadroon, and Mulatto in the censuses of 1850–1920 has been described more as a reflection of the growth of the eugenics movement's ranking of genetic intelligence than as a serious attempt to institutionalize a mixed-race, middle-tier buffer class.") (footnotes omitted). For a history of the changing status of "mulattos" in the census and society more generally, see Aliya Saperstein & Aaron Gullickson, *A "Mulatto Escape Hatch" in the United States? Examining Evidence of Racial and Social Mobility During the Jim Crow Era*, 50 DEMOGRAPHY 1921, 1923–25 (2013).

49. C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 569 (2003). The role of the census enumerator was reduced after it became clear that minority populations were being undercounted. *Id.*

50. *Id.* at 569.

51. Wendy D. Roth, *The End of the One-Drop Rule? Labeling of Multiracial Children in Black Intermarriages*, 20 SOC. F. 35, 38 (2005).

52. Kenneth Prewitt, *Race in the 2000 Census: A Turning Point*, *in* THE NEW RACE QUESTION 356 (Joel Perlmann & Mary C. Waters eds., 2002) ("[T]he government's position [is] that one's race is what one believes it to be."); Evelina Lou, et al., *Examining a Multidimensional Framework of Racial Identity Across Different Biracial Groups*, 2 ASIAN AM. J. PSYCHOL. 79, 79 (2011).

Beginning in 2000, individuals were allowed to check all the racial categories that they deemed applicable. In many ways, this was an administrative compromise that still allowed the government to tabulate individuals according to traditionally defined racial categories. *See* Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 279 (2011).

belonging to more than one race.[53] Of that group, nearly 1.8 million individuals checked "Black" and at least one other race in indicating their racial identity.[54] The implications of this change are yet to be fully understood, and may have far-reaching effects with regard to race-based legal claims and broader social understandings of race.[55] With regard to the latter, the change in race assessment reflected by the 2000 census sparked a wave of social science research relating to multiracial identity—including exploration of how multiracial individuals identify and how possession of a multiracial background, and one's choices about defining identity, may affect other factors, such as psychological health.[56]

The collection and reporting of racial and ethnic data in the 2000 census largely followed the Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, issued by the Office of Management and Budget (OMB) in 1997 (the "1997 Revised Standards").[57] The history of these standards is itself reflective of the shift towards identity—and self-identification in particular—as a driving factor in how the government conceives of and quantifies race.[58]

Until the 1970s, the federal government did not have any standardized means for collecting or reporting data on race and ethnicity.[59] The impetus for creating such standards was the need to monitor race-based discrimination and to ensure equal access, in part to enforce civil rights laws enacted during the previous decade.[60] Ultimately, OMB, in conjunction with other federal agencies, promulgated the Race and Ethnic Standards for Federal Statistics and Administrative Reporting[61]—later known as "Directive 15"[62]—which provided

53. Steven Hitlin, J. Scott Brown, & Glen H. Elder, Jr., *Racial Self-Categorization in Adolescence: Multiracial Development and Social Pathways*, 77 CHILD. DEV. 1298, 1298 (2006).

54. Brunsma & Rockquemore, *supra* note 16, at 102.

55. Nathaniel Persily, *The Legal Implications of a Multiracial Census*, *in* THE NEW RACE QUESTION 161 (Joel Perlmann & Mary C. Waters eds., 2002) ("[T]he shift in census format from a single response to multiple expressions of racial identity may represent a turning point . . . in the way Americans conceive of and measure race and also in the way lawyers prove racial discrimination."); *see also id.* at 180 ("The decision to allow respondents to check more than one race on their census forms will have its most significant consequences on the way inherently arbitrary racial categories are understood rather than on the way racial data are used in the courtroom.").

56. *See infra* Part I.C.

57. Kevin Brown & Tom I. Romero II, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1135 (2011). *See also Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, WHITE HOUSE, http://www.whitehouse.gov/omb/fedreg_1997standards (last visited June 20, 2014).

58. *Cf.* Rich, *supra* note 7, at 186, 191 (noting the "current cultural trend encouraging greater respect for individuals' racial self-identification decisions" and that, for many Americans, "racial self-identification is an important part of one's identity construction").

59. Brown, *supra* note 52, at 264, 267.

60. *Id.* at 268.

61. RAINIER SPENCER, SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES 68 (1999).

for five racial and ethnic categories: "American Indian or Alaskan Native," "Asian or Pacific Islander," "Black," "Hispanic," and "White."[63] These standards remained in place for two decades, until the federal government, spurred by great debate regarding the categories and definitions utilized by Directive 15, drafted the 1997 Revised Standards.[64] Among other things, the 1997 Revised Standards emphasized that self-identification would be the preferred means for obtaining race and ethnicity data,[65] adopted a two-question format that inquired about "Hispanic or Latino" origin before requiring a selection among other racial categories,[66] and prohibited the use of an "other" category.[67]

Aside from its substantive mandates regarding the collection and reporting of data, the 1997 Revised Standards also required that all federal agencies—including the Department of Education (DOE), for example—adopt consistent reporting requirements. The DOE issued its own guidelines—the Final Guidance on Maintaining, Collecting and Reporting Racial and Ethnic Data to the United States Department of Education (the "Guidance")—in 2007.[68] Under the Guidance, respondents are allowed to select as many racial categories as they deem applicable from among an array of specified options.[69]

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62. Brown & Romero II, *supra* note 57, at 1138 n.18 ("In 1978, the standards went through a name change and were subsequently renamed the Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting or 'Directive 15' for short.").

63. The Race and Ethnic Standards for Federal Statistics and Administrative Reporting listed the following five racial and ethnic categories and definitions:

a. American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

b. Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

c. Black. A person having origins in any of the black racial groups of Africa.

d. Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

e. White. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, U.S. CENSUS BUREAU, http://wonder.cdc.gov/wonder/help/populations/bridged-race/Directive15.html (last visited June 20, 2014).

64. Brown, *supra* note 52, at 264–65.

65. *Id.* at 274.

66. *Id.* at 274–75. The primary reason given for separating out the "Hispanic or Latino" origin category was that individuals identifying as such may not always identify with American-defined racial categories. *Id.* at 275.

67. *Id.* at 274–75. The Census Bureau obtained an exemption to the provision prohibiting the "other" category, which allowed it to use the "Some Other Race" category on the 2000 Census. *Id.* at 275.

68. Brown & Romero II, *supra* note 57, at 1135. The guidance went into effect in 2010. *Id.*

69. *Id.* at 1135–36 (listing the available options as: "American Indian or Alaska Native;" "Asian American;" "Black or African American;" "Native Hawaiian or Other Pacific Islander;" and "White"). As Brown and Romero explain, institutions may develop and use subcategories within these

Notably, the Guidance requires that individuals who select more than one racial category be included in a "Two or More Races" category; these respondents are not included in the counts for any specific racial category.[70]

The history and evolution of these standards reveal three interesting points relevant to this Essay. First, they demonstrate increased government concern about identity and the individual's need to self-identify. Second, they reveal a shift in the purpose of collecting racial and ethnic data, from combating discrimination to validating identity. This shift will inevitably result in quantitative differences and may subsequently hinder the use of racial and ethnic data to counter racial discrimination and subordination, per the concerns raised in Part II.B. Last, there may be some irony in the fact that, as currently framed, the standards for collecting and reporting racial and ethnic data lump all self-identified multiracials into one category ("Two or More Races"), which then has no specific purpose or independent meaning within the DOE reporting structure. In a sense, by striving for a unique identity, self-identified multiracials—at least for purposes of federal data collection—have become structurally invisible.

2. The Multiracial Movement

The emergence of a multiracial "movement"—the amalgamation of individuals and organizations who seek recognition of their multiracial identity by the government and others—has played an important role in the broadening of categorical status options available to multiracial individuals in the United States. Kim Williams, who has written extensively in this area, provides her own explanation for why this phenomenon constitutes a "social movement":

> Multiracial politics has flowered in unexpected places in recent years, yet it is a social movement not because the multiracial idea is becoming culturally accepted or ubiquitous but rather because the push for multiracial recognition has involved a series of interactions between the state and challenging groups. . . . Years of institution building, letter writing, demonstrations, lobbying, groups and Web sites launched and folded, ambitious plans devised and dropped, and encounters with state and federal officials make it a social movement.[71]

In her book, *Mark One or More*, Williams describes in detail three main groups that served as the "locus of political action" in the early stages of the multiracialism movement: the Association of MultiEthnic Americans (AMEA), Project RACE (Reclassify All Children Equally), and A Place for Us

broader racial and ethnic categories to collect data; however, when reporting data, they must aggregate responses into these six categories. *Id.* at 1136.

70. *Id.* at 1136.

71. WILLIAMS, *supra* note 18, at 13–14.

(APFU).[72] AMEA encouraged multiracials to "claim their entire heritage and embrace their total identity."[73] Its primary goal was to "promote a positive awareness of interracial and multiethnic identity"; multiracial recognition on the census was one means toward that end.[74] Project RACE's main objective was the creation of a multiracial classification "on all school, employment, state, federal, local, census and medical forms requiring racial data" to save multiracial children from the harmful consequences of being regarded as "Other."[75] APFU offered support for those involved in interracial relationships and hoped to achieve a "color-blind society."[76]

At the core of AMEA, Project RACE, and APFU's arguments was the belief that mixed-race individuals view themselves as "multiracial" rather than as members of a single racial or ethnic group,[77] and that identification as such should be both respected and encouraged. Supporters of the multiracial movement "argue[d] that claiming a biracial or multiracial identity is a 'right' that mixed-race individuals can, and in some respects should, exercise."[78] AMEA in particular spoke in the language of "rights and recognition"[79] and, along with Project RACE, lobbied state and federal legislatures with the aim of creating a government-recognized multiracial category.[80]

The groups behind the multiracialism movement—sometimes referred to as the Multiracial Category Movement (MCM)—found unexpected bedfellows among conservative legislators and white Americans. Williams reports that "white, liberal, and suburban-based middle class women (married to black men) held the leadership roles in most multiracial organizations."[81] Conservative politicians, particularly those with "poor civil rights records,"[82] provided support for the movement: "[T]he elected officials most open to the

72. *Id.* at 9.

73. *Id.*

74. *Id.* (internal quotation marks omitted).

75. *Id.*; *see also* Brown, *supra* note 52, at 277 (describing history of Project RACE).

76. WILLIAMS, *supra* note 18, at 9.

77. Brown, *supra* note 52, at 277–78.

78. Townsend et al., *supra* note 41, at 91 (citations omitted); *see id.* at 91–92 ("The movement also led to an array of cultural products and practices that encourage biracial identification. Children's books such as *Black, White, Just Right!* and t-shirts created by mixed-race organizations with slogans such as "Hybrid Vigor," are just two examples.") (parentheticals omitted).

79. WILLIAMS, *supra* note 18, at 10.

80. *Id.* at 12–13. In the years leading up to the 2000 census, Project RACE, AMEA, and APFU specifically lobbied for the creation of a "multiracial" option. Brown, *supra* note 52, at 275–76. Initially, the groups possessed a range of different ideas as to how multiracial individuals should be classified. As Williams explains, Project RACE advocated for a "stand-alone multiracial classification" while AMEA "endorsed a multiracial category 'followed by a listing of the racial and/or ethnic groups appearing on the main list.'" WILLIAMS, *supra* note 18, at 43 (footnote omitted). Regardless of their differences in approach, in 1993, Project RACE and AMEA agreed that every multiracial individual had the "same right as any other person to assert an identity that embrace[d] the fullness and integrity of their actual ancestry." *Id.* (footnote and internal quotation marks omitted).

81. WILLIAMS, *supra* note 18, at 112.

82. *Id.* at 122.

idea of multiraciality . . . [were] conservative Republicans in Congress and state legislators (mostly Democrats) representing affluent, suburban districts. . . . [The idea of multiraciality was] appeal[ing] across the ideological spectrum and . . . [was popular among an] increasing number[] of whites."[83] The basis for such appeal was the possibility that the multiracialism movement could be used to advocate against the use of traditional racial categories and thus eradicate race-conscious policies. Newt Gingrich, then the Speaker of the House of Representatives, was one of the movement's most prominent supporters.[84] One of Project RACE's founders lived in Gingrich's Georgia district and found that Gingrich "embraced the effort to get a multiracial category on the census. [He] felt that the multiracial option was a step toward the eventual elimination of racial and ethnic categories."[85]

California's failed Proposition 54 demonstrates how political conservatives might use multiracialism to "undo" race. Following in the wake of Proposition 209, which targeted race-conscious policies,[86] and similarly backed by conservative juggernaut Ward Connerly, Proposition 54 "attacked the idea of race itself."[87] Proposition 54, also known as the Classification on Race, Ethnicity, Color, and National Origin (CRECNO) initiative, would have barred the state from classifying individuals on the basis of race, ethnicity, color, and national origin, and thus from collecting racial and ethnic data in all but a few exempted areas.[88] Supporters of the initiative argued that it was necessary to help society move "beyond" race.[89] Williams argues that those backing the initiative exploited the agenda of the multiracialism movement (and its desire to create new racial categories) as justification for making race

83. *Id.* at 121.

84. Brown, *supra* note 52, at 281; WILLIAMS, *supra* note 18, at 121. Williams further observes that "Republicans—and conservatives more widely—have exhibited keen interest in multiracialism as a means of capitalizing on the prevailing confusion about race." WILLIAMS, *supra* note 18, at 121.

85. Brown, *supra* note 52, at 281 (footnote omitted); *see also* Mezey, *supra* note 42, at 1756 ("Gingrich's push toward ultimate color blindness . . . gained many allies in the 1980s and 1990s who have wanted to deracialize American law and culture."); john a. powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 793 (1997) ("The language used by the new right of a raceless, colorblind society is viewed by some not simply as an error, but as a strategy or racial project to maintain white supremacy and racial hierarchy."). Compare Eduardo Bonilla-Silva's discussion of the new triracial order and its possible political consequences, see *supra* note 6, at 245 (predicting that "the ideology of color-blind racism . . . is likely to become even more salient in the United States").

86. Upon approval in 1996, Proposition 209 amended the California Constitution to prohibit state government institutions from considering race in various public domains. CAL. CONST. art. I § 31(a) now provides: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

87. WILLIAMS, *supra* note 18, at 122.

88. *California Proposition 54*, THE LEADERSHIP CONFERENCE, http://www.civilrights.org/equal-opportunity/proposition-54 (last visited June 20, 2014).

89. WILLIAMS, *supra* note 18, at 122.

irrelevant.[90] To the relief of many civil rights organizations, the initiative—which would have impeded the state's ability to address racial disparities in areas like health, education, hate crimes, and discrimination—was ultimately defeated.[91]

One concern regarding the MCM is thus its potential for exploitation by political conservatives aiming to forward a colorblind agenda. Aided by perceptions presented by mainstream media, some view multiracialism as a signifier of the post-racial era and multiracial people as the embodiment of "a color-blind America."[92] Others have more forcefully hypothesized that "the increasing rate of interracial dating and marriage between racial minorities and Whites, and resulting patterns of biracial identification of their offspring, will lead to a fundamental change in the American racial hierarchy."[93] Because the realities of racism continue to be very real, any notion that we have entered a post-racial era is a myth; much progress remains in the quest for racial inequality.[94]

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90. *Id.* (suggesting that the proliferation of new racial classifications were "invented by different groups trying to get in on America's racial spoils system.").

91. *Id.* at 123.

92. Ho et al., *supra* note 19, at 492–93. Like many others, I believe that post-racialism is a myth; as Ho and his co-authors observe, "These sentiments assume that biracials will be accepted as part of their dominant parent group and not limited by their minority parent group status." *Id.* at 493.

93. *Id.* at 492 (citing various studies); *see also* Peter Skerry, *Multiracialism and the Administrative State*, *in* THE NEW RACE QUESTION 334 (Joel Perlmann & Mary C. Waters eds., 2002) ("David Hollinger suggests that, under the influence of multiculturalism, ethnicity has subtly shifted its meaning from a social concept denoting affiliation to one or more groups to a psychological concept denoting identity. . . . [E]thnicity in the census has become 'a matter of choice, a state of mind rather than a matter for genealogists to determine: 'It doesn't matter if you don't think I look Chinese. I feel Chinese; ergo I am Chinese.'").

At the very least, some commentators have suggested that younger generations may be less inclined to apply traditional racial labels. Marcia Dawkins, author of *Clearly Invisible: Racial Passing and the Color of Cultural Identity*, suggests that younger Americans may be "seeking liberation from traditional racial labels." *See* Jenée Desmond-Harris, *My Kid Insists That I'm White, but I'm Not*, THE ROOT (June 5, 2013, 12:38 AM), http://www.theroot.com/views/my-kid-insists-im-white-im-not?page=0,1.

94. *See* Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 979–82 (2010) (arguing that post-racialism ignores the very real presence of race in today's society); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2009) ("[P]ost-racialism obscures the centrality of race and racism in society."); Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 STAN. J. C.R. & C.L. 213, 215 (2011) (noting current and increasing levels of racial and economic segregation); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1162 (2010) ("Race is so deeply embedded in the fabric of the United States that racial discrimination is simply a constitutive aspect of the culture. . . . [The election of Barack Obama as President] does not mean that the United States has now evolved to a post-racial stage of development in which the problems of racial discrimination have largely been relegated to the past."); *see also* Ian F. Haney-López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011) (arguing that "post-racialism constitutes a liberal embrace of colorblindness" and is "likely to limit progress toward increased racial equality").

Another reason for cynicism is the belief that the multiracialism movement is motivated by a desire to reduce the taint of non-whiteness.[95] A more pragmatic basis for opposition, as demonstrated in Part I.B.1, is the potential effect that the creation of a multiracial category might have on the allocation of resources to minority populations or civil rights enforcement.[96] One of the strongest opponents of the efforts of Project RACE and others was the National Association for the Advancement of Colored People (NAACP), which has long championed the cause of racial equality, particularly with regard to African Americans.[97] Many traditional civil rights groups, including the NAACP, feared that the creation of a new "multiracial" status would undermine antidiscrimination law and other state-provided race-based protections[98] and weaken their ability to police racial identity (these concerns are revisited in Part II.B). As a result, during the 2000 census, several interest groups launched campaigns actively encouraging multiracial individuals to identify as monoracial.[99]

C. The Nature of Multiracial Identity

Multiracialism adds a layer of complexity to racial definition by refuting the notion that others can or must assign individuals to only one racial category. Yet another layer exists in the various ways that multiracial individuals may choose to define their own identity. According to Nancy Leong, those studying the topic of multiracial identity have highlighted two of its features: (1) its multiplicity (the many different ways in which multiracial individuals might racially identify), and (2) its fluidity (the fact that such identification may

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95. *See, e.g.*, Mezey, *supra* note 42, at 1754–55 (noting that "light-skinned blacks could opt out of an African American identity at the expense of those with less identity mobility."); *see also* Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1104 (2013) (explaining that multiracials' existence as a group of individuals with "no shared history of oppression and resistance. . . . has rendered the multiracial identity movement suspect; it is often viewed as an attempt to opt out of a less desirable identification per hypodescent").

96. Mezey, *supra* note 42, at 1754 (suggesting that African Americans stand to lose the most from the creation of a multiracial option in terms of "important material protections and entitlements based on numbers as well as increased internal divisiveness based on color").

97. *See Our Mission*, NAACP, http://www.naacp.org/pages/our-mission (last visited June 20, 2014).

98. Mezey, *supra* note 42, at 1753 ("The concern of the NAACP and others was that a separate multiracial category would dilute the numbers of currently recognized minority groups and weaken the legal protections to which their members are entitled.").

99. David R. Harris, *Does it Matter How We Measure? Racial Classification and the Characteristics of Multiracial Youth*, *in* THE NEW RACE QUESTION 67 (Joel Perlmann & Mary C. Waters eds., 2002).

This reaction is similar to that adopted by the Brazilian Institute for Social and Economic Analysis (IBASE) in the context of Brazil's own multiracial discourse. During the 1991 Brazilian census, IBASE launched a public campaign to politicize racial self-classification for the purpose of collecting more detailed race-based statistics: "The goal was to encourage a collective political-racial identity for persons of African descent regardless of their personal perspectives about their color and racial appearance." Hernández, *supra* note 5, at 1165.

change over time or depend on the context).[100] Multiracial individuals "may move fluidly between racial groups" and, at the same time, "view themselves apart from these reference groups without feeling marginal because they have generated a new reference group."[101]

Social science scholars have identified several different manifestations of multiracial identity. First, some mixed-race individuals may choose to identity with a single race—for example, exclusively black or exclusively white. This is often described as a "monoracial" or "singular" identity.[102] Second, others may identify exclusively as biracial or multiracial, explicitly rejecting the idea that they can fit into any one racial category. This is often referred to as a "border identity."[103] Third, multiracial individuals may adopt what some have labeled a "protean" or shifting identity: identifying as one racial category in one or more contexts and as another racial category (or perhaps as biracial or multiracial) in another context or contexts.[104] For example, a study by David Harris shows a statistically significant difference in the race reported by white-black individuals at home and at school (8.6 percent identified as white-black at school and 16.6 percent as white-black at home).[105] Last, some multiracial individuals assume a "transcendent" identity, meaning that they view themselves as occupying a space where racial categories do not apply and, in effect, reject any racial identity.[106]

How frequently are these identity types employed by multiracial individuals? David Brunsma and Kerry Ann Rockquemore provided one answer to this question in their 2002 empirical study of Detroit area college students with one black parent and one white parent. More than 60 percent of respondents (61.3 percent) described themselves as biracial (as possessing a

100. Nancy Leong, *Half/Full*, 3 U.C. IRVINE L. REV. 1125, 1128 (2013).

Complicating the picture is the fact that blackness is itself a fluid construct. Brunsma & Rockquemore, *supra* note 16, at 112.

101. AhnAllen et al., *supra* note 43, at 676.

102. *See, e.g.*, Brunsma & Rockquemore, *supra* note 16, at 109; Lisa S. Giamo et al., *Perceived Discrimination, Group Identification, and Life Satisfaction Among Multiracial People: A Test of the Rejection-Identification Model*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 319, 319 (2012); Lou et al., *supra* note 52, at 81; Miville et al., *Chameleon Changes: An Exploration of Racial Identity Themes of Multiracial People*, 52 J. COUNSELING PSYCHOL. 507, 511 (2005).

103. Brunsma & Rockquemore, *supra* note 16, at 109; Lou et al., *supra* note 52, at 81.

104. Brunsma & Rockquemore, *supra* note 16, at 109; Lou et al., *supra* note 52, at 82.

Of course, in matters of identity, things are not always so clear-cut. Perhaps this is not surprising where one attempts to draw categories among people who have refused to be categorized by traditional means. See, for example, one author's description of her own racial identity: "I actively identify as black as well as biracial (which I see as one kind of being black—that's a reflection of my personal experience and social reality, not a mandate for how other people should identify). I think I'm very comfortable in that identity because it makes so much sense to me, and I believe strongly that my black experience is as legitimate as anyone else's." Jenée Desmond-Harris, *Yes, I'm Biracial, and I Cover Black Stuff*, THE ROOT (June 26, 2013, 12:36 AM), http://www.theroot.com/articles/culture/2013/06/biracial_writer_for_africanamerican_publication_pushback.html.

105. Harris, *supra* note 99, at 78.

106. Brunsma & Rockquemore, *supra* note 16, at 109.

"border identity") and identified as neither exclusively black nor white, but instead a unique combination of the two.[107] Almost 17 percent of respondents identified with a singular racial identity—either as exclusively black (13.1 percent) or exclusively white (3.6 percent).[108] A smaller group of students (4.8 percent) described themselves as possessing a protean identity: "sometimes black, sometimes white, and sometimes biracial depending on the situation."[109] Approximately 13 percent of the students claimed a "transcendent" identity, "consciously identify[ing] race as a master status that is external to their individual identity."[110]

Another more recent study conducted by Evelina Lou, Richard Lalonde, and Carlos Wilson explored the variants of identification for both black-white and Asian-white biracial individuals and revealed similar results. Of the black-white group (again defined as having one black parent and one white parent), the greatest percentage of study participants (42.1 percent) chose the validated border identity[111]—meaning that not only did they consider themselves biracial, but others accepted their identity as biracial.[112] The next most common selection for black-white participants (34.2 percent) was the unvalidated border identity,[113] meaning that these individuals considered themselves biracial but their self-understanding was *not* consistent with the response of others.[114] Perhaps notable is that none of the black-white participants in this study chose to identify monoracially as either exclusively white or exclusively black,[115]

107. *Id.* ("For these respondents, the one-drop rule is not salient in determining racial identity, nor is black a personally meaningful construct. Instead, 'black' is an intangible quality that is blended with an equally intangible 'white' into a new hybrid category of social identity.").

108. *Id.* at 110 ("Despite its disfavored status, the singular black identity continues to be a meaningful racial identity option for biracial individuals and evidence that the one-drop rule does remain salient in identity construction for some multiracial people.").

109. *Id.* at 111 ("For them, black is meaningful as a social identity, yet it is but one of several racial identities.").

110. *Id.* ("While acknowledging the existence of the one-drop rule, they understand black only as a socially constructed category that is utterly meaningless to their individual sense of self.").

111. Lou et al., *supra* note 52, at 85, 87. The authors note: "Contributing to this unique finding may be the decreasing pressure for biracial individuals to choose a single racial category since the 2001 U.S. Census. Another contributor may be the characteristics of the sample (e.g., the fact that some participants were recruited from Web sites that are geared specifically toward multiracials; the different national contexts of the participants) . . . ." *Id.*

112. *Id.* at 81. The response selected by these participants was: "I consider myself exclusively biracial (neither ******* nor White)." *Id.* at 84.

113. *Id.* at 85, 87.

114. *Id.* at 81. The response selected in these cases was: "I consider myself biracial, but I experience the world as a ******* person." *Id.* at 84. Notably, the proportion of black-white individuals who chose the unvalidated border identity option was higher than the proportion of Asian-white individuals who chose the same option (20 percent). *Id.* at 87 ("The fact that many Black/White participants saw themselves as biracial but felt that others perceived them as Black may be residual of the historical "one-drop" rule applied to Blacks (but not Asians), which placed individuals with any Black ancestry as members of the Black race, even if they were multiracial.").

115. *Id.* at 85, 87.

although 5.3 percent did select a transcendent description, refusing to align themselves with a specific racial identity.[116]

The trends found in the more recent study by Lou, Lalonde, and Wilson are likely to increase. A 2006 study by Steven Hitlin, J. Scott Brown, and Glen H. Elder found that

> [i]ndividuals in younger age cohorts in the United States are more likely to self-categorize multiracially . . . . There is a historical element to this with rates of increasing racial intermarriage. Developmental processes are shaped by historical context, and the development of racial self-categorization is likely to vary in concert with social and demographic shifts around issues of race. Our study suggests that such trends will lead to more changes in multiracial self-identification, but this is an empirical question.[117]

Those who consistently identify as multiracial are more likely to come from higher-educated households (functioning as a proxy for socioeconomic status) and to be associated with higher-status racial and social class groups.[118] Thus, even when it may appear to be, the decision to identify as multiracial is not wholly insulated from external factors.[119]

As demonstrated by the distinction between the validated border identity and unvalidated border identity, a multiracial individual's self-conception may not mesh with others' perception of her race, giving rise to tension within the individual and between the individual and society. Earlier studies of multiracial identity suggested that it was "culturally accepted" that the "interracial child must select the identity of one parent, usually the parent of color"[120] or that "Black/White biracial children should identify themselves as Black because society will ultimately characterize them that way. This may occur despite the fact that the individual may have a racial self-designation as a member of more

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116. *Id.* The response selected by these participants was: "Race is meaningless, I do not believe in racial identities." *Id.* at 84.

117. Hitlin et al., *supra* note 53, at 1306.

118. *See id.* Factors such as mother's education level, neighborhood racial context (in other words, the percentage of the surrounding census tract that is white), socioeconomic status, and skin color have been shown to affect one's likelihood to identify as multiracial and to "switch" one's racial identity over time. *Id.* at 1302–07; Harris, *supra* note 99, at 78–79 ("Those who report being white-black in both contexts are older, more likely to have parents with moderate levels of income and schooling, and more likely to live in racially homogenous neighborhoods with a high fraction of white residents."); *see also* Kerwin et al., *Racial Identity in Biracial Children: A Qualitative Investigation*, 40 J. COUNSELING PSYCHOL. 221, 225–28 (1993) (discussing other factors bearing on racial identity in biracial children, including use or nonuse of racial and ethnic labels, location of the family, preparation for anticipated discrimination, and the children's self-description and racial awareness). One study revealed that Asian-white participants were more likely to identify as biracial than black-white or Latino-white participants. Townsend et al., *supra* note 41, at 93.

119. Townsend et al., *supra* note 41, at 95 ("With the 2000 Census, the opportunity to claim a biracial identity was made 'officially' available to all mixed-race people. However, as our findings suggest, this option may represent yet another of the many choices to express one's self and to exert control over one's identity that are more available to those with higher status.").

120. Kerwin et al., *supra* note 118, at 221.

than one racial group."[121] Such studies also suggested that multiracial individuals were often perceived as under pressure to choose one racial affiliation or another, and adhered to such expectations.[122]

The various forces weighing on the question of identity can create great tension for those attempting to define their place in a traditional racial hierarchy. Many racial identity models assume the relevant minority component accepts multiracials; however, such acceptance is not always available for biracial individuals who are discriminated against by both blacks and whites.[123] Moreover, the tension within the multiracial individual may mirror and—in some sense, serve as a manifestation of—the tensions present in society between various racial constituencies.[124] The possible consequences of this tension are described below.

D. Consequences of Identity

The choice to identify racially in one way or another—for example, as monoracial or multiracial—is not only a matter of preference or of politics; rather, that decision can have tangible psychological and emotional consequences.[125] One case study indicated that for biracial black-white individuals, adopting a monoracial identity can lead to "guilt and 'feelings of disloyalty'"[126] and may be "emotionally damaging."[127] Another study

121. *Id.*

122. Miville et al., *supra* note 102, at 514 ("[A]s biracial–multiracial people come of school age, particularly during the periods of preadolescence and adolescence, they may experience exposure to racism along with increased pressure to identify with a specific racial group, usually that of the parent of color. The present results indicate that this indeed occurs.").

123. *See* Angela R. Gillem et al., *Black Identity in Biracial Black/White People: A Comparison of Jacqueline Who Refuses to Be Exclusively Black and Adolphus Who Wishes He Were*, 7 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 182, 194 (2001) (referring to the story of Adolphus, a black/white individual who "experienced name calling from his Black friends, rejection from Black women, and racism from White classmates"); *see also* Giamo et al., *supra* note 102, at 320 ("[P]erceptions of discrimination among multiracial people might encourage them to identify with other multiracials, creating a collective identity around having multiple racial backgrounds. Because multiracial people often feel torn between the monoracial groups that comprise their racial and ethnic heritage and can experience discrimination from groups that make up their ethnic heritage, no monoracial identity may be able to fully capture their subjective social reality. In contrast, a multiracial identity shared with other people who do not fit neatly into monoracial categories is likely more reflective of many multiracial people's experiences. Therefore, adopting a multiracial group identity is one potential strategy for coping with discrimination." (citations omitted)).

124. Gillem et al., *supra* note 123, at 183 ("Root (1990) postulated that when racial identity and self-concept are difficult for biracial people, it is because of the tension between the two racial components of the self (which reflects the tension in the greater society between those two 'components').").

125. As Angela Onwuachi-Willig describes, in earlier times, the inability to define one's own identity led to even more dramatic consequences. ONWUACHI-WILLIG, *supra* note 18, at 13 ("*Rhinelander* [*v. Rhinelander*] exposes the manner in which the powerlessness to completely define one's own identity can result in the misuse of the body—the physical representation of one's being—especially among black women.").

126. Gillem et al., *supra* note 123, at 183.

concluded that "biracial people demonstrate internalized oppression if they reject either part of their heritage."[128] A third study concluded "that denying biracially identified individuals the ability to choose a biracial identity is associated with lower self-esteem and decreased motivational outcomes."[129] Assuming a biracial identity, in contrast, "is related to a more positive sense of identity, fewer psychological problems, and greater self-confidence than adopting a monoracial label."[130]

Given such findings, many social science studies suggest that rather than forcing multiracial individuals to choose between one racial identity or another, society should "support biracial people in exploring both sides of their heritage in order to develop positive biracial identities and healthy psychological adjustment."[131] Maria P.P. Root has suggested, and later studies have affirmed, that "regardless of how biracial people identify, they must always accept both sides of their heritage, make their own unforced choices, and develop ways to deal with others' perceptions of them."[132] This trend in social science reflects the multiracial movement's core belief that the border identity option is preferable to monoracial categorization:

> The border identity is the racial identity option that has been privileged by multiracial activists because (to them) it embodies the need for separate categorization. They argue that because individuals no longer understand themselves as one race, additional categories are necessary in order to reflect existing demographic and social realities. Many multiracial identity researchers have also privileged this identity option over the traditional singular black identity.[133]

Moreover, because the ability to claim all aspects of one's heritage is so critical to multiracial identity, it would seem that the inability to claim any heritage would be equally damaging. This conclusion is bolstered by the data above which show that relatively few multiracials reject the very notion of racial identity.[134]

By no means is the citation of these studies meant to imply that *all* people assuming biracial or multiracial identities are psychologically healthier than

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127. *Id.*

128. *Id.*

129. Townsend et al., *supra* note 41, at 91.

130. Gillem et al., *supra* note 123, at 194. As Nancy Leong writes, regardless of how multiracials choose to identify, they may be subject to criticism. Should they choose to identify as part of a traditional racial group, they may not be accepted or feel the need to justify their claim to membership in that group. Leong, *supra* note 130, at 496. In contrast, should they choose to identify as multiracial, they may be accused of using their mixed-race identity to gain social advantage. *Id.* at 499.

131. Gillem et al., *supra* note 123, at 194.

132. *Id.* at 194; *see also id.* at 194–95 ("They need to cope within mainstream society without sacrificing the integrity of their racial/ethnic identities . . . ."); *id.* at 195 ("Our case studies are consistent with these conclusions.").

133. Brunsma & Rockquemore, *supra* note 16, at 109.

134. See *supra* notes 110 and 116 and accompanying text.

those who assume monoracial identities. They do suggest, however, that the acknowledgement of a varied racial background (such as, "I am black and white") or the adoption of different racial identities in different contexts (for example, "I am biracial but identify politically as black") may result in less psychological harm than the explicit rejection of any particular racial identity ("I'm not white" or "I'm not black").[135]

Beyond the definition of their personal identity, mixed-race individuals may possess a different view of race and racial classifications. Multiracials are more likely to view race as a social construct and less prone to view race as biologically based; this can reduce their vulnerability to or diminish the impact of race-based stereotypes.[136] Relatedly, they are also less likely to demonstrate reliance on traditional racial categories or labels when processing racial ambiguity due to a "reduced tendency to essentialize race."[137] Multiracials are more likely than blacks to identify with the concepts of colorblindness and individuality and less likely to view race and ethnicity as inextricable from their identities.[138] Charmaraman and Grossman suggest that multiracial individuals

135. The latter characterization ("I'm not black") may seem particularly offensive to some, who view the rejection as an attempt to avoid racial stigma.

136. Shih et al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 125, 125–26 (2007); *see also id.* at 131 ("Specifically, . . . we found that multiracial participants subscribed less to the notion that racial differences were biologically based, were more likely to inhibit stereotypes in response to race salience, and were less affected by race-based stereotypes than were monoracial participants. We also found direct evidence that emphasizing race as a social construction buffers individuals from stereotype threat effects. In short, emphasizing the social construction of race may lead multiracial individuals to buy into racial stereotypes less."); *id.* at 132–33 ("By emphasizing the fact that race is a biologically meaningless dimension along which to categorize people, multiracial individuals are also able to undermine the validity of many of the social stereotypes and stigmata associated with race. This process could make them less susceptible to negative racial stereotypes.").

137. Kristin Pauker & Nalini Ambady, *Multiracial Faces: How Categorization Affects Memory at the Boundaries of Race*, 65 J. SOC. ISSUES 69, 69 (2009). This may stem from the fact that multiracial individuals are often characterized by racial ambiguity and may frequently suffer from misidentification. *See id.* at 70 ("How social perceivers' classify a multiracial individual is likely to differ from the multiracial individual's self-identification. This mismatch between self-identification and perception may lead to a feeling that their identity is not validated by society (Rockquemore & Brunsma, 2002). But this mismatch may also contribute to cognitive flexibility that could possibly enhance multiracial individuals' social processing skills."). For further discussion of racial ambiguity and its application beyond the biracial and multiracial context, see Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. (forthcoming).

138. Linda Charmaraman & Jennifer M. Grossman, *Importance of Race-Ethnicity: An Exploration of Asian, Black, Latino and Multiracial Adolescent Identity*, 16 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 144, 148 (2010). Multiracial participants scored notably lower as to both external and internal pride. *Id.*

The relationship between multiracials' tendency toward colorblindness and their reluctance to eschew the racial framework altogether is reminiscent of the distinction drawn between colorblindness and post-racialism by Critical Race Theory scholars. *See, e.g.*, Cho, *supra* note 94, at 1595, 1598 (distinguishing colorblindness, which "offers a largely normative claim for a retreat from race that is aspirational in nature" from post-racialism, where "race does not matter, and should not be taken into account or even noticed").

are less engaged with racial-ethnic identity than black individuals but more engaged than monoracial white individuals; they also display higher levels of individuality than black individuals.[139]

According to another study, multiracial students experience significantly fewer instances of discrimination in all of its variations—everyday discrimination, lifetime discrimination, and perceived professional barriers—than monoracial minority students and report significantly lower ethnic identity.[140] Perhaps not unrelated, multiracial students are less likely than monoracial minority students to support affirmative action, show significantly less opposition to symbolic racism, perceive significantly lower levels of discrimination against minorities in present day society, and demonstrate significantly less positive attitudes toward diversity.[141] Compared to white students, however, multiracial students experience significantly more discrimination, have significantly more contact with others of different backgrounds, and are more likely to support affirmative action.[142]

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In sum, social science research suggests that among the growing population of multiracial individuals in the United States, and black-white individuals in particular, an increasing number identify not as consistently monoracial, but as biracial, or at the very least, identify differently over time or in different contexts. Although some multiracial individuals refuse to identify with any racial group, or reject the idea of racial classification altogether, they compose a proportionally small group. At least some social science scholars seem to suggest that identification as biracial or multiracial is a healthier approach from a psychological perspective and that being forced to associate only with one monoracial group may cause internal tension and emotional or psychological damage. In addition to conceiving of their own identity differently, some studies show that mixed-race individuals tend to be more individualistic and disengaged with regard to issues of race than minority

139. Charmaraman & Grossman, *supra* note 138, at 152 ("Ambiguity about racial group membership or lack of belonging to a well-defined racial–ethnic community for Multiracial adolescents may make racial–ethnic identity more complex thereby reducing racial–ethnic engagement or causing potential distress and identity confusion." (citations omitted)).

Interesting also was the variation between male and female respondents: "Females (26%) also expressed fewer responses [reflecting racial–ethnic disengagement] than males (16%) . . . . This is unsurprising, since females are more likely to value family ties and maintaining connections. In addition, the dual minority status of females of color may make them less likely than males to dismiss or downplay racial or ethnic identity." *Id.* at 152.

140. A. T. Panter et al., *It Matters How and When You Ask: Self-Reported Race/Ethnicity of Incoming Law Students*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 51, 60, 64 (2009). Here, "ethnic identity" was used as a metric for "the extent to which respondents identified with their ethnicity, felt close in ideas and feelings about things to others with the same ethnicity, and wanted to spend time with individuals sharing their ethnicity." *Id.* at 55.

141. *Id.* at 60.

142. *Id.* at 59, 64.

monoracials, but less so than majority monoracials. In addition, multiracials may be less likely to rely on traditional race-based classifications and more likely to understand race only as a social construct.

Regardless of how multiracial individuals may define their own identity and how they may perceive the role of race in American society, the law still operates largely within the context of monoraciality. The next Part explores the ways in which the law has traditionally dealt with questions of race and racial hierarchy and which aspects of different theories of equal protection—namely, anticlassification and antisubordination—align with the findings discussed above.

II.
EQUAL PROTECTION AND MULTIRACIAL IDENTITY

The ways in which race has been treated and viewed by society are often mirrored in constitutional doctrine regarding race and, in particular, by the interpretation of the Equal Protection Clause as it applies to race-based classifications. The Fourteenth Amendment clearly states that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[143] yet the definition of "equal protection" has been anything but clear. To interpret the meaning of equality as encompassed by the Fourteenth Amendment, scholars have often brought to bear two approaches: anticlassification and antisubordination.[144] After providing a brief overview of these theories as traditionally understood, this Part aims to explore how they might apply to multiracialism and, more specifically, to multiracial identity.

A. The Meaning of Equal Protection: Anticlassification and Antisubordination

Under the Equal Protection Clause, state-created racial classifications are subject to strict scrutiny, meaning that the government must demonstrate that such classifications are both "necessary to further a compelling governmental interest"[145] and "narrowly tailored to that end."[146] The interests that have been

143. U.S. CONST. amend. XIV, § 1.

144. For purposes of this Part, which aims only to outline the general values of each approach, I have treated the two approaches as separate, although I acknowledge that, in doctrine, they have not functioned in complete or independent isolation. *Compare* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*], *with* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (both arguing that, in reality, the two approaches have been intermeshed and that cases relying primarily on one set of values have been informed and influenced by the other approach); *see also* Siegel, *Equality Talk*, *supra*, at 1537 ("[E]ven in the 1970s, when the Court began to use anticlassification discourse to limit rather than express antisubordination values, it never embraced one understanding of equal protection to the exclusion of the other."); *id.* at 1542 ("In fact, concerns about subordination shape the concept of classification itself.").

145. Johnson v. California, 543 U.S. 499, 514 (2005) (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

recognized by the Court as compelling in the context of race are few, and their meaning has been narrowed through years of jurisprudence. These interests include protecting national security,[147] remedying specifically identifiable past discrimination,[148] and achieving the "educational benefits that flow from a diverse student body."[149] The Court has made clear that other interests—such as the effects of racial prejudice (in the context of a custody dispute involving a white mother who had remarried a black man)[150] and remedying the effects of general societal discrimination[151]—are not sufficiently compelling to justify the use of racial classifications.

Setting aside the legal standard applied to the use of racial classifications, a prefatory debate has long existed with regard to the best understanding of equal protection as it relates to race and whether it should apply in the same way in varied contexts. In attempting to answer these questions, the Court has often applied what scholars have termed either an anticlassification or antisubordination approach. These two approaches differ as to the instances in which they would apply heightened scrutiny to racial classifications and, to a lesser degree, the interests that might sufficiently justify their use. Under the antisubordination approach, only oppressive uses of racial classifications warrant the application of strict scrutiny. In contrast, under the anticlassification approach, which has been the dominant approach in current jurisprudence,[152] racial classifications in all forms are discouraged. The overall sentiment is that the state should not draw distinctions based on race, either overtly or surreptitiously.[153]

The anticlassification approach is often aligned with the notion of "colorblindness,"[154] or the idea that race should simply not be a consideration

146. *Id.*

147. Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (upholding an evacuation order directed at all persons of Japanese ancestry during World War II).

148. Richmond v. J. A. Croson Co., 488 U.S. 469, 504 (1989). The Court further held that a state wishing to use race in this regard must provide "a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'" *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

149. *Grutter*, 539 U.S. at 317. From its origination, the Court has been clear that this understanding of diversity must reach more broadly than racial diversity. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) ("Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.").

150. Palmore v. Sidoti, 466 U.S. 429, 434 (1984).

151. *See Bakke*, 438 U.S. at 307.

152. *See infra* note 180 and accompanying text.

153. *See* Balkin & Siegel, *supra* note 144, at 10; *see also Grutter*, 539 U.S. at 349 (Scalia, J., concurring) ("The Constitution proscribes government discrimination on the basis of race.").

154. *See, e.g.*, 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."). Here, the term denotes a process rather than a goal. For a more thorough history of the emergence of "colorblindness" in Supreme Court jurisprudence, see Ian F. Haney-López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 992–1004 (2007).

at all.[155] It impugns affirmative action policies, seeing no distinction between invidious and benign race-based classifications, and has legitimated facially neutral laws that have a disparate racial impact.[156]

In *Regents of University of California v. Bakke*,[157] often cited as an example of the anticlassification principle,[158] Justice Lewis F. Powell, Jr.'s opinion evinced some hostility toward the use of racial classifications and an unwillingness to carve out exceptions for the treatment of specific groups, stating that regardless of the group being discriminated against or the purpose for the discrimination (invidious or benign), racial classifications would be treated with the same level of scrutiny.[159] In doing so, the Court rejected the idea—rooted in antisubordination—that the history and experiences of some racial groups, such as African Americans, might warrant differential, and even preferential, treatment to achieve equal protection.[160] Justice Powell concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[161]

Also telling were the purposes Justice Powell deemed sufficiently compelling or rejected as insufficiently compelling to justify the use of racial classifications. Although specific and identifiable instances of past discrimination could justify the use of racial classifications in the present, the more "amorphous concept" of generalized societal discrimination would not

155. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 907 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)); Shaw v. Reno, 509 U.S. 630, 642 (1993) (stating that the Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race" and that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition"); Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

156. *See* Balkin & Siegel, *supra* note 144, at 12 (citing Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 129–46 (1976)); *see also* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2430 (2013) (Thomas, J., concurring) ("Racial discrimination is never benign.").

157. 438 U.S. 265 (1978).

158. *See, e.g.*, Siegel, *Equality Talk*, *supra* note 144, at 1533.

159. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294–99 (1978); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (definitively reaffirming that strict scrutiny applies to all racial classifications, invidious or benign).

160. *See Bakke*, 438 U.S. at 294–95 ("Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'" (citations omitted)). The petitioners in *Bakke* had argued that strict scrutiny should apply only to "classifications that disadvantage 'discrete and insular minorities.'" *Id.* at 288. *See also* Siegel, *Equality Talk*, *supra* note 144, at 1531 ("Justice Powell refused to limit classification discourse to policing the kinds of stigmatic harms suffered by members of socially subordinate groups.").

161. *Bakke*, 438 U.S. at 291.

suffice.[162] In this sense, anticlassification might be seen as a more literal interpretation of equal protection: only obvious and specifically demonstrable inequality will justify the targeted use of race.[163]

The Supreme Court's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,[164] decided nearly three decades after *Bakke*, is paradigmatic of the anticlassification approach. In *Parents Involved*, the Court struck down two school-assignment plans utilizing racial classifications; the self-described goal of each plan was to achieve racial diversity (and to avoid racial imbalance) among the students in each district's schools.[165] The Court held that the districts' use of racial classifications failed strict scrutiny, in part because the districts had not demonstrated a sufficiently compelling interest and in part because their use of racial classifications was not deemed necessary to meet the stated goal.[166] Chief Justice Roberts's opinion epitomized the anticlassification view, rejecting "racial balance" as a permissible objective[167] and famously concluding that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[168]

In contrast, the antisubordination approach neither equates all racial classifications nor suggests that racial classifications are undesirable in all circumstances. Rather, it views the Equal Protection Clause as designed to prohibit caste legislation and the subordination or oppression of a particular group. In that sense, equality is more substantive than procedural (favoring equal outcome over equal opportunity), and is viewed not as a means, but as an end to which the consideration of race may be necessary. Thus, the antisubordination approach sees benign discrimination as legally distinct from invidious discrimination and would view certain racial classifications as permissible. For example, the use of racial classifications in the context of

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162. *Bakke*, 438 U.S. at 307; *see also* Richmond v. J. A. Croson Co., 488 U.S. 469, 505–06 (1989) (rejecting past societal discrimination as a justification for the use of racial classifications).

163. Justice Powell also recognized that diversity may serve as a compelling interest; the Court in *Grutter* confirmed this. *Grutter*, 539 U.S. at 328. As to diversity, however, the Court has been clear since *Bakke* that race may not be the sole consideration and instead should only be one of many factors that are taken into account in building a diverse class. *See, e.g.*, *Bakke*, 438 U.S. at 314 ("Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."); *id.* at 315 ("Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725–26 (2007) (distinguishing "racial diversity" from the "broader diversity at issue in *Grutter* [*v. Bollinger*, 539 U.S. 306 (2007)]").

164. 551 U.S. 701 (2007).

165. *Id.* at 712 (Seattle School District No. 1), 716 (Jefferson County Public Schools in Louisville), 725–26 (stating "the diversity they seek is racial diversity").

166. *Id.* at 725–35.

167. *Id.* at 726 ("In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.").

168. *Id.* at 748.

affirmative action would not be objectionable because race is not being used to subordinate; rather it is being used "benignly" on behalf of members of a disadvantaged race to level the playing field. Another distinction between anticlassification and antisubordination is the extent to which they take context into account. The anticlassification approach seeks to evaluate claims of racial discrimination without any reference to the broader social context, while antisubordination emphasizes the larger social context in determining whether a given racial classification constitutes impermissible mistreatment.[169]

In contrast to Justice Powell's opinion in *Bakke*, Justice William J. Brennan, Jr.'s opinion, concurring in part and dissenting in part, is an example of the antisubordination approach. After recounting the history of the past century, including the Court's "separate but equal" doctrine, Justice Brennan wrote:

> Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[170]

Justice Blackmun's separate opinion in *Bakke* also took a very different view from Justice Powell's regarding the role that the consideration of race should play with respect to equality. He wrote: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[171]

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169. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1779 (2012) (describing the Court's equal protection jurisprudence as "intentionally blind to the persistence of racial discrimination against non-Whites"). This distinction is similar to that Neil Gotanda has made between "formal-race," a "vision of race as unconnected to the historical reality of Black oppression," and "historical-race," under which "racial categories describe relations of oppression and unequal power." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 37, 40 (1991).

170. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978).

171. *Id.* at 407 (Blackmun, J.). The Court took a similar approach in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), upholding the lower court's use of its equitable powers to use race in remedying past school segregation in the school district at issue. *Id.* at 15–19. In doing so, the Court rejected the school board's argument that assignments must be made on a "color blind" basis to avoid violating the Constitution. *Id.* at 19. *See also* Siegel, *Equality Talk*, *supra* note 144, at 1518 (describing how, during this era, "judges generally understood the presumption against racial classification as a race-asymmetric constraint: courts wielded the principle to protect blacks against status-enforcing harm but did not employ it to constrain race-based state action designed to alleviate segregation, even when whites objected that such race-based policies inflicted harm.").

Brown v. Board of Education,[172] arguably our nation's preeminent case regarding the issue of race, embodies both anticlassification and antisubordination elements.[173] On one hand, signaling an anticlassification rationale, the Court declared that public schools may not use racial classification to segregate schools.[174] On the other hand, the Court focused its analysis on segregation's effects on young black children and its message about the relationship between the races.[175] Similarly, *Loving v. Virginia*,[176] which held unconstitutional a state statute prohibiting interracial marriage, blended anticlassification and antisubordination values,[177] relying on the presumption against racial classifications[178] and reflecting a resistance to reinforcing racial hierarchy.[179]

The Court's current approach to equal protection is most often characterized as an anticlassification, or colorblindness, approach.[180] Many

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172. 347 U.S. 483 (1954).

173. *See* Haney-López, *supra* note 154, at 1000 (noting that Thurgood Marshall's strategy as an advocate in *Brown* "combin[ed] an anticlassification argument with an emphasis on segregation's deleterious consequences").

174. *Brown*, 347 U.S. at 493. Some have interpreted this aspect of *Brown* more literally, suggesting that all racial classifications are inherently troubling from a constitutional standpoint. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (citing *Brown*).

175. *Brown*, 347 U.S. at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). As Reva Siegel has observed: "the language of classification was conspicuously absent in *Brown*, which emphasized that racially segregated schools harmed children by causing in them powerful feelings of 'inferiority as to their status in the community.' The decision did not condemn racial classification as such; rather, it addressed the harmful consequences of separating school children in a specific institutional context." Siegel, *Equality Talk*, *supra* note 144, at 1481.

176. 388 U.S. 1 (1967).

177. *See* Balkin & Siegel, *supra* note 144, at 11–12 ("Cases like *Brown* and *Loving* contained language condemning the practice of classifying citizens by race as well as language condemning practices that enforced subordination or inflicted status harm.") (footnotes omitted).

178. *See Loving*, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

179. *See id.* at 11 n.11 (noting that Virginia's antimiscegenation statute extended only to whites marrying nonwhites); *see also* Siegel, *Equality Talk*, *supra* note 144, at 1504 ("Like *McLaughlin* [*v. Florida*, 379 U.S. 184 (1964)], the *Loving* opinion refrained from discussing how prohibitions on interracial relationships injured people or shaped their identities. Yet *Loving* spoke more directly about the relationship between classification and caste than would any of the Court's ensuing cases. The Court declared the prohibition on interracial marriage unconstitutional not only because the racial classifications violated strict scrutiny, but because they enforced a system of racial hierarchy.").

180. *See, e.g.*, Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 315 (2009) ("The Court's current approach to equal protection, which has been labeled an antidiscrimination, anticlassification, or colorblind approach, emphasizes the impropriety of government use of racial classifications."). *But see*, Siegel, *Equality Talk*, *supra* note 144, at 1504 (arguing that the two cannot be so easily separated and are more often interwoven in the doctrine). *See also* Tanya Kateri Hernández, *A Watered-Down Vision of Equality*, N.Y. Times, June 26, 2013, http://www.nytimes.com/roomfordebate/2013/06/26/is-the-civil-rights-era-over/a-watered-down-vision

progressive scholars and those concerned with racial equity have touted antisubordination as the superior approach,[181] advocating that an approach that focuses purely on equal treatment, or on equality as a means rather than an end, ignores the realities of how race continues to operate in today's society.[182] Anticlassification, many would argue, ignores the realities of racial hierarchy.

Whether the anticlassification and antisubordination approaches have been perceived as beneficial or harmful in the context of traditionally defined monoracial groups, their application to an increasingly multiracial demographic has the potential to alter the normative understanding of each. I explore below the ways in which each approach meshes with the core values of multiracial identity.

B. Viewing Equal Protection Through the Multiracial Identity Lens

Both anticlassification and antisubordination have developed amidst a rigid, categorical understanding of race, in a doctrinal context operating on the basis of clearly defined monoracial categories.[183] To the extent it implicates

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-of-equality ("Th[e] view [dominating the 2013 Supreme Court term] would dictate that discrimination exists when the law is directly implicated in separating groups of people for the purposes of imposing stigma, parallel to Jim Crow segregation. Any other manifestation of harm against individuals based on their socially derided group status is irrelevant as long as 'the law' is formally neutral. The formality of the law is considered paramount over the actual unequal status of disfavored groups.").

181. For arguments in favor of the antisubordination approach, see, for example, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (2d ed. 1988) (describing the Equal Protection Clause's "antisubjugation principle, which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens"); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (arguing that courts should adopt the antisubordination perspective, which "seeks to eliminate the power disparities between . . . whites and non-whites, through the development of laws and policies that directly redress those disparities"); Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO L.J. 2279, 2295–96 (2001) ("Whether an action or structure contributes to material oppression seems a much more fruitful, and ultimately, worthy way of addressing America's most intractable and complex problem: race."); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (proposing a "group-disadvantaging principle" because it "represent[s] the ideal of equality," "takes a fuller account of social reality," and "focuses the issues that must be decided in equal protection cases"); Gotanda, *supra* note 169, at 63 ("[A] revised approach to race must recognize the systemic nature of subordination in American society."); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1994).

182. *See, e.g.*, Colker, *supra* note 181, at 1013 (advocating antisubordination over anticlassification as a "more flexible doctrine that permits the courts or employers to use race- or sex-specific remedies in some situations that call out for redress of prior discrimination").

183. *See* Gotanda, *supra* note 169, at 26 ("Much of constitutional discourse . . . treat[s] racial categories as if they were stable and immutable."); *id.* at 31 (referring to "the American classification system's assertion that race is a fixed and objective feature"); *see also* ONWUACHI-WILLIG, *supra* note 18; Leong, *supra* note 130, at 505 (explaining that "antidiscrimination jurisprudence is built around the existence of clear categories"); *id.* at 505–06 ("The famous *Carolene Products* footnote generated an entire jurisprudence in which protection of an individual against discrimination depended on whether that individual fell into a 'discrete' category—one for which the very terminology implies that the category is straightforward and has distinct boundaries."); *id.* at 506 (observing that in *Loving*, which

any notion of identity, equal protection doctrine assumes identity is fixed and equated with race.[184] In that sense, neither theory truly contemplates the dynamics of multiracialism.[185] Here, I only intend to explore how each approach might be viewed through the lens of multiracial identity—by those concerned with preserving the ability of multiracial individuals to identify as they wish, and in ways that align with the findings outlined in Part I.

As discussed in Part II.A, there are three generalized distinctions between anticlassification and antisubordination: (1) antisubordination views the purpose and effect of racial classifications as highly relevant, whereas anticlassification discourages any use of race-based classifications; (2) antisubordination takes the historical dynamics between racial groups into account while anticlassification is unconcerned with context; and (3) anticlassification is concerned primarily with individual harm while antisubordination recognizes group-based harm. Judging by those three metrics, multiracial identity concerns appear to fare better under anticlassification: (1) the very act of classification can be harmful to multiracial identity; (2) the contemplation of historical racial dynamics may not benefit multiracials unless they are grouped together with minority monoracials; and (3) given the individuality of multiracial identification, multiracials are more likely to suffer identity harm on an individual, rather than group, basis.

The equal protection debate is largely about harm—specifically, which types of harm we value or feel the need to remedy.[186] Therefore, one way of thinking about traditional approaches to equal protection and multiracial identity is how one might evaluate the harm that is inflicted by racial

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struck down Virginia's antimiscegenation law, the Court "automatically accepted that racial categories are fixed classifications in which one is either a member or a non-member.").

Natasha Silber has argued that the antireification principle (viewing race as a social construct rather than something real or biological) underlies much of the Supreme Court's race jurisprudence and yet is fundamentally incompatible with equal protection doctrine, which "attempts to protect 'minorities' [and] other vulnerable classes through judicial review [and thus] necessarily results in the reification (and ultimately, essentialization) of identity categories." Silber, *supra* note 8, at 1875, 1906.

While I tend to agree with scholars like Gotanda who argue that, in actuality, race is neither objective nor immutable, I view that conversation as distinct from the way in which the Court's equal protection jurisprudence has treated race.

184. *See* Hernández, *supra* note 5, at 1096 ("[T]he race ideology that predominated during the time of the early Civil Rights movement was one which viewed racial identity as static and Blackness as rigidly determined by the existence of even one ancestor of African ancestry."). Arguably, equal protection doctrine essentializes members of a given race, assuming, for example, that an individual who is identifiable by others as black will both identify as black and will have experienced life as a black individual. This is true both in the context of remedial race-based measures and diversity-based policies, such as affirmative action.

185. Gotanda explains that classifications such as "black" and "white" are "'objective' and 'immutable' in the sense that they are external to subjective preferences," Gotanda, *supra* note 169, at 30. This stands in stark contrast to the notion of multiracial identity as discussed in Part I, which is both fluid and subjective.

186. *See, e.g.*, Siegel, *Equality Talk*, *supra* note 144, at 1546 ("To this day, equal protection law remains unclear about the nature of the harm it is rectifying and the values it is vindicating.").

classification. The anticlassification approach aims to remedy harm that is inflicted on an individual as an isolated entity, without regard to context or the individual's affiliation with a majority or minority racial group. In contrast, antisubordination's assessment of the harm to an individual is not conducted in a vacuum; it necessarily relates affected individuals to their positioning in a larger social structure.

As background, it is helpful to recognize the differing motivations behind the racial equality movement as it existed at the time of *Brown* (or even *Plessy*) and the multiracial movement as it exists today. The civil rights movement was justifiably focused on political, social, and economic equality and grounded in the historical realities of slavery, Jim Crow, and war-time internment. In contrast, the multiracial movement is more recent and largely identity-driven[187]—in part because it can rely on the victories achieved by past generations and in part because its primary concern has always been self-definition. In an era of the one-drop rule and brown paper bag test,[188] it may have been unfathomable to think that one could have any say in how one would be classified by the state.[189] However, for some multiracial individuals in today's society, the most pressing issues relate to how one is classified and who is doing the classifying, not to the actions taken on the basis of that classification.

The harm that is most damaging and most central from the vantage point of multiracial identity is that which stems from the act of classification itself, not the harm generated by the classification's broader effects.[190] In other words, the way in which race-based classifications are ultimately used may not be as important as the means of classification and the extent to which those means allow multiracial individuals to control the definition of their racial

187. *See* Skerry, *supra* note 93, at 329 ("[M]ultiracial advocates are motivated 'more [by] recognition of multiraciality than [by] any specific political or economic advantage for multiracials. The advocates do not want to deny a part of their own or their children's origins.'"); *id.* at 337 (characterizing some multiracialists as "preoccupied with issues of personal identity"); *see also* Kim, *supra* note 95, at 31 (discussing the "multiculturalist" agenda of the late twentieth century as "less focused on establishing a harmonious, culturally enriched society and more concerned with the remediation of identity harms that were being inflicted on excluded minorities" and the "*recognition* of identity" rather than the "right to be left alone"); *id.* at 32 (describing the civil rights movement's focus as conferring dignity and establishing access for non-whites to that which had been attainable only by whites—not the recognition of identity); Mezey, *supra* note 42, at 1706 ("Those who sought to be counted on the census as 'multiracial' stood to gain nothing that they could not otherwise get from being counted as a minority race; theirs was a campaign for recognition as a group and inclusion in the nation on their terms.").

188. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1515–16 (2000) (describing how the comparison of a person's skin color to that of a brown paper bag was used to determine admissibility into certain social clubs).

189. *See supra* notes 25–26.

190. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring) ("Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.").

identity. For example, the use of race in the census has traditionally been deemed unproblematic because the pure act of classifying individuals—before that data is used in any affirmative way—is not perceived as harm-generating.[191] Yet the way the government collects such data, before it is further used for any specific purpose, lies at the crux of the harm at issue for multiracial identity. The primary concern is not how the information is interpreted or applied, but rather how an individual is allowed to identify, how she is classified, and who is deciding which options are available to her.

Although the antisubordination approach is arguably more effective from the perspective of historically marginalized groups,[192] it may have negative ripple effects for those who wish to carve out a distinct identity not based on traditional group definitions. The antisubordination approach is inherently group-based[193] and focused on dismantling social structures based on race,[194] whereas the project of determining one's own multiracial identity is largely individual-based.

A group-based approach may conflict with identity interests in several ways. First, a focus on group power may emphasize the diverging interests of minority power blocs and individuals focused on self-identity. The desire of some individuals to self-identify as multiracial, or in any way other than monoracial, has the potential to dilute the power of more traditional race-based organizations that rely on the influence of their numbers.[195] This helps to contextualize the above-discussed objection of civil rights groups, including the

191. As one lower court held: "Statistical information [from census-generated responses] . . . is a rather neutral entity which only becomes meaningful when it is interpreted. . . . Plaintiffs' position [that census collection of data regarding race, ethnicity, legitimacy, sexual preference, and alienage is unconstitutional] is based upon a misunderstanding of the distinction between collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and governmental use of suspect classifications without a compelling interest." *Morales v. Daley*, 116 F. Supp. 2d 801, 814 (S.D. Tex. 2000) (citation omitted); *see also* Balkin & Siegel, *supra* note 144, at 18 (discussing antisubordination's influence in deeming the use of race in the census permissible because it does not necessarily "inflict some dignitary or distributive harm" but instead "merely describes social realities").

192. *See supra* note 181.

193. Colker, *supra* note 181, at 1008–09 (explaining that antisubordination is more group-based in that it "focuses on society's role in creating subordination" and "focuses on the way in which this subordination affects, or has affected, groups of people").

194. Balkin & Siegel, *supra* note 144, at 14 (describing the approach as "concerned with the subordination of social groups and the need to dismantle unjust social structures").

195. *See* KENNETH PREWITT, WHAT IS *YOUR* RACE? THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS 133 (2013) (contrasting multiracial advocates' primary interest in self-identification and in "social recognition, not social justice" with the NAACP's concern that the "'creation of a multiracial classification might disaggregate the apparent numbers of members of discrete minority groups, diluting benefits to which they are entitled as a protected class under civil rights laws and under the Constitution itself'"); *see also id.* (citing NAACP testimony that the purpose of racial classification is "'the enforcement of civil rights laws'" and not "'to provide vehicles for self-identification'").

NAACP, to the creation of a "multiracial" category on the census.[196] Among the NAACP's and others' concerns was also the possibility that:

> many blacks would designate themselves as multiracial in order to escape the social stigma . . . that occurs if individuals identify themselves as Black/African American. . . . They also argued that while the "one-drop rule" was a product of racism, it had become a means of mobilizing communities of color to organize against white race privilege.[197]

One way of framing this concern is as the "loss of a sense of 'linked fate'" among the members of traditionally racialized groups:[198]

> The easier it is to escape racial discrimination . . . the more defectors there will be from the disfavored races. The result may be both increased competition and tension among people within a single racialized group, and harsher treatment of those who cannot mobilize sufficient resources to escape the box of racial stereotyping.[199]

Indeed, as Tanya Hernández has noted, it was the presumably fixed nature of race-based classification and the ability to frame racial disparities as an issue of group-oriented bias that helped the civil rights movement to organize domestically.[200]

Groups like the NAACP also had a more pragmatic concern that recognition of multiracials as an independent category would undermine the legal protections and state-provided benefits currently enjoyed by traditional racial minorities.[201] As Harris notes, "[T]he more complex racial identity is

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196. Brown, *supra* note 52, at 279.

197. *Id.* at 279–80; *see also* Hernández, *supra* note 48, at 126 (arguing that recognition of a multiracial class reinforces the existing racial hierarchy by allowing members of "middle-tier" categories to disassociate from "concern with racial justice out of a psychological sense of superiority, notwithstanding their own consistent experiences of discrimination and prejudice").

198. Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 63 (2008).

Using the example of coalescing various European ethnic groups under the label "white," Naomi Mezey explains how the creation of a new racial category has the potential to both foster a common racial identity but also solidify the division between that group and other racial groups. *See* Mezey, *supra* note 42, at 1747–48.

199. Harris, *supra* note 198, at 63–64. Kevin Brown points out that identifying as multiracial may hurt black multiracials attempting to benefit from traditional affirmative action policies, given that their comparison group then shifts to white-Asian and white-Native American multiracials. *See* Brown, *supra* note 52, at 301 ("For Black Multiracials, however, the potential impact on their admissions prospects to selective higher education institutions created by a change in their comparison group, could be devastating.").

200. Hernández, *supra* note 5, at 1161.

201. *See* Deo, *supra* note 11, at 433 ("The concern of these groups [opposing the addition of a multiracial category], articulated by the National Association for the Advancement of Colored People (NAACP), is that a separate multiracial category would dilute the numbers of currently recognized racial minority group members, as well as weaken the legal protections and wide range of benefits to which racial minorities are entitled."); *see also* Hernández, *supra* note 48, at 126 ("Middle-tier census categories in racially stratified societies . . . present an inherent threat to racial justice efforts."); Mezey, *supra* note 42, at 1749 ("Those who understand themselves as multiracial, and who sought

acknowledged to be, the more fugitive and difficult to identify will be acts of racial discrimination."[202] The more difficult it becomes to demonstrate race-based discrimination, the more difficult it will be to demand or justify protection against such discrimination. Some of the findings touched upon in Part I provide a potential basis for these concerns, including the findings that relatively few black-white multiracials choose to identify themselves as exclusively black[203] and, on a very generalized level, multiracials appear to be less attuned to societal racial discrimination, have fewer personal experiences with such discrimination, and are less likely to perceive a need for race-based policies such as affirmative action.[204]

Some may also argue that under an antisubordination approach, multiracial individuals do not warrant any heightened protection because, unless they are lumped in with a larger, more traditionally defined monoracial group,[205] multiracials are rarely the specific targets of race-based policies. Antisubordination's concerns about group oppression are more likely to implicate multiracials only insofar as they identify as or have been perceived as members of a minority racial group.[206] Thus, in order to benefit from the protections of an antisubordination approach, multiracial individuals may be forced to rely on external racial classifications—as defined by society and others—or on forced association with single-race groups that have a well-established history of subordination.[207] Although it is certainly not true that multiracials have never faced discrimination based specifically on their

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government recognition of their identity, did not stand to gain any legal or political entitlements that they could not get from simply checking a single race category. Indeed, according to many civil rights groups, their claims ran counter to their political self-interest by complicating, perhaps even undermining, the enforcement of civil rights laws.").

202. Harris, supra note 198, at 62; *see also* Haney-López, *supra* note 154, at 1034–37 (arguing that in a "nation of minorities," there are no dominant and subordinate races, and thus it becomes impossible to determine which groups are deserving of special protection under the law).

203. *See supra* note 108.

204. *See supra* notes 138–42 and accompanying text.

205. Here, there is another interesting parallel to Gotanda's juxtaposition of formal-race and historical-race. *See* Gotanda, *supra* note 169. The term "historical-race" itself implies that judicial review of race-based laws should "recognize the historical content of race." *Id.* at 39. Yet multiracial individuals have not always occupied a unique racial space; therefore, a reliance on historical notions of race may either force them into a larger racial category or will not have any direct application.

206. However, when multiracials do choose to identify with a traditional racial group, there is a potential danger that they will be accused of claiming such status to secure preferential treatment. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1268 (1997) ("[O]ne fears being accused of claiming to be a minority—sometimes by members of the very group with which he or she identifies—simply to obtain a 'special' preference.").

207. Some may not view such forced association as a purely negative phenomenon. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 4 (2002) ("[B]eing forced to identify with a group of people can be an unexpected blessing. Those who are racialized by society may miss out on a specific kind of individual liberty, but they gain a different perspective on wholeness and its relationship to freedom.").

status as multiracial,[208] it is notable that our legal system has not consistently recognized such discrimination, making it all the more likely that multiracials may be pressured to rely on external classification or associate with single race groups.[209] In that regard, the interests of the antisubordination approach run counter to an individual's interest in defining her own unique identity.

An expanded view of classification, including specific categories for multiracial individuals, might ultimately deepen our understanding of discrimination and of racial hierarchy and help to highlight the specific forms of discrimination faced by multiracials. This argument mirrors that made by Angela Onwuachi-Willig in *According to Our Hearts* in support of adding "interraciality" as a protected category in the context of antidiscrimination law.[210] Such a framework may ultimately better capture the complexities of race and help to attack specific forms of discrimination as they operate in practice. In this sense, a classification scheme that incorporates the notion of border identity might work against subordination. However, application of antisubordination to a world where multiracialism has been accepted as a unique status or category differs from the project of addressing the dangers posed to identity by applying the antisubordination framework to the current reality.

As a related matter, Neil Gotanda has suggested that, under a regime of hypodescent, the classification of a multiracial individual as black may itself be a form of subordination.[211] Although this may be a way to view antisubordination as empowering multiracial identify, it also assumes and thus ultimately reifies racial hierarchy, threatening to further oppress those who are unequivocally classified as "black."

To the extent that the social science suggests that multiracial individuals are psychologically and emotionally harmed by adopting a monoracial identity (or by being denied the opportunity to identify as multiracial),[212] the antisubordination approach may contribute to this harm. As the excerpted NAACP arguments above suggest, the antisubordination approach may assume that, in order to fully engage in the project of racial equality, multiracials must abandon some sense of self in the name of larger, collective goals. Under the antisubordination view, race is not only real, but has been affirmatively used as a tool to oppress others. To question the hold of race on the individual—perhaps the very crux of the multiracial identity dilemma—is in many ways to

208. *See* Leong, *supra* note 130.

209. *See id.* at 470 ("Despite the historical and ongoing hostility to racial mixing, our legal system consistently fails to recognize racism directed at those seen as racially mixed."); *see id.* at 475 (distinguishing color discrimination from multiracial discrimination).

210. *See* ONWUACHI-WILLIG, *supra* note 18, at 22.

211. *Cf.* Gotanda, *supra* note 169, at 26 ("[H]ypodescent imposes racial subordination through its implied validation of white racial purity. Subordination occurs in the very act of a white person recognizing a Black person's race.").

212. *See supra* Part I.D.

question the very premise of antisubordination. If one views race as having a singular, fixed meaning (which is itself a flawed premise[213]), it is difficult to reconcile the notion of race as a fluid concept that any one person can adapt to her own identity with the notion of race as systematically applied to create and maintain social hierarchy. Given its emphasis on the dynamics of oppression and unequal power between racial groups, and thus on how individuals relate to one another rather than how they conceive of themselves, antisubordination has the potential to render the issue of self-identification meaningless.

In contrast, there are several elements of the anticlassification approach that are supportive or reflective of multiracial identity concerns. While the anticlassification approach is often viewed as ignorant of racial realities and detrimental to those who are currently oppressed or without the ability to utilize the political process effectively,[214] it has the potential to benefit those in the quest for recognition or support of a unique multiracial identity. First, because the approach is focused on the individual as an isolated entity,[215] it does not presume or require membership in a particular group as a threshold to determining equal treatment.[216] This aspect of anticlassification has the potential to alleviate pressure on multiracial individuals to choose one group affiliation—most likely based on society's perception of the individual's race—and thus avoid some of the harm that can follow from being forced to adopt a monoracial identity.[217] While the antisubordination approach, in some sense, legitimizes race as a powerful force in mapping the social structure, the anticlassification approach's rejection of that view lessens the extent to which multiracials may feel the need to define their own racial identity based on dominant social understandings of race.

Second, the anticlassification approach's disapproval of state-created racial classifications suggests that the state should neither distribute benefits on the basis of race, nor force individuals into racial categories.[218] In this regard,

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213. As Lani Guinier and Gerald Torres explain, traditional conceptions of race also ignore the fact that race can have many different meanings: biological, political, historical, or cultural. GUINIER & TORRES, *supra* note 207, at 4.

214. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

215. *See* Siegel, *Equality Talk*, *supra* note 144, at 1535 n.219 (recounting Owen Fiss's observation that the anticlassification approach "justified itself by emphasizing fairness to individuals"); *cf.* Balkin & Siegel, *supra* note 144, at 15 (attributing to the anticlassification principle the belief that "[i]t is wrong to distribute goods and opportunities on the basis of certain kinds of group membership").

216. *Cf.* Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 282–83 ("I do think that civil rights groups would prefer that we remain 'black' even if such a false unitary racial category midgets us mentally, enslaves us intellectually, and bankrupts us spiritually.").

217. *See supra* Part I.D.

218. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 n.11 (2007) ("The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent

the paradigmatic anticlassification characterization of the Equal Protection Clause as protecting "persons, not groups"[219] may be helpful to multiracial individuals who do not wish to be affiliated with a particular group or to affiliate only with one group. If the anticlassification approach disapproves of the state making classifications on the basis of race, surely it finds even more offensive any state attempt to define race or to impose a racial label on any given individual.[220] Thus, to the extent that both approaches—by nature of their grounding in the Fourteenth Amendment—are oriented primarily toward the state's role, anticlassification's hands-off approach to race may leave more freedom for the individual to self-identify or, at the very least, create less tension between the state's view of race and any competing view that the individual may hold.

The quality of anticlassification that is perhaps most attractive from the perspective of multiracial identity is its tendency toward colorblindness and its wishful premise of a world where race-based classifications are no longer necessary. The data regarding multiracial identity bolster this aspirational view: multiracials are more likely to adhere to a "colorblindness" mentality or to view themselves as transcending race, rejecting the notion of racial identity altogether.[221] Some consider the very notion of multiracial identity aspirational;[222] similar characterizations of the anticlassification approach[223] offer an opportunity for possible alignment or, in the more cynical view, for misappropriation.

III.
RECONCILIATION: UNDOING RACE?

If it is true that in the context of multiracial identity, the anticlassification model appears to offer some advantages and the antisubordination model generates certain problems or harms, the logical next question is how those findings should be reconciled with the current state of equal protection

identifies more than one race on the form, '[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box.'"); *cf. id.* at 723 ("Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/ "other" terms in Jefferson County.").

219. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (emphasis omitted); *see also* Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) ("At the heart of this [equal protection guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.").

220. *See infra* Part III.A.

221. *See supra* Part I. Ironically, others have argued that "[t]he very terms 'mixed race' or 'multiracial' imply the existence of 'pure' and distinct races." Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 19 (1997).

222. *See, e.g.*, Mezey, *supra* note 42, at 1706, 1744–49 (describing the census's role in the recognition of racial identity as "aspirational").

223. Siegel, *Equality Talk*, *supra* note 144, at 1535 ("the objectivity, individualism, and nonsubstantivity of anticlassification discourse were aspirational only. . . .").

doctrine. The clear danger is that heading down this path and incorporating the values that are central to the quest for multiracial identity into doctrine (or by allowing those values to be exploited to that end) will lead to the inability to use race-based classifications, even toward benign ends.[224]

As demonstrated above, several Justices hinted at this possibility during the oral argument in *Fisher*, suggesting that the existence of a growing multiracial population may undermine existing compelling purposes that can justify the use of racial classifications, namely identifiable past discrimination and diversity.[225] The Court made clear at the end of the 2012 term that, in the context of affirmative action in higher education, racial classifications may still be drawn and upheld as constitutional, assuming they can survive strict scrutiny as defined by *Fisher*.[226] The Court has yet to address, however, the question of how constitutional doctrine will or should adapt to account for multiracialism, if at all. Adding (or perhaps contributing) to the Court's strong desire to curtail the use of racial classifications is the public's own increasing distaste for the same.[227]

Because we have not yet reached the aspirational ideal of post-racialism, the understandable concern is that undoing race altogether—at least from the state actor's perspective—will serve to disadvantage those who are already vulnerable to discrimination and subordination.[228] This tension can be discerned to some degree in the different ways that racial and ethnic data have been collected and reported by the federal government. As discussed in Part I, as the primary motivation for developing such data has shifted from countering racial subordination to pursuing notions of self-identity, the data itself has potentially become less useful in advancing the larger goal of racial equality.

I suggest here that while the findings regarding multiracial identity require some accommodation, they need not and should not be used to eliminate the consideration of race. Below, I explore two different responses to the tension between identity concerns and equal protection doctrine. The first is to view the

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224. Skerry, *supra* note 93, at 337 (noting that some conservatives "have supported multiracialism as a means of undermining the entire post-civil-rights regime of affirmative action and group rights"); *see also* Chaudhry, *supra* note 25, at 512 ("[S]elf-classification may have the effect of eliminating [affirmative action] programs, a consequence which must be seriously considered by MCM [multiracial category movement] proponents.").

225. *See supra* note 2 and accompanying text; *see also Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013) (Alito, J.) (highlighting that although Baby Girl is only 1.2 percent Cherokee, she is classified as Indian).

226. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2414 (2013) ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.").

227. *See* Kenneth Prewitt, *Race in the 2000 Census: A Turning Point*, *in* THE NEW RACE QUESTION 358–59 (Joel Perlmann & Mary C. Waters eds., 2002) (describing public discomfort with "the expanding scope and complexity of racial measurement").

228. Skerry, *supra* note 93, at 338 ("Multiracialism may well be the silver bullet that finishes off the affirmative action regime. If so, however, this outcome will not bring the nation to a state of colorblind innocence.").

dominant anticlassification approach as supportive of self-identification and to exploit those aspects of anticlassification that would further identity interests. Ultimately, I do not endorse this more immediate response; tethering identity interests to anticlassification increases the danger that the multiracial movement may be exploited to serve political ends. Focusing solely on the benefits provided by anticlassification also ignores the fact those who claim multiracial status are more likely to be operating from a point of socioeconomic privilege and less likely to experience or be sympathetic to racial discrimination.[229] Thus, there is the potential to exacerbate inequalities between multiracial individuals and to make those who are already privileged even more so, at the expense of the most vulnerable. Taken to its logical end, anticlassification may reach further than even those seeking multiracial status desire (including total abolishment of racial classification, which may contribute to, rather than alleviate identity concerns)[230] and is likely to have negative consequences for members of other racial groups. I therefore provide a second, more expansive proposal, which is to separate the question of identity from the provision of state-enforced rights or legal entitlements and state-apportioned benefits. This approach responds to concerns about multiracial identity, as expressed in Part I, but has less potential to undermine necessary protections for other racial groups.

It may aid the reader to contemplate this point in the context of a more concrete hypothetical: What should we make of the potential equal protection claim by a multiracial individual that she has been wrongly prohibited by the state from identifying as "multiracial"? Which approach would best serve the plaintiff's interests? Based solely on the discussion in Part II, perhaps the anticlassification approach would be more advantageous. The plaintiff's claim aligns in some respects with the idea that she should be able to self-identify her race and that the state should not dictate racial classification. Her claim is not supported by the logical extreme of the anticlassification view, however, as she seeks not the absence of classification, but the ability to classify herself in a specific way. An antisubordination approach, in contrast, might be unlikely to honor a rights-based claim to a particular form of racial identity absent a showing that the denial was somehow connected to larger patterns of racial oppression. At the very least, one would have to demonstrate that being

229. *See supra* Part I.D. Sheryll Cashin has argued that African Americans, and low-income African Americans in particular, will have the least ability to declare their own racial identity, due to residential segregation and concentrated poverty: "These folks will be black, they will be 'othered' as black, and they won't have much volition to perform some other identity." Jenée Desmond-Harris, *The Future of Race in America*, THE ROOT (Nov. 5, 2013, 12:15 AM), http://www.theroot.com/articles/culture/2013/11/the_future_of_race_in_america_will_people_of_color_unite_can_we_abandon.html.

230. As discussed in Part I, while many multiracials prefer to not identify as monoracial, relatively few identify as "transcendent," rejecting the notion of racial identity altogether. Relatedly, one of the driving forces behind the multiracial movement was a desire to have some identity—to occupy a unique space, rather than simply to be lumped in as "Other." WILLIAMS, *supra* note 18, at 9.

afforded the freedom to identify as such would not contribute to the entrenchment of racial hierarchy. As explained above, this may not be a simple burden to carry: the choice by some to identify as multiracial may perpetuate the social stigma associated with being monoracially black and support the view that race is socially constructed, making it more difficult to monitor racial discrimination. While the assertion of a rights-based claim to identity would certainly force the courts to address the issue of which interpretive theory to apply to equal protection in this context, the larger point I seek to make here is that equal protection is not the proper battleground on which to litigate claims of identity. The plaintiff's claim should not be cognizable as a constitutional matter. While doctrine should attempt, where possible, to accommodate differing visions of identity, identity should not be the driving force behind the definition of rights.

A. The Temptation Toward Anticlassification

One way of thinking about the conclusions reached in Part I is that they provide reason to favor the arguably dominant anticlassification approach. Although this Essay ultimately rejects that conclusion, the argument follows logically from the observations made in Part II: anticlassification's focus on the individual without regard to context and its opposition to state-created racial classifications support the notion that the state should not define race or dictate how a multiracial individual is racially classified.[231] In that sense, anticlassification may directly support self- rather than state identification. Justice Kennedy captured this sentiment in his concurring opinion in *Parents Involved*:

> When the government classifies an individual by race, it must first define what it means to be of a race. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.[232]

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231. Skerry, *supra* note 93, at 334 ("[I]n the American context, self-identification of race and ethnicity is sustained by more than convenience to bureaucrats or social scientists. It accords with strongly held beliefs in individual choice and liberty."); *id.* ("Further entwining self-identification with individualism are evolving American conceptions of race and ethnicity.").

232. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring). Justin Driver has argued that Justice Kennedy's concurring opinion in *Parents Involved* is "both anticlassification and anticolorblindness." Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 454 (2012). Although he acknowledges that the above-referenced quote embodies anticlassification, Driver points out that, in the same opinion, Justice Kennedy eschewed the notion that state actors must never take racial considerations into account. *Id.* at 455. Driver uses the opinion as illustrative of his larger argument that anticlassification and colorblindness need not be understood as synonymous and are in fact conceptually distinct. For example, forbidding the government from classifying individuals on the basis of race and taking account of racial considerations within society as a whole (rather than just among individuals) are not mutually exclusive. *Id.* at 450–56.

In fact, one could argue under this approach that to choose any path other than self-identification suggests an even more intrusive, and thus impermissible, role for the state. As the Massachusetts district court observed in *Cotter v. City of Boston*,[233]

> If we go beyond self-definition and seek to confer some genuine meaning upon race-based identifiers, we rapidly find ourselves slipping into the most abhorrent racial stereotyping and classification—the very conduct directly forbidden by our Constitution and laws. We simply cannot condemn the notorious black codes . . . while at the same time looking behind self-identification. The very idea of imposing some lexicon of United States government racial definitions is revolting.[234]

If the idea of state-drawn classifications between races is offensive, the idea of the state defining racial categories is certainly even more so.[235] Thus, one could use anticlassification to argue that policies of self-identification be imposed across the board, including in the affirmative action and employment contexts.[236] It could be used to argue further that both states and the federal government must allow for multiracial classification or, at the very least, the option to include oneself in as many racial categories as desired. The argument for the latter would be that to offer only monoracial or predefined racial categories not only constitutes impermissible identity suppression, but also is equivalent to state classification based on race.

This view of anticlassification offers a potential response to Chief Justice Roberts and Justice Scalia's suggestion during the *Fisher* oral argument that the possibility of racial fraud (created, in their minds, by the possibility of self-identification) undermines the continued viability of diversity as a compelling purpose for race-based affirmative action policies. To suggest that the proper or only response to racial fraud is state enforcement of predefined racial categories or that the state should have the final say with regard to one's racial

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233. 193 F. Supp. 2d 323 (D. Mass. 2002), *aff'd in part, rev'd in part*, 323 F.3d 160, 174 (1st Cir. 2003) (reversed only as to the lower court's decision "to retain jurisdiction over future hiring decisions, and . . . over future promotional decisions," failing to address the court's discussion of self-identification).

234. *Id.* at 328.

235. Related ideas may also explain some of the difference between *Grutter* and *Gratz*. *See* Charlie Gerstein, *What Can the Brothers Malone Teach Us About* Fisher v. University of Texas*?*, 111 MICH. L. REV. 1 (2012), *available at* http://www.michiganlawreview.org/articles/what-can-the-brothers-malone-teach-us-about-em-fisher-v-university-of-texas-em (explaining that under a more holistic review, the state can avoid any need to define race or members of one race, while under an approach that attempts to assign a numeric point value to members of specific races, the state may have to be more involved in categorizing individuals according to pre-conceptualized and state-formulated notions of race).

236. *See* Jennifer L. Hochschild, *Multiple Racial Identifiers in the 2000 Census, and Then What?*, *in* THE NEW RACE QUESTION 350 (Joel Perlmann & Mary C. Waters eds., 2002) ("[I]f we are somehow to incorporate racial identity into Americans' long-standing commitment to individualism and self-definition, the first step is to enable people to choose their own racial identities.").

definition would directly contradict the view that the state should not meddle with issues of race.[237]

It is worth noting that using anticlassification to support policies of self-identification need not necessarily affect areas of the law reliant on external rather than internal perceptions of race. An important distinction can be made between providing a remedy to individuals for discrimination they experience due to private actors' perceptions of their racial affiliation and disallowing the state to force a racial affiliation upon any individual.[238] Thus, there is no necessary impact on antidiscrimination law as defined by claims based on outside observers' assignment of race; rather these anticlassification-based arguments are relevant only when an individual's ability to classify herself racially is also relevant.[239] The paradigmatic example of this is race-based affirmative action, left intact—for now—by the *Fisher* decision.

In the context of affirmative action, concerns of 'racial fraud' might also be countered by arguing that when diversity is the goal, it is not clear that allowing individuals to self-identify racially does anything to undermine that end. If an individual who is one thirty-second Native American, for example, chooses to identify as such because he identifies strongly with Native American history and culture, his inclusion in the class may actually contribute more towards diversity than the individual who is phenotypically identifiable as a member of a minority race, but whom does not identify as such. This is one reason why more sophisticated data collection mechanisms that parse out the ways in which an individual applicant is racially classified both internally and

237. An alternative response to concerns about racial fraud would be to implement a more rigorous method for determining who may qualify as a member of a specific race. For example, Congress could implement the same process as it has done in the context of the Americans with Disabilities Act, requiring that claimants make a threshold showing that they have or are regarded as having a "disability" as defined by statute. 42 U.S.C. § 12102(1) (2008). Attempting to define race by statute would not only be extremely controversial and lead to the same frustrations experienced in other contexts (such as an inordinate amount of time spent litigating the issue of categorization rather than discrimination), but would also likely be an undesirable solution from all perspectives.

238. Allowing race to serve as the basis for a discrimination claim need not necessarily test the validity of one's self-conceived racial identity, given that discrimination claims ultimately turn on the other party's reasons for discriminating. Leong, *supra* note 130, at 507 ("Whether a plaintiff succeeds on a [Title VII] claim of race discrimination hinges on a showing that she was discriminated against *because she was Asian* (or Black, or White, etc.)."). For a discussion of the unique difficulties that multiracial individuals may face in making more traditional antidiscrimination claims, see generally Leong, *supra* note 130. Leong emphasizes that multiracial individuals are in a unique position in part because they face discrimination as a result of their multiracial identity and also as a result of their affiliation (or the perception of their affiliation) with a monoracial group. *Id.* at 475. Ultimately, she suggests that antidiscrimination jurisprudence be reformulated to "acknowledge[] animus directed against a person's perceived race without an attendant need to define that person's 'objective' racial identity or to place that person in a category." *Id.* at 543.

239. Ford, *supra* note 34, at 1267 (describing the two primary means for race adjudication as "self-reported" and "other-ascribed" identification); *see also* Gerstein, *supra* note 235, at 2 (explaining that "[t]he former invite the unscrupulous to deceive; the latter seem counter to our basic notions of self-description and self-determination").

externally (as described in Part III.B) might better serve universities' ability to satisfy the diversity goal.

The problem for those seeking legal recognition of their unique multiracial status by the government is that, taken to its logical end, the anticlassification approach would simply do away with the consideration of race altogether. Eliminating the use of race-based classifications, which Chief Justice Roberts and Justice Scalia arguably support,[240] would alleviate any concerns about racial fraud by rendering race irrelevant. While state-defined racial categories may run counter to anticlassification ideals, the complete abdication of racial categories by the state might also mean that multiracials cannot garner any state recognition of their unique status. That recognition was perhaps as central to the multiracial movement as the nature of the proposed classification itself.[241]

Another problem is that allowing for the creation of additional racial categories (the "multiracial" option) has the potential, as described in Parts I and II, to cause harms to minority monoracial groups, such as undercounting and a diminished capacity to counter discrimination. To the extent that multiracials are included in those groups—particularly from an external vantage point—they risk the infliction of those harms on themselves as well.

Even if anticlassification arguments can be interpreted to allow multiracial identity the freedom it demands, it is likely naïve to believe that the arguments made in this context can be effectively cabined; hence the alternative offered below. There is always a danger that applying an interpretive theory to one group (here, multiracials) even with certain limitations in mind (such as the preservation of identity), may have spillover effects into the general treatment of other racial groups, creating the undesirable effect of dismantling decades of progress.

B. Untangling Identity from Doctrine

A wholly different possibility involves rejecting, rather than emphasizing or embracing, the relationship between doctrine and identity. One might approach the dilemma of reconciling multiracial identity with equal protection not by attempting to exploit helpful aspects of anticlassification, but by untethering the state's race-related interests, as the Court has narrowly defined them,[242] from the individual's interest in identity. While the two exist as

240. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (majority opinion authored by Chief Justice Roberts); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

241. *See* Williams, *supra* note 18, at 37 ("It is one thing to assert that a group deserves acknowledgement. It is yet another thing to look to the state for that recognition. Even from very early on, multiracial advocates sought recognition in one form or another from the local, state, or federal government.").

242. *See supra* Part II.A.

parallel strands, they need not always align. The relationship between the two is better understood by implementing two necessary distinctions: (1) assessing whether an "internal" or "external" conception of identity is applicable to the state purpose to be achieved, and (2) recognizing that the decision of how to classify racially is logically separable from the decision of how to use race-based classifications.

As described in Part I, the multiracial movement has in part been co-opted by a conservative element invested in a "colorblind" interpretation of equal protection and, in turn, is more conveniently aligned with the anticlassification rationale. This element has grouped both the interest in identity and the state's interest in equality under the umbrella of individualism; this alignment has arguably had—and will continue to have—negative effects for traditionally defined racial groups.[243] As a result, it has also pitted groups focused primarily on the fate of such groups against multiracial advocates.

I suggest that the problem lies in conflating these two interests: the interest in defining one's own identity and the state's interest in providing equal protection of the law. The endeavor to define and shape one's identity as a person of multiracial heritage need not be equated with the way in which the Court has defined legal rights or entitlements under equal protection. In fact, tethering questions of identity to the government's treatment of racial classifications may lead to negative ramifications for each.[244]

If the two cannot be viewed as distinct, the application of an antisubordination approach may suppress identity, as suggested in Part II. Conversely, if the freedom to define one's own identity assumes top priority, then the anticlassification approach—which may weaken the law's ability to address historical or ongoing subordination—may emerge as the better facilitator. Just as imposing doctrine's conception of race on multiracial individuals may be problematic, using the multiracial experience as a guide for doctrinal development would be misguided. In practice, the number of self-categorized multiracials is still relatively small, their experience (as a generalized or empirical matter) is qualitatively different from monoracial

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243. *Cf.* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012) (advocating for a baseline of vulnerability rather than a focus on individualism or identity).

244. For example, Kenji Yoshino has observed that the law is not always capable of resolving challenges relating to identity: "When I think about the elaboration of my gay identity, I am grateful to see litigation has had little to do with it . . . . I am troubled that Americans seem increasingly to turn toward the law to do the work of civil rights precisely when they should be turning away from it." KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 193–94 (2006); *see also id.* at 194 (explaining that some of the best advice the author received was to "speak my truth and make the law shape itself around me").

For a discussion of the ways in which the commodification of racial identity—the derivation of social or economic value from nonwhite racial identity, as in the concept of "diversity"—may both "inflict[] identity harms on nonwhite individuals and . . . displac[e] substantive antidiscrimination reform," see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156 (2013).

individuals (see Part I), and, as attractive as it may be, their emerging view of race remains aspirational.[245] The intention here is not to ultimately present either anticlassification or antisubordination as the winning approach to multiracial identity. Rather, this project is intended to demonstrate the possible consequences of viewing identity and doctrine as inextricably interlinked and thus using identity as the driving force for shaping doctrine.

To further explore the dangers of this conflation, I return to the discussion in Part I about the possible identity-related harms to which multiracials may be exposed as a result of their unique backgrounds. These harms may include: being forced to identify in a way other than how they wish to personally identify, being identified by others (either the state or third parties) in a way that does not comport with their own conception of their identity, and the cognitive dissonance that may stem from attempting to make sense of a racial background that does not comport with traditional racial categories.[246] While these harms may all be manifested by the state denying individuals the freedom to define their own identity, that phenomenon is distinct from the state's decisions about how to use racial classifications once they have been generated.[247] In other words, the means for racial classification can be, and perhaps should be, distinguished from the ends to which racial classifications are utilized by the state. The question of how the state might choose to interpret and apply self-ascribed racial classifications opens an entirely new debate.[248] But, at the very least, it is clear that individuals can be given some freedom to self-identify while also providing the state with the information it needs to employ racial classifications toward established compelling purposes (for example, by allowing individuals to check several boxes rather than opting into one broader, less-descriptive category). The alternative—that racial classifications be abandoned altogether—would be just as harmful to

245. Mezey, *supra* note 42, at 1749 ("The genesis of the multiracial lobby in this country is deeply aspirational . . . .").

246. I have omitted here the possible harm of being discriminated against based on the fact of one's multiraciality, since I do not consider that an "identity harm."

247. This is, of course, assuming that the state chooses to use racial classifications at all. For purposes of this Section, I assume that the state will still continue to use racial classifications in some respect.

248. As to how race should be considered in this context, several scholars have offered up relevant thoughts. *See* Leong, *supra* note 244 (voicing concerns about racial commodification—the process by which the importance of race in the context of diversity initiatives is reduced to mere presence, rather than a means for effecting substantive change); *see also* Rich, *supra* note 7, at 198 (advocating for a "functionalist" model, under which employers are permitted to inquire into an individual employee's specific experiences with racialization before determining how that employee may contribute to pertinent diversity initiatives by, for example, ensuring that the employee's experiences give him or her insight into social subordination). *See also* Brown & Bell, *supra* note 263, at 1282–83 (distinguishing between "ascendant" blacks and others with black heritage and concluding that all blacks should not be treated alike in the context of affirmative action).

multiracials engaged in this quest.[249] It is not that they seek not to be classified at all; rather, they seek to be classified in a specific manner and, in the case of many, for the state to legitimize that choice through its use of racial classifications.[250]

Moreover, there are many aspects of the findings discussed in Part I that should raise significant concerns about using identity as the guiding force to structure law. First, as demonstrated by various social science studies, there are many different ways in which multiracial individuals may choose to identify;[251] this suggests that multiracial identity is highly individualized and contextualized, and could not be applied to legal doctrine in any consistent or universal manner.[252] In other words, it would be difficult to craft or apply effective legal interventions when the categorizations on which such intervention is based are fluid and constantly shifting.[253] Second, as explained in Part I, those mixed-race individuals most likely to characterize themselves as multiracial come from a privileged socio-economic background and typically enjoy higher societal status.[254] As a result, they are the least vulnerable to subordination and should not serve as the guidepost for determining how the law can best protect all racial minorities. Third, although legal recognition or recognition by others has been touted by some in the multiracial movement as the most critical element of multiracial identity, it is not clear that the social science findings bear that out. Although external recognition is clearly important to some multiracials—as evidenced by those who opt for a validated border identity—many others still adopt a border identity (biracial rather than monoracial), even if that identity does not comport with outside perception.[255] Last, to the extent that much of the social science research points toward providing multiracials with the flexibility to determine their own identity (given the psychological benefits that can result and, conversely, the harms that can result from the denial of such an opportunity),[256] imposing any legal scheme based on one particular conception of identity stands to suffer from the same shortcomings. More likely than not, it would result in different strains of the same tension and potential for alienation present under the current regime,

249. *Cf.* Hochschild, *supra* note 236, at 350 (outlining the costs of eliminating racial categorization altogether).

250. Mezey, *supra* note 42, at 1750 ("[A] person can only sustain her identity if others recognize her as she recognizes herself and . . . she is only included in the national community to the extent that the government classifies her in a recognizable way.").

251. *See supra* notes 100–06 and accompanying text.

252. For example, many multiracial individuals still choose to identify as monoracial, particularly in certain settings where that choice may assume strategic value or ease psychological tension. *See supra* note 108 and accompanying text.

253. In contrast, maintaining the same basic racial categories and allowing individuals to categorize themselves in varying ways allows for both concerns to be simultaneously vindicated.

254. *See supra* note 118 and accompanying text.

255. *See supra* notes 111–14 and accompanying text.

256. *See supra* notes 125–32 and accompanying text.

particularly if the realities of race remain distant from the aspirational ideal of post-racialism.

Aside from the possibility that equating doctrine and identity may be based on a misunderstanding, or manipulation, of the latter, it also ignores the fact that law and identity serve very different purposes. Based on social and historical phenomena that reach far beyond the individual, the state may act, and use racial classifications, to address larger structural issues relating to race.[257] This is an appropriate role for the state to play as the necessary arbiter of many societal relationships, including those relating to race. That should not affect, however, the individual's ability to define his or her own identity, which primarily serves an important inward function. Nor should it suggest that an anticlassification approach must apply to the application of equal protection doctrine.

In this sense, Justice Kennedy's observation in *Parents Involved* (and its possible appropriation by the multiracial movement) is flawed: it is not necessarily true that the government's definition of race or its use of race-based classifications impose on the individual's ability to "define her own persona."[258] That view is based on the misconception that individuals must divine their identity solely from the government's definition of race and that two conceptions of race cannot possibly co-exist, even if they exist to serve distinct ends. Similarly, the multiracial movement to date has been dominated by the idea that state recognition is equivalent to identity recognition.[259] The two are better viewed as related, but not equivalent. Individuals should not be wholly reliant on the state (especially as distinct from society) in defining their self-perception.[260] It is the conflation of these two phenomena that gives rise to the dangerous possibility that allowing individuals the space to develop their own racial identity must necessarily undermine the structural use of race for a greater societal purpose.

If, however, we separate doctrine from identity and the structural from the individual, perhaps it is possible to achieve dual ends: to allow multiracial individuals the freedom to define their own identity while also allowing the state to address racial discrimination and combat racial subordination. The state can still decide how it wishes to apportion benefits, or to redress racial

257. For example, the OMB directive accompanying the 2000 census instructed: "Mixed-race people who mark both White and a non-White race will be counted as the latter for purposes of civil rights monitoring and enforcement." Hugh Davis Graham, *The Origins of Official Minority Designation*, *in* THE NEW RACE QUESTION 298 (Joel Perlmann & Mary C. Waters eds., 2002).

258. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

259. *See* WILLIAMS, *supra* note 18, at 37.

260. One might query where we would be today if racial minorities had historically relied on the state to define or legitimize their own identity, particularly given the history of African Americans and the ways in which the state has classified them throughout this nation's history (including the decision to count each slave as only three-fifths of a person). U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. Const. amend. XIV.

discrimination. This reaches beyond individual identity, and should not be restricted by any individual's conception of his or her own race. Conversely, while the state's activities are constrained and defined by the Court's interpretation of equal protection, identity need not be.[261]

In other words, we should distinguish the means by which individuals are allowed to classify themselves and to structure their personal relationships[262] from the question of how race is monitored by the state and how benefits will be distributed on the basis of race.[263] Although the ends for which racial classifications can be used are necessarily limited by the means used to classify individuals, as described below, it is possible to structure the means of classification such that a variety of ends are still feasible.

David Hollinger has made one proposal that illustrates this distinction. He has suggested that two questions be asked on the census: (1) "Do you have the physical characteristics that render you at risk of discrimination, and if so, do those characteristics make you black, red, yellow, or brown?" and (2) "Do you consider yourself to be a member of any of the following ethno-racially defined cultural groups?"[264] While not a perfect analogy, Hollinger's fairly imaginative suggestion acknowledges the distinction between the "legal and political" and the "emotional components of 'race.'"[265] Similarly, Kenneth Prewitt has suggested that an ideal, if unrealistic, adjustment to the census questions would

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261. As Mezey points out: "[B]ecause identities do not have an independent existence, but rather depend on social and cultural acknowledgment to be called into being, the race categories on the census have always played a dual role: of recognizing identity and also of *conferring* it." Mezey, *supra* note 42, at 1747. I agree that the mode of racial classification reflected in the census categories informs the way in which people categorize others, and the way we categorize the people around us influences the way in which such categories are defined. There is, however, a distinction between the roles played by the census and the greater legal framework. Ultimately, the census is a tool that has symbolic but also utilitarian value, serving as a mechanism by which the government can generate demographic analysis and allocate state benefits.

262. For an overview of the harms caused by the government's or the courts's attempts to define race and racial relationships, see ONWUACHI-WILLIG, *supra* note 18.

263. Conversely, others believe that there is good reason to treat "ascendant" blacks—those with two native-born black parents or who have a more direct connection to America's history of racial discrimination—differently from multiracials with some black heritage or black immigrants. *See* Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229 (2008). In their view, treating all of these groups equally (as black, with no further categorization) for purposes of affirmative action undermines the original goals of affirmative action and leads to the underrepresentation "of blacks whose predominate ancestry is traceable to the historical oppression in the United States." *Id.* at 1231.

264. DAVID A. HOLLINGER, POSTETHNIC AMERICA 179–82 (2006). Camille Gear Rich has made a similar argument in the context of affirmative action, suggesting that employers utilize "functionalist" inquiries to isolate those individuals who are disadvantaged by their race. This approach recognizes the dignity harm inflicted by challenging an employee's racial identification decisions, but prioritizes the need to clarify the employee's experience of racialization in the context of claiming to advance an employer's diversity goals. *See* Rich, *supra* note 7, at 185.

265. Hochschild, *supra* note 236, at 350.

ask: "Are you discriminated against, and if so, on what basis?"[266] The point is that external perception—over which the individual has no control and as to which the state can play a more relevant role in policing—is distinct from internal perception, over which the state need not maintain control (and where the risk of identity harm is greatest). In this sense, "classification" in this context may assume two distinct meanings: an individual's own conception of his or her racial identity, and the means by which race is externally organized[267] (which may still rely on more traditional and less nuanced understandings of race). The latter type of classification relates directly to societal race discrimination or racial subordination requiring action by the state, while the former does not require state action. A benefit of distinguishing between internal and external classification is that, in contrast to data collection methods that require individuals to self-identify by selecting one or more predefined racial categories, under this framework, internal classification need not necessarily be constrained by a limited number of racial categories (which are integral to meaningful state-based classification).

Social science research provides an additional reason to distinguish between externally-based racial classification and racial self-identification, and to collect data on the basis of each. A recent study by Aliya Saperstein demonstrates that incorporating both measures into data analysis reveals "more complex patterns of racial advantage and disadvantage in the United States" than relying on either factor alone.[268] Her data demonstrate that models including both racial classification (based on external perception) and

266. Keli Goff, *Multiracial America Makes Census Boxes Obsolete*, THE ROOT (Nov. 4, 2013, 12:10 AM), http://www.theroot.com/articles/culture/2013/11/it_may_be_time_to_take_race_out_of_the_u_s_census.html. In his recently published book, Prewitt makes several other suggestions, including that census inquiries as to race and national origin be disaggregated (and the former eventually dropped). Prewitt considers the census inferior to vehicles such as the American Community Survey, which include enough variables to decipher the true cause of racial disparities. PREWITT, *supra* note 195, at 196, 202–04. Prewitt suggests replacing references to race with national origin in part because he views the notion of race embodied in the census as clumsy and outdated, *id.* at 175–76, and because it would prevent the government from "acting as if these race categories are real," Goff, *supra*.

267. Throughout this piece, I am primarily contrasting the individual's definition of his or her race with the way in which she is categorized racially by the state. Other-ascribed identity is obviously imposed not only by the state but also by others in society. While self-defined racial identity and state-defined racial classifications should not be conflated, because state-based racial classifications and societal racial classifications are both externally-oriented, there may be more reason for correlation. Moreover, to the extent the state wishes to address racial subordination occurring in society, it may need to operate on terms society can understand.

To the extent "multiracial" evolves (or has evolved) into a socially salient category, what of the person who is perceived, even externally, to be multiracial? Might there then be an argument that it should also be a governmentally salient category? Not necessarily—at least not in the current context of equal protection. The relevance of the "multiracial" label remains primarily in the realm of identity; it will likely be more effective for the government to utilize broader racial categories in addressing larger social problems.

268. Aliya Saperstein, *Capturing Complexity in the United States: Which Aspects of Race Matter and When?*, 35 ETHNIC & RACIAL STUD. 1484, 1485 (2012).

self-identification provide a better account of racial disparities in areas such as family income and health care than models based only on self-identification.[269] Thus, relying in part on external perception and not solely on self-identification may ultimately provide more clarity into how the law can most effectively address such disparities. One way of addressing the two sides of identity and classification, therefore, is to ask people to distinguish between the way in which they classify themselves internally and how they are perceived externally.

Another way to parse the difference between internal and external classification is to allow for classification mechanisms that can be used differently for different purposes. The option to mark one or more races is thus preferable to the option to select a "multiracial" category because the former both allows the individual to more accurately describe her identity while also allowing the state to use such race data to larger ends.[270] For example, in the case of a black-white mixed-race individual who chooses to check both the white box and the black box, the identity concern is vindicated (at least to some extent) and the state is also able to categorize the individual as "black," for example, in determining which voting districts are majority-minority or measuring the racial achievement gap in the context of education policy.

This view would be consistent with allowing individuals to define their own identity (for example, on state or government forms, by checking either a "multiracial" box and including a more specific description or checking as many boxes as desired). It would also comport with the reality that individuals may identify differently in different contexts. At the same time, this view would not deem problematic a decision by public entities to implement affirmative action policies with regard to a traditionally defined racial group. Nor would it necessarily render troubling the decision of a state or public institution to categorize self-identified multiracials along traditional racial lines

269. *Id.* at 1496–97. For example, women who are seen as white are more likely to receive health screenings regardless of whether they identify as white or black. With regard to annual family income, however, those women who identified as black and those who were perceived as black had the most similar outcomes, and all had significantly lower family incomes, on average, than those women who both identify as white and are seen as white. In other words, as Saperstein explains, "women who are seen as white but identify as black seem to fall on the 'white' side of the divide in health screenings but the 'black' side of the divide in family income." *Id.* at 1498. It is even more interesting to contemplate how the varying degrees to which individuals exercise the agency to self-identify (based, for example, on their socioeconomic status) might further affect such data analysis.

270. Another reason to prefer this option to the option of a "multiracial" category is, as Jennifer Chacón suggests, that carving out a new racial category (in her case, responding to the suggestion of adding "interraciality" as a protected status in antidiscrimination statutes) may have several negatives. First, it could be seen as a reason for a narrower interpretation of more general claims of race-based discrimination. Second, the added provision could itself be read narrowly; and third, a reopening of the political discussion may lead to worse, rather than better results. Jennifer Chacón, *Opening Our Hearts: A Response to Angela Onwuachi-Willig's* According to Our Hearts, 16 J. GENDER RACE & JUST. 725, 730–34 (2013).

for the specific purpose of accomplishing a greater end.[271] Likewise, anti-discrimination laws based on external perceptions of race would not be impacted, whether or not they specifically include multiracialism or interraciality as a protected category.[272]

Perhaps it is helpful to return briefly to the questions posed by Chief Justice Roberts and Justice Scalia during the oral argument in *Fisher* regarding whether an applicant who is one thirty-second Hispanic would be considered Hispanic by the University of Texas. Under the proposal made here, the applicant would be allowed to select any box or set of boxes that she views as the most accurate description of her own identity. It would be for the University to decide, however, how to structure its process such that it has the information it needs to fulfill its diversity goals. For example, the University might ask additional questions about the individual's external perception, her personal experiences, or her cultural affiliations. Once provided with that information for each applicant, the University would admit applicants as it sees fit to meet its objectives.

Aside from more practical effects, this approach could alleviate some of the tension between multiracial and racial equality advocates, providing a basis for multiracial concerns to become part of a larger civil rights agenda, rather than presenting a threat to that cause.[273] Other questions will of course follow as to the particulars of how state or government actors should take race into account once an individual has been classified and how much meaning should be ascribed to an individual's own conception of his or her race as part of that

271. *Cf.* Skerry, *supra* note 93, at 334–35 ("[H]owever powerfully embedded the idea of choosing one's own race and ethnicity may be in our individualistic political culture, the realities of public policy eventually intrude and require that the government impose order. Self-identification results in such a profusion of facially incorrect or merely idiosyncratic responses (and nonresponses) that sooner or later federal bureaucrats must violate their commitment to self-identification and force the data into usable categories . . . . From the policy maker's perspective, the plain fact is that racial and ethnic identity are too important to be left completely to the preferences of individuals."). This "compromise" approach offers a way to avoid diluting the numbers or weakening the political strength of groups that rely on traditional racial categories. This differs from the "Two or More Races" approach used by the DOE and described in Part I, which would lump multiracials into a wholly different and arguably meaningless category, rather than counting multiracials as part of each racial group with which they identify.

So, to return to the *Fisher* example, there would be nothing inherently troubling about the decision of someone who is one-quarter or one-eighth Hispanic to identify as Hispanic on the admissions form. The question of how that person is accounted for racially under the University's admissions scheme would be up to the University, and its definition of diversity (within constitutionally permissible guidelines). That inquiry would, and should, be separate from whether the University's decision to consider race in its admissions process is constitutional under the Equal Protection Clause.

272. *See, e.g.*, ONWUACHI-WILLIG, *supra* note 18, at 22, 264–66 (suggesting the addition of the term "interraciality" as a protected category in current antidiscrimination law statutes); Leong, *supra* note 130, at 547 (advocating for recognition of multiracial discrimination as distinct from discrimination based on perception of being a member of a fixed racial category).

273. WILLIAMS, *supra* note 18, at 126–31 (suggesting multiracial concerns be brought into the civil rights fold).

process (or, for example, whether individuals who check only "black" should be treated differently from those who check both "white" and "black"); several scholars have made constructive contributions to that growing conversation, primarily in the affirmative action context.[274] This Essay is not intended to resolve all of those questions, although it is certainly part of the same conversation. Instead, it addresses and answers in the affirmative a looming prefatory question, which threatens to undercut the entire enterprise of race-based affirmative action: whether recognition of multiracial identity and a changed understanding of racial categories can co-exist with the productive and constitutional use of race-based classifications.

CONCLUSION

Reconciling the individual's quest for identity with the doctrinal framework of equal protection will never be an easy task. It would be too simplistic to suggest that the two can be viewed as completely distinct entities. Inevitably, the way the law is constructed will inform individuals' perceptions of how they are valued and perceived, which will influence their identities.[275] And the way individuals define their own identity will, in turn, influence not only the way society understands race, but also legal frameworks governing issues of race.

The freedom to self-identify with regard to race integrates the notion that race is a social construct.[276] But to expand that project beyond the individual disregards the realities of how race operates in today's society.[277] If we lose the notion of race, we "lose a language in which to talk about structural privilege and disadvantage."[278] Societal conceptions of race will surely continue to evolve over time and acknowledging that racial boundaries are no longer clear may be an important part of that process. It is important to recognize, however, that journey is still in a relatively nascent phase. In the interim, we should not

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274. As to how race should be considered in this context, several scholars have offered up relevant thoughts. *See* Leong, *supra* note 244 (voicing concerns about racial commodification—the process by which the importance of race in the context of diversity initiatives is reduced to mere presence, rather than a means for effecting substantive change); *see also* Rich, *supra* note 7, at 198 (advocating for a "functionalist" model, under which employers are permitted to inquire into an individual employee's specific experiences with racialization before determining how that employee may contribute to pertinent diversity initiatives by, for example, ensuring that the employee's experiences give him or her insight into social subordination). *See also* Brown & Bell, *supra* note 263, at 1282–83 (distinguishing between "ascendant" blacks and others with black heritage and concluding that all blacks should not be treated alike in the context of affirmative action).

275. Mezey, *supra* note 42, at 1701 ("The law, as many have recognized, calls people into being. Out of the distribution as well as the absence of rights and regulatory devices emerge statuses and identities.") (footnote omitted). In her article, Mezey explores the role of the census in influencing the meaning of race and the politics of racial identity.

276. *Cf.* GUINIER & TORRES, *supra* note 207, at 11–14 (framing racial membership not as a matter of racial purity but instead as a set of political and cultural allegiances).

277. *Cf.* HOLLINGER, *supra* note 264, at 39 ("Racism is real, but races are not.").

278. Harris, *supra* note 198, at 62.

conflate the individual project of identity with the structural project of racial equality. To do so is to ignore the fact that each serves an independent purpose. While identity is a critical facet of the individual, legal doctrine must retain the potential to govern the role race plays in societal relationships and to break down societal barriers grounded in race.

To date, the multiracial movement has helped make great strides for multiracial individuals striving to define their own racial identity and made valuable contributions to a broader conversation about how we might reconceive of race and its role in society. It has also presented a danger—in the hands of those who would use it for specific political ends—of undermining other important movements. Here, I suggest that while the ability to define one's own identity and adoption of a more fluid understanding of race are positive developments and should be embraced or at least explored,[279] we should be wary of immediately reconfiguring legal doctrine in response. And while the debate of how and whether racial classifications can be used by the state will rage on post-*Fisher*, we should protect identity from being used as a tool to advocate for any doctrinal approach. Issues of racial identity need not necessarily be perceived as incompatible with the goals of the civil rights movement. A more cautious approach would divorce the quest for identity from the use of racial classifications, allowing for individuals to define their own racial identity, but also for the state to act, when deemed appropriate, based on a broader view of racial dynamics. While a post-racial world may be the ideal for some, for now, it is also aspirational; to ignore current realities in favor of future hopes may disguise regression as progress.

279. Mezey, *supra* note 42, at 1763 (observing the option to choose more than one racial category "recognizes multiracial people and at the same time opens a space for acknowledging that our identities are multiple, shared, divided, composite, and that they are so even in the face of an otherwise enduring regime of race").