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# Functionally Suspect: Reconceptualizing "Race" as a Suspect Classification

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# FUNCTIONALLY SUSPECT: RECONCEPTUALIZING “RACE” AS A SUSPECT CLASSIFICATION

Lauren Sudeall Lucas\*

*In the context of equal protection doctrine, race has become untethered from the criteria underlying its demarcation as a classification warranting heightened scrutiny. As a result, it is no longer an effective vehicle for challenging the existing social and political order; instead, its primary purpose under current doctrine is to signal the presence of an impermissible basis for differential treatment. This Symposium Article suggests that, to more effectively serve its underlying normative goals, equal protection should prohibit not discrimination based on race per se, but government actions that implicate the concerns leading to race’s designation as a suspect classification. For example, a possible equal protection violation would no longer be triggered by the mere act of racial categorization, but by classifications targeting groups characterized by a history of past discrimination, political powerlessness, or a trait that has no bearing on its members’ ability to participate in or contribute to society. By directly integrating the values underlying suspect classification into equal protection analysis, this Article attempts to replace the categorical use of race with a substantive approach that is less vulnerable to arguments grounded in colorblindness or postracialism and more focused on deconstructing existing racial hierarchies.*

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\* Assistant Professor, Georgia State University College of Law. I would like to thank Osamudia James and Wendy Greene for their thoughts on an early draft of this article as well as the participants in the Culp Colloquium at Duke Law School at which I presented an early version of the ideas that ultimately informed this piece. I am also thankful to the editors of the Michigan Journal of Race and Law, for inviting me to participate in this symposium, and to Pierce Hand, who provided valuable research assistance. The ideas raised by this Symposium Article are further explored in my forthcoming Essay, *Identity as Proxy*, 115 COLUM. L. REV. \_\_\_\_ (forthcoming 2015).

## INTRODUCTION

Race matters. But it's not always clear what that means. Much ink has been spent analyzing how and when race should matter, and even what is meant by the concept of "race" itself.<sup>1</sup> Many authors have chronicled the ways in which, historically, race has been constructed—for example, based on blood fraction (or the "one-drop rule"), phenotype, skin color, or performance.<sup>2</sup> In the context of equal protection doctrine, race matters because it has been deemed a "suspect classification," meaning that governmental classifications based on race receive strict scrutiny and, as a result, require strong justification.<sup>3</sup>

But to understand for whom and when race will matter, there must be some common understanding as to what race means and which individuals will fall within specific racial categories. Prohibiting discrimination based on "race" may mean disallowing discrimination based on skin color, community association, or certain performance traits, and thus means little without further elaboration.<sup>4</sup> It may mean that every use of race, regardless of its nature or its contextual application, is subject to heightened scrutiny; or it may mean that only some uses of race are viewed with a more skeptical eye. As to whom certain labels apply, the law has not kept pace with changing notions of identity, relying just decades ago on antiquated and formalized notions of how to assign individuals to a racial category.<sup>5</sup> Even if the law were more progressive in its understanding of what "race" entails, it is unclear what the proper metric would be for making such assignments. Inevitably, there would be a wide variety of views about how the lines should be drawn and who should fall on either side of the line.<sup>6</sup>

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1. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 *STAN. L. REV.* 747 (1994); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060 (1991); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 *STAN. L. REV.* 1 (1991). This is obviously only a small sampling of the many works written on the topic.

2. See, e.g., D. Wendy Greene, *Determining the (In)determinable: Race in Brazil and the United States*, 14 *MICH. J. RACE & L.* 143, 189 (2009); 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, 1102 (2002) (describing "prejudice of mark," which is based on phenotype); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 *UCLA L. REV.* 1705 (2000).

3. See *infra* note 23.

4. See, e.g., DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013).

5. See, e.g., *Malone v. Haley*, No. 88-339, at 17 (Mass. July 25, 1989) (relying on visual observation, documentary evidence of ancestry, and community perception); *Doe v. Louisiana*, 479 So. 2d 369, 371 (La. Ct. App. 1985) (relying on official designation based on the one-drop rule).

6. See, e.g., *infra* text accompanying notes 110–112.

Although ambiguity in racial determination is far from new, changing demographics and the increased political presence of those clamoring for specific recognition of multiracial identity<sup>7</sup> are bringing more attention to how the law can or should best accommodate racial dynamics.<sup>8</sup>

Because race is a social and legal construct,<sup>9</sup> in the context of doctrine, it is malleable by those wielding power over the law. Therefore, under the current regime, the power to make legally significant decisions about how race is defined and who will be considered a member of what race is held primarily by the government—whether the executive, legislature, or judiciary. To the extent that the Supreme Court continues to allow the limited use of race-based classifications,<sup>10</sup> at least some of the Justices appear unlikely to accept more nuanced understandings of how members of a minority race should be defined; instead, they seem drawn to formulations based in ancestry, without regard for cultural affiliation or other factors.<sup>11</sup> Moreover, the Court has squarely rejected the notion that different uses of race—for example, remedial (or “benign”) and invidious—might be treated differently.<sup>12</sup> As currently understood by the Court, equal protection doctrine is unlikely to recognize the pervasive na-

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7. See, e.g., Susan Saulny, *Black? White? Asian? More Young Americans Choose All of the Above*, N.Y. TIMES (Jan. 30, 2011), at A1.

8. See, e.g., Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243 (2014) (exploring how equal protection doctrine should accommodate racial self-identification and concerns about multiracial identity); Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505–06 (2014) (describing the ascendant “elective race” model, which caters to the dignity concerns of those who wish to control the terms of their racial identification); Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469 (2010) (describing the law’s failure to specifically recognize against mixed-race individuals because of their multiracial background).

9. LÓPEZ, *supra* note 1, at 10.

10. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2414 (2013) (holding, in the context of higher education, that racial classifications can be used only when there are “no workable race-neutral alternatives that would produce the educational benefits of diversity”); *Schuette v. Coalition to Defend Affirmative Action, et al.*, 134 S. Ct. 1623, 1637–38 (2014) (holding that states can legislatively choose to prohibit race-based preferences).

11. For example, during the oral argument in *Fisher*, Chief Justice Roberts asked whether someone who is one-quarter or one-eighth Hispanic should be able to identify themselves as “Hispanic,” and Justice Scalia asked whether someone who is one-thirty-second Hispanic would be considered “Hispanic” by the University of Texas. Transcript of Oral Argument at 32–35, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) 2012 WL 4812586; see also *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (noting that the little girl at issue was classified as Indian even though she was only 1.2% (3/256) Cherokee). *Cf., e.g., Appiah, Race, Culture, Identity: Misunderstood Connection*, in *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 30, 79 (1998) (discussing how we can question “whether someone is really of a black race, because the constitution of this identity is generally theoretically committed . . . [and] “there can be a gap between what a person ascriptively is [racially] and the racial identity he performs”).

12. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995).

ture of race and its broad impact on social and political life. Ultimately, it privileges form over function.<sup>13</sup>

Given the continued need to eradicate racial discrimination and the various practical, political, and personal difficulties surrounding the definition of race, this Symposium Article offers an alternative frame for conceptualizing the role of race in the context of equal protection.<sup>14</sup> In the context of equal protection doctrine, race's elevated status results from its embodiment of the various factors used to designate suspect classifications: a history of past discrimination, political powerlessness, and its irrelevance to one's ability to contribute to or participate in society.<sup>15</sup> By delineating race as a category that exemplifies these obstacles to equal protection, we assume that by treating racial classifications in a given way—i.e., with heightened scrutiny—we will exhibit less tolerance toward laws that irrationally treat certain individuals differently, perpetuate a history of discrimination, or render individuals unable to effectively utilize the political process.

The problem is that as “race” has taken on a more objective, formal, and less normative quality, it has failed to serve this role. In a sense, race has become untethered from the normative values underlying its demarcation as a suspect classification.<sup>16</sup> Thus, the law no longer operates to ensure that specific traits like skin color or ancestry will not be used to perpetuate the factors justifying race's special treatment under the law, but instead that such traits are not used at all.<sup>17</sup> This ignores the fact that such traits continue to function as an obstacle—or as a basis for the denial of such values—only for some.

Focusing on the definition of “race” as the term now functions in the legal context is a losing strategy in the shadow of a Court uninterested in the racial equality of outcomes. It is potentially divisive (both among and within racial groups) and risks alienating or under-protecting less powerful racial minority groups. It has also allowed majority groups to co-opt

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13. Derek Black has argued that the Court's opinion in *Fisher* represents the “triumph of form over function in race cases, which, as a practical matter, works to the serious disadvantage of minorities.” Derek W. Black, *Fisher v. Texas and the Irrelevance of Function in Race Cases*, 57 *How. L.J.* 477, 479. (2014).

14. The ideas presented here are explicated further in a forthcoming piece, in which I advocate more generally against an identity centered equal protection jurisprudence and for a more substantive understanding of the values underlying equal protection doctrine.

15. Normally, immutability would be included here as well. I have omitted it for the reasons discussed in Part II, *infra*.

16. *Adarand Constructors, Inc.*, 515 U.S. at 239 (Scalia, J. concurring) (“In the eyes of government, we are just one race here. It is American.”).

17. As Chief Justice Roberts paradigmatically stated in 2007, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

the doctrine to serve their own interests.<sup>18</sup> Moreover, the Court's unwillingness to recognize additional suspect classifications under the current model may also foreclose a more expansive interpretation of existing categories.<sup>19</sup> The fact that ideas of post-racialism and colorblindness continue to gain political traction<sup>20</sup> does not bode well for those advocating for more aggressive application of race-based protections.

Rather than push for more under the current regime, under which race is defined monolithically, we might think about what the use of race is meant to achieve in the context of equal protection. To that end, we might look to the factors rendering race a suspect classification<sup>21</sup> and directly apply those criteria—without filtering them through the lens of race—to demarcate permissible discrimination from that which is impermissible. In other words, we would ask directly whether the act of discrimination stems from or perpetuates a history of past discrimination, affects a claimant's ability to access the political process (as a means to provide for legal protection), or is based on a trait that is irrelevant to one's ability to contribute to or participate in the context at issue.<sup>22</sup>

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18. Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 514 (2003) (“[T]he present framework inevitably embodies a conception of race that both maintains its nineteenth century meaning as an objective fact beyond the power of the court to eradicate (thereby capturing the most pernicious aspects of the meaning of race) and also strips race of its socio-historical implications, permitting, for example, whites, who continue to control America's major institutions and the vast majority of the country's wealth, to claim equal if not greater vulnerability to race-based oppression in present day America.”).

19. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 (2011) (noting that in the past several decades, the Court has limited its equal protection jurisprudence in “at least three ways—it has limited the number of formally protected classifications, it has curtailed its solicitude for classes within already protected classifications, and it has restricted Congress's power to enact antidiscrimination legislation.”).

20. See, e.g., Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L. J. 967, 968 (2010) (noting the “growing popularity of and significant societal turn toward a so-called “post-racial” ideology”); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 538 (2014) (“By all accounts, the colorblindness revolution has arrived.”); Janine Young Kim, *Resistance and Transformation: Re-Reading Mari Matsuda in the Postracial Era*, 18 ASIAN PAC. AM. L.J. 35, 38 (2013) (“Lately, the idea of a “postracial” America has captured the public imagination.”).

21. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (describing “the traditional indicia of suspectness” as being “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”).

22. This last factor implicitly acknowledges that some traits will be more relevant than others. For example, a person's weight or eyesight may have legitimate bearing on whether he or she can fill a particular position of employment, whereas the color of one's skin cannot. What about the claim by an employer that race is relevant because an individual of a minority race will be less connected professionally and/or face discrimination as an external representative of the company? Such circular reasoning would not be permissible under this framework—i.e., can't discriminate based on relevance when relevance itself is based on discrimination.

Lifting the veil of race as a suspect classification is responsive to increasing calls to eradicate racial classifications completely, can more appropriately accommodate varied racial categories and identities, can more effectively manage intragroup differences, and still allows the law to confront the realities of racism—perhaps more effectively than the existing model in the current climate. Infusing “race” with more definitive meaning in the context of equal protection also reincorporates a normative component into the doctrinal concept of race. The Court has refused to distinguish between invidious and benign discrimination, holding that strict scrutiny will apply to discrimination in both contexts.<sup>23</sup> By conceiving of race (for purposes of equal protection)<sup>24</sup> as I have described it here—and rooting it in the factors of suspect classification—the analysis can, as a functional matter, render remedial “discrimination” unproblematic, as it does not trigger any of the suspect classification factors.<sup>25</sup>

Because this Symposium pays tribute to Justice Thurgood Marshall’s role in inspiring students to establish the *Michigan Journal of Race & Law*, it is fitting to note that the approach suggested here incorporates some elements of Justice Marshall’s own approach to equal protection. Justice Marshall repeatedly expressed his disagreement with the Court’s rigid approach to equal protection analysis, rejecting (what was at the time) the application of only two predetermined levels of scrutiny.<sup>26</sup> Instead, he advocated for a “spectrum of standards” which would base the degree of care applied on the constitutional and societal importance of the interest affected and the character (or invidiousness) of the classification drawn.<sup>27</sup> Although this Article does not discuss in detail the level of scrutiny that should be applied—instead simply suggesting that heightened scrutiny

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The factors that have been used to identify suspect classifications under current doctrine need not necessarily be and are not necessarily the best substantive criteria against which discrimination should be measured, but given their role to date in the context of equal protection, they provide a clear and accessible starting point for discussion.

23. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 361–62 (1978).

24. I should emphasize here—as I have tried to do so throughout the piece—that I am by no means suggesting the irrelevance of race or denying its real importance as an organizing force; rather, I am attempting to provide it with renewed legal salience.

25. This framework may be less impactful or necessary when we are dealing with acts motivated by animus or with individual acts of discrimination—such as a state prosecutor striking a black juror based on his race. In the latter instance, “race” likely serves as an amalgamation of characteristics, including skin color, community association and language. Where, however, the allegation is that a policy or law systemically discriminates against members of a certain race, and the claimant cannot demonstrate animus on the part of an institution or the legislature, it may be more helpful to have a set of criteria by which the impermissibility of such discrimination may be judged. The framework would be most relevant in the context of ‘benign’ or remedial discrimination—those instances in which benefits are distributed on the basis of race—where animus is not alleged.

26. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 98 (1973) (Marshall, J., dissenting).

27. *Id.* at 99.

should be applied where the substantive values are implicated, and a lower level where they are not—it aligns with the notion that equal protection analysis should be less rigid in terms of the categories it defines. It also agrees that the identification of equal protection violations should be driven by the degree and type of harm inflicted, rather than a predefined, categorical level of scrutiny.

The argument that race serves, in essence, as a proxy for the criteria of suspect classification (and that the criteria can thus be applied directly to achieve certain normative ends) is distinguishable both from arguments that other characteristics, like class, can serve as proxies for race<sup>28</sup> and from arguments that race serves as a proxy for certain characteristics or actions.<sup>29</sup> Here, I intend not to substitute other criteria that serve as correlates for race, or undermine the continued salience of race, but instead to endow race with a particular substantive meaning that can more effectively fulfill its political ends. Rather than using color, phenotype, blood quantum, or other physical characteristics to define the category, I suggest that we define the category by its ability to serve as a basis for discrimination, exclusion, and disempowerment.

#### I. “RACE” AS A SOCIAL, LEGAL, AND POLITICAL CONSTRUCT

The notion of “race” has been defined in many different ways by many different disciplines. I could not possibly provide an adequate overview of those discussions in this short symposium piece. For purposes of this Article, I start from the premise that race is not a biological phenomenon, but instead a social and legal construction.<sup>30</sup> Drawing on the work of various critical race theory scholars, Ian Haney López has insightfully explained that “[r]ace can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”<sup>31</sup> Thus, elements of physical appearance and ancestry are relevant not because they are a function of racial variation, but because society and the law invest them with meaning to denote race.<sup>32</sup>

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28. See, e.g., Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277, 279 (2007) (discussing the legality, in the wake of Michigan’s decision to ban race-based preferences in university admissions, of using other characteristics, such as language and geographic location, as proxies for race); see also Brian T. Fitzpatrick, *Is the Future of Affirmative Action Race Neutral?*, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY (Samuel Bagenstos & Ellen Katz eds., 2014) (arguing that the combination of the Court’s focus on intent and its colorblindness approach suggest that “race-neutral affirmative action”—i.e., programs designed to increase minority representation without directly invoking race—must also be subject to strict scrutiny).

29. See, e.g., Philip Lee, *On Checkbox Diversity*, 27 J. CIV. RTS. & ECON. DEV. 203 (2013) (countering the notion that checked boxes—denoting racial designation—necessarily serve as proxies for different perspectives).

30. LÓPEZ, *supra* note 1, at 10.

31. *Id.*

32. *Id.*

This definition of race is not one, however, that courts in the United States have embraced. This may be, in part, because such an understanding of race is complex and not always easily administrable as a matter of law and policy. In determining Blackness (or Whiteness), Wendy Greene explains that courts in the United States have applied four metrics: physical appearance, ancestry, community recognition, and racial performance.<sup>33</sup> This is not surprising, given common societal understandings of race and the need for courts to have easily administrable means to implement race-based doctrine. Unfortunately, the need under the current model to define race by trait—to determine who will benefit from certain legal protections or privileges and when they will apply—has allowed racism, whether conscious or unconscious, to permeate the judicial construction of race.<sup>34</sup>

In spite of the volume of Supreme Court jurisprudence dealing with the relationship between race and equal protection and the issue of racial classification, as Reva Siegel has noted, the Court has never defined what a “racial classification” is or who it might include.<sup>35</sup> And if Justice Kennedy’s position is any indicator, to the extent the Court is even willing to entertain the continued use of race-based classifications, it has no interest in defining race itself.<sup>36</sup> The Court seems to suppose—as does much of the scholarship on race and the law—that there is a common, fixed understanding of race that can provide a basis for doctrine. This may be due to the long held misconception that race is a “prelegal phenomenon,” or one that the law can simply build upon.<sup>37</sup> However, the law does not simply codify or give meaning to pre-existing social categories; rather, it plays a powerful role in determining racial identity and the relative privilege that

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33. D. Wendy Greene, *Determining the (In)determinable: Race in Brazil and the United States*, 14 MICH. J. RACE & L. 143, 189 (2009); see also Rich, *supra* note 8, at 1551 (explaining that in *Nieves v. Metropolitan Dade County*, 598 F. Supp. 955 (S.D. Fla. 1984), the district court concluded that “based on its examination of the plaintiff’s ‘speech patterns, mannerisms and pronunciations of the English language’ it was not apparent that Nieves was Hispanic”).

34. See, e.g., LÓPEZ, *supra* note 1, at 39–43, 96–97 (explaining how the treatment of race in the naturalization cases of the late 19th and early 20th century demonstrate the pervasive nature of racism); cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (describing the need for equal protection to recognize the influence of unconscious racism).

35. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1362 (2011) (“[T]o date, the Court has never defined what a racial classification is.”).

36. *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring) (“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.”).

37. LÓPEZ, *supra* note 1, at 9; Lee, *supra* note 1, at 750 (“Current statutory and constitutional doctrine presupposes that the law merely reflects or recognizes race’s independent ‘reality.’”).

racial groups hold.<sup>38</sup> The problem with this arrangement is where it locates the power to make such decisions; the vision of race that emerges from the law may not align with that held by advocates for racial equality. And if the law utilizes a notion of race that is superficial, or even influenced by racism itself, it may lessen the effectiveness of legal protections based on race.

In *White by Law: The Legal Construction of Race*, Ian Haney López wrote, “[T]here is a close connection between our racial future and the legal construction of race. That future will turn on the persistence of race in the United States as a system for allocating and preserving social advantage.”<sup>39</sup> If our primary concern about race is its role in perpetuating systems of disadvantage,<sup>40</sup> perhaps we should take steps to ensure that dimension of race is not lost in the doctrinal shuffle. One might thus conceptualize “race,” even in the context of doctrine, as a tool used to create and maintain political and social disadvantage, rather than an intermediary measure that can be superficially attacked as superfluous. Under the current regime, race has no normative meaning and can therefore be appropriated by different political forces to serve their own ends. For example, anticlassificationists—those who discourage any use of race-based classifications—might paint race as an unnecessary source of societal division.<sup>41</sup> The fact that race is a social construct does little to dissuade those propagating this view. It may even bolster it: if race is something that has been created by society, surely a post-racial society can render it a nullity.

If race is reconceptualized, however, as a collection of substantive values rather than superficial traits, it is more difficult to dismiss its relevance. For example, discrimination that has been shown to reinforce a history of past discrimination or thwart access to the political process is harder to dismiss than discrimination based on skin color, which some may see as an irrelevant or superficial distinction. In this reenvisioned legal framework, the logic of anticlassificationists can transform them into unwitting champions of racial justice, as they target for dismantling classifications that create or maintain systems of oppression.

One might argue that using race as a stand-in for such values preserves the underlying values themselves from attack. However, it is also possible, particularly under the current legal regime, that offering up

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38. LÓPEZ, *supra* note 1, at 7, 14 (“On multiple levels, law is implicated in the construction of the contingent social systems of meaning that attach in our society to morphology and ancestry, the meaning systems we commonly refer to as race. The legal system influences what we look like, the meanings ascribed to our looks, and the material reality that confirms the meanings of our appearances.”).

39. *Id.* at xvii.

40. *Cf.* Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325 (forthcoming 2015) (manuscript at 3) (arguing that “everyday acts of racial classification . . . are acts of hierarchical social stratification”).

41. Reva Siegel has explained that the desire to avoid societal divisiveness is a motivating factor in the equal protection jurisprudence of several Supreme Court justices—a phenomenon she refers to as antibalkanization. Siegel, *supra* note 35, at 1278.

“race” as a proxy allows for the quiet snuffing out of such values—for example, the idea that discrimination is truly a phenomenon of the past—without any opportunity for open challenge or debate. Moreover, as other scholars have emphasized, “race” as currently understood refers to both Whiteness and Blackness,<sup>42</sup> enabling those who may enjoy certain group-based privileges to claim rights under the race moniker and to dilute the relevance of race as it serves to demarcate relative disadvantage.<sup>43</sup> For example, under the current model, Abigail Fisher<sup>44</sup> and Linda Brown<sup>45</sup> both have potentially meritorious claims, because they can both claim discrimination on the basis of race. In contrast, under the model proposed herein, Fisher’s claim would be much harder to prove than Brown’s, given the historic differential treatment of Whiteness and Blackness.

The concept of legal race advanced here overlaps some with the concept of “political race” advanced by Lani Guinier and Gerald Torres in *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*.<sup>46</sup> Political race divorces race from identity and instead aims to use race as a substantive vehicle for activism.<sup>47</sup> It categorizes individuals not on the basis of biology or skin color, but instead by the individual’s choice to be part of a larger activist agenda fighting for racial justice.<sup>48</sup> While anyone can choose to be a part of the political race project, it is driven by the exper-

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42. See, e.g., Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014); WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM 215, 228 (Ashley W. Doane & Eduardo Bonilla-Silva eds., 2003); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic, eds., 1997).

43. White, male Princeton student Tal Fortgang claimed that being told to “check” his white privilege “toes the line” of overt racism because he is being judged collectively with a certain ethnic group. Fortgang wrote that his “privilege” stems from his Jewish grandparents that escaped from Nazi Germany to America to allow him to flourish and obtain a great education, not from “‘power systems’ or other conspiratorial imaginary institutions” in America that benefit white males. See Tal Fortgang, *Why I’ll Never Apologize for My White Male Privilege*, TIME (May 2, 2014), available at <http://time.com/85933/why-ill-never-apologize-for-my-white-male-privilege>.

44. Abigail Fisher was the white plaintiff in *Fisher*, 133 S. Ct. at 2411 (2013).

45. Linda Brown was the African-American daughter of Oliver Brown, the lead plaintiff in *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955). RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America’s Struggle for Equality* 408–09 (2004).

46. See GUINIER & TORRES, *supra* note 1, at 14–15.

47. *Id.* at 15. Interestingly, the authors note that they initially used the term “political blackness,” but opted instead for “political race” as a more inclusive term. *Id.* at 14.

48. *Id.* at 300 (“People do not assume it. They *choose* it by their actions.”); *id.* at 283, 300 (“Political race helps us understand who is functionally black, whether that person identifies with blackness or not.”).

iences of people of color, and of Black people in particular.<sup>49</sup> In some respects, the legal framework proposed herein might be viewed as a way to actualize some elements of political race within the realm of equal protection doctrine.

My goal here is not to rehash discussions had by many others about the nature of race. The relevant distinction this piece attempts to make in thinking about how race is used and interpreted in the context of equal protection is one of function over form.<sup>50</sup> Camille Gear Rich has recently advocated for a more functional view of race, arguing that diversity-based affirmative action programs should take account not only of racial identity as it is formally constructed (in terms of labels or categories), but also of how racial identity operates in different contexts to ensure that the ends to which race is used as a means are actually being met.<sup>51</sup> For example, she suggests that employers should not rely solely on racial identity in effectuating diversity-related policies, but should employ “functionalist” inquiries to isolate those individuals who are truly disadvantaged by their race.<sup>52</sup> Similarly, I suggest here that one might conceive of suspect classification in a functional manner, focusing not on the qualities or traits of the group that render the group a suspect class, but on the characteristics of discrimination that warrant heightened scrutiny for any group or individual subjected to such treatment by the government.<sup>53</sup>

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49. Guinier and Torres analogize to feminism in the sense that a man can rightly claim to be a feminist, but as a movement, feminism is clearly driven by the experiences of women. *Id.* at 20.

50. Some Supreme Court cases—often seen as anomalies—have eschewed a more formalized suspect classification inquiry in favor of a more functional approach. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the Court acknowledged that “community prejudices are not static” and that “from time to time other differences from the community norm may define other groups which need the same protection.” *Id.* at 478. In determining that persons of Mexican descent constituted a “discrete class” warranting equal protection, the *Hernandez* Court looked to their specific treatment in the community—for example, the fact that their involvement in business and community groups had been marginalized and that segregation measures either were or until recently had been in place. *Id.* at 476, 479. Similarly, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court held that the undocumented status of Mexican children could not justify their exclusion from public schools. Although the Court acknowledged that their immigration status was not wholly irrelevant, it emphasized to a greater degree the extent to which the deprivation of a proper education would take an “inestimable toll . . . on the social economic, intellectual, and psychological well-being of the individual” and stand in the way of individual achievement. *Id.* at 222. In both cases, the Court focused primarily on the contextual impact of the claimed discrimination, rather than on the nature of the identity at issue.

51. 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) (functional race); see also Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. \_\_\_\_ (forthcoming 2015) (manuscript at 175) (suggesting we “consider why legal rules hinge on identities at all, and if the reasons are valid, consider what definition of identity best serves the law’s purpose.”).

52. Rich, *supra* note 51, at 185.

53. In many ways, the model put forth in this piece reflects a preference for substantive over procedural justice. Nancy Ehrenreich has contrasted the two approaches by characterizing

## II. DEFINING “RACE” AS A SUSPECT CLASSIFICATION

This section describes three criteria that underlie the classification of race as a suspect classification and which can serve as principles to guide the application of equal protection doctrine: a history of past discrimination, political powerlessness, and relevance.<sup>54</sup> I have chosen here not to focus on two other often-invoked bases for suspect classification: inclusion in a “discrete and insular minorit[y]”<sup>55</sup> and immutability.<sup>56</sup> This is primarily because they are characteristics of a group rather than related to the way in which the group classification is used.

Traditionally, in equal protection doctrine, these criteria are applied to a particular trait, such as race, to determine whether heightened scrutiny is warranted when the trait is invoked as a basis for discrimination.<sup>57</sup> Rather than filtering these criteria through group-based traits,<sup>58</sup> we might instead think about how the discrimination or exclusion at issue itself satisfies one or more of the criteria as related to any individual or group of individuals.

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substantive justice as “focus[ing] on positive rather than negative rights and liberties; emphasis[ing] substantive, not formal, understandings of both legal rules and the human interactions they regulate; defin[ing] fairness in (re)distributive, not proceduralist, terms; and acknowledg[ing] its own contingency and normativity.” Nancy Ehrenreich, *Foreword: Conceptualizing Substantive Justice*, 13 J. GENDER RACE & JUST. 533, 535–36 (2010).

54. Individuals like Abigail Fisher might use these same criteria to argue that they are being democratically excluded as a result of race-conscious admissions policies. See *Fisher*, 133 S. Ct. 2411. In response, I would suggest that (1) plaintiffs like Fisher seem to be faring very well even under the current regime; (2) exclusion in one narrow context does not rise to the level of historical or systemic discrimination required under the proposed framework; and (3) a counter to political powerlessness can be demonstrated by the number of local initiatives that have successfully banned race-based affirmative action in states like California and Michigan. See *Schuetz*, 134 S. Ct. 1623 (upholding as constitutional an amendment to Michigan Constitution prohibiting affirmative action in public education, employment, and contracting); see also CAL. CONST. art. I, § 31 (Proposition 209); MICH. CONST. art. I, § 26 (Proposal 2). Under either framework, affirmative action is most literally understood as discrimination; the question remains, however, as to whether that discrimination is permissible—to be determined under the current framework or under the model presented here. See CAL. CONST. art. I, § 31 (Proposition 209); MICH. CONST. art. I, § 26 (Proposal 2).

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

56. For a thoughtful discussion of immutability and its evolving role in the law, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. \_\_\_\_ (forthcoming 2015).

57. See *supra* text accompanying note 23.

58. For a history and broader critique of suspect classification analysis, and its internal contradictions, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004). For example, Goldberg contrasts the fact that the focus on a history of discrimination implies a remedial nature and yet, the Equal Protection Clause treats as suspect laws that discriminate against whites in the context of race discrimination and against men in the context of gender discrimination. *Id.* at 504.

A. *History of Past Discrimination*

Designation as a suspect class has often required that members of the class have been subjected to a history of past discrimination.<sup>59</sup> Historical discrimination is relevant to suspect classification insofar as it demonstrates a lack of political power over time and a failure of the legislative process to provide adequate protection against discrimination.<sup>60</sup> It can also be an indicator of prejudice or bias on the part of government officials.<sup>61</sup>

There are a number of difficulties that arise from using past discrimination as a criterion either to designate a group as a suspect class or, as this piece suggests, as independent justification for heightened scrutiny. For example, it is unclear how long the requisite historical period must be or what type or degree of discrimination is required.<sup>62</sup> Yet these problems persist whenever the question of past discrimination is being asked, regardless of the context. When past discrimination serves as a criterion for designating a particular group as suspect, however, it encourages analogy of that group's experience with discrimination to that of a group that has

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59. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682, 684 (1973) (designating sex as a suspect classification and observing that “[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination”); cf. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (finding that “unlike, say, those who have been discriminated against on the basis of race or national origin,” the aged “have not experienced a ‘history of purposeful unequal treatment’”). See generally Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 150 (2011) (“An additional factor used by courts is a group’s history of discrimination.”).

60. See Strauss, *supra* note 59, at 150 (“[a] history of discrimination is relevant to a group’s suspect status because it is connected to the group’s political power and indicates whether the legislative process has failed to protect it, warranting judicial intervention”); cf. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 443 (1985) (finding “mental retardation” is not a quasi-suspect classification because “the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary”).

61. See *infra* text accompanying note 72. See also Strauss, *supra* note 59, at 151 (“Legislators are not always immune from the public biases that have resulted from a history of discrimination against the group. . . . [A] history of discrimination can determine whether a bias exists in the legislature (which can otherwise be difficult to ascertain) and whether it necessitates judicial scrutiny.”); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 738 (1985) (“[A]lthough each of us cannot always expect to convince our legislators, we can at least insist that they treat our claims with respect. . . . , rejecting them only after conscientiously deciding that they are inconsistent with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits.”).

62. Strauss, *supra* note 59, at 151 (describing lack of clarity regarding the factor of past discrimination). Cf. *In re Marriage Cases*, 183 P.3d 384, 442 (2008) (holding, without specifying the length of historical discrimination required to be considered suspect, that sexual orientation is “ ‘a stigma of inferiority and second-class citizenship,’ manifested by the [lesbian and gay] group’s history of legal and social disabilities” that supports a finding of suspect class status. See also *id.* (“[L]esbians and gay men . . . share a history of persecution comparable to that of blacks and women”) (citing *People v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Ct. App. 2000)).

already achieved suspect status, such as racial minorities (and African Americans in particular).<sup>63</sup> That type of argument invites comparative analysis that is potentially divisive and obscures the fact that different types of discrimination may harm in different ways.<sup>64</sup>

Hashing these questions out in the context of individual cases would, as discussed below, reorient the inquiry toward empirical analysis, which courts are better suited to perform. Litigants thus need not argue that the discrimination they have suffered is qualitatively and quantitatively similar to that suffered by the formerly enslaved. Instead, the level of scrutiny applied may simply be commensurate with the degree of past discrimination they have established.<sup>65</sup> In other words, when there is reason to be concerned that current action is informed by or perpetuates a history of past discrimination, courts may require a stronger justification on the part of the government actor for its treatment of a particular individual or group.

Under this model, the basis for the claim and the level of scrutiny afforded are defined contextually and by the individual plaintiff, rather than doctrinally. In other words, a claim of discrimination is made not in conformance with the current doctrinal understanding of race, as tethered to strict scrutiny, but instead on the basis of any specific and definable characteristic that the plaintiff offers; the plaintiff must then prove that the trait embodies some or all of the substantive criteria in the context at issue.<sup>66</sup> This does not mean, however, that each plaintiff will need to create a wholly new empirical data set to support her allegation; a parsing of existing historical data will likely lend support to the most common claims. For example, should a plaintiff wish to make a claim based on skin

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63. See, e.g., *Frontiero*, 411 U.S. 677 (analogizing sex to race). See also SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 231–32 (2011) (describing analogies drawn by the feminist movement to the civil rights movement); Strauss, *supra* note 59, at 152–53 (“[T]he discrimination of any group in comparison to that of African-Americans will fall short of 100 years of enslavement followed by years of segregation and Jim Crow laws.”).

64. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 797 (2014) (“By comparing social groups to one another and sorting them into suspect, quasi-suspect, and non-suspect classes, the Court itself engages in discriminatory, hierarchical ordering of these social groups with respect to one another.”).

65. In this way, the approach suggested here may be more like the “spectrum of standards” endorsed by Justice Marshall, see *supra* text accompanying notes 26–27, or the less rigid application of equal protection in cases like *Hernandez v. Texas* and *Plyler v. Doe*, see *supra* note 50.

66. Given the short length of this symposium piece, I do not purport to describe in detail the possible implementation of such a framework. To the extent critiques suggest that such a framework would demand too much of plaintiffs or provide lesser protection, I would suggest that the current framework has not been very generous in recent years. Moreover, I think the ideas raised here serve as a productive reminder of why the Court chose to provide such categories with heightened protection and what that might mean about how the Court actually applies such doctrine today.

color, much of the data currently viewed as demonstrative of race-based discrimination would likely support her claim.

Breaking free of the terminology of “race” allows for a focus on those aspects of race that may pose specific problems for a subset of the group and which may be diluted by forcing courts to grapple with race as a broader concept. For example, Taunya Lovell Banks has written about the pervasiveness of color-based discrimination as a subset of race-based discrimination.<sup>67</sup> Under the old framework, colorism is either not distinctly recognized or must be aligned with race to receive legal protection.<sup>68</sup> In contrast, under the model proposed here, color need not be equated with some other concept of race,<sup>69</sup> but can instead be presented as an independent basis for discrimination (grounded in one or more of the factors described herein). Then, litigators can marshal data from various sources to prove that the factor is applicable to the group or claimant at issue (for example, that historically, those with darker skin have faced greater discrimination).<sup>70</sup> The ability of litigators to present cases in such a manner thus has the potential to serve an important educative function, for both courts and the public, in elucidating the specific ways in which discrimination can manifest.

This Article does not suggest that this approach will always lead to better outcomes than the current model. A weak empirical showing or a Court unwilling to acknowledge certain forms of discrimination will stymie claimants under either approach. But, as discussed throughout this Part and specifically highlighted in Part III, there are a number of advantages to the model suggested here in comparison with the current framework.

### B. Political Powerlessness

Another basis for suspect classification is political powerlessness, derived from footnote four of *Carolene Products*.<sup>71</sup> Although not specifically

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67. See Banks, *supra* note 2, at 1714.

68. *Id.* at 1731 (explaining that “judicial application of antidiscrimination law causes ‘people to frame their identities in terms of the racial categories recognized by law,’ not by reality” (quoting LÓPEZ, *supra* note 1, at 88)); Banks, *supra* note 2, at 1734 (“The court sees color claims as being subsumed by race, obscuring the way in which skin tone within a racialized group can mediate racial discrimination.”).

69. Banks, *supra* note 2, at 1711 (“[T]he government’s definition of the racial category black impedes recognition by courts that black people can be differently racialized” (footnote omitted)).

70. For example, there is data demonstrating the perniciousness of color-based discrimination (beyond the larger category of race discrimination). See, e.g., Eberhardt, Jennifer L.; Davies, P. G.; Purdie-Vaughns, Valerie J.; and Johnson, Sheri Lynn, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006) (demonstrating that defendants with more stereotypically Black features are more likely to be sentenced to death).

71. *Carolene Prods. Co.*, 304 U.S. at 152-53 n.4.

relied upon in *Carolene Products*, the language of footnote four has provided the basis for much of equal protection doctrine. In the footnote, Justice Stone wrote:

It is unnecessary to consider now . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>72</sup>

Aside from its identification of political powerlessness as a basis for heightened scrutiny, this quote supports the argument for favoring function over form. In the Court's own words, the status of the individual as part of a "discrete and insular minorit[y]"<sup>73</sup> group is only relevant insofar as it serves as a vehicle that restricts his or her ability to utilize the political process to provide necessary protections.<sup>74</sup> The definition or nature of the group itself is less important from a legal perspective than the function performed by the group status (or, in other words, the way in which the claimed basis for discrimination satisfies the substantive criteria set forth in this Part). Under the model presented here, a potential claimant need not declare or defend her membership in a group to prevail on her claim.<sup>75</sup> Instead, she can demonstrate empirically how she lacks access to the political process by virtue of her circumstances or aspects of her identity,

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72. *Id.*

73. *Id.* at 153.

74. *Id.*

75. A number of examples from the Title VII context demonstrate the difficulties a plaintiff may face under a scheme that categorizes individuals on the basis of race. See *Perkins v. Lake Cnty. Dep't of Utilities*, 860 F. Supp. 1262 (N.D. Ohio 1994) (considering in a Title VII discrimination suit evidence as to whether plaintiff qualifies as a member of the American Indian protected class, which included: plaintiff's physical appearance and belief that he is American Indian, whether his immediate family were members of any tribe and lived in an Indian community or participated in Indian cultural events, the fact that plaintiff and members of his family had been listed on birth and death certificates as "white," and defendants' concession that Plaintiff may be one-sixteenth Indian blood); *Butler v. Potter*, 345 F. Supp. 2d 844 (E.D. Tenn. 2004) (holding that "an employee who is Caucasian could not maintain claim of national origin or race discrimination, in violation of Title VII, based on alleged perception that he was of Arab, Indian or Middle Eastern descent"); *Burrage v. FedEx Freight, Inc.*, 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012) (holding that an employee who is half Caucasian and half black but alleges harassment for being considered Mexican cannot establish that he was discriminated against or harassed based on his race or color, or on a theory of "perceived" national origin).

To succeed on an intentional race discrimination claim, a plaintiff raising a claim under Title VII must prove actual membership within the group at which the alleged discrimination is targeted. See D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J. L. REFORM 87, 106–07, 109 (2013); see also *id.* at 131 (arguing that the actuality requirement "reflects an age-old conceptualization of racial identity as biological, fixed, and inherent").

whether standalone or intersectional.<sup>76</sup> Thus, the focus is not on whether the claimant is similarly situated to others<sup>77</sup> or on the nature of the claimant's identity as compared to that of others, but rather on the substantive nature or effect of the discrimination.

For some, political powerlessness is viewed as the ultimate test of the denial of equal treatment, and other factors, such as a history of past discrimination or prejudice, are important because they serve as vehicles by which people are deprived of political power.<sup>78</sup> As is the case with historical discrimination, agreement that political powerlessness must be protected against leaves many remaining questions about how political power should be measured. The Court has made clear that the numerical size of the group is not dispositive, recognizing that numbers do not always equate to political power or equal representation at different levels of power.<sup>79</sup> Other evidence considered by the Court in assessing political powerlessness has included the ability to vote, the existence of favorable legislation, and the attainment of positions of power or authority.<sup>80</sup> While all of these considerations possess quantitative and qualitative measurement difficulties, they remain present under either the old model or the one suggested here. And the hashing out of these questions on a case-by-case basis, rather than a one-time assessment made on behalf of a particular group without any empirical evidence, would lend itself to a more context-focused inquiry. It could also better account for intersectionality (e.g., skin color with gender, language, accent) and acknowledge, for example, that discrimination against Asian Americans—and within that category, further differences in

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76. For a discussion of equal protection's "class-of-one" doctrine, allowing a claimant to assert discrimination against her in her capacity as an individual, see William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435 (2013). For a more in-depth discussion of intersectionality and the law's failure, as currently structured, to adequately address intersectionality, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

77. See *Cleburne*, 473 U.S. at 439 (holding that the Equal Protection Clause "requires that the government treat all similarly situated people alike"); see also *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (emphasizing that the similarly-situated requirement applies even in the class-of-one context, where the claimant does not base her claim on membership in a particular class).

78. See Strauss, *supra* note 59, at 154 ("In many ways, the issue of political power overlaps with the earlier criteria: it is the reason we care about a group's history of discrimination or whether the group is a discrete and insular minority. Thus, some courts consider political powerlessness to be the ultimate question and view the other factors as subissues.").

79. *Frontiero*, 411 U.S. at 686 n.17 ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils.").

80. Strauss, *supra* note 59, at 154. For further discussion of how political powerlessness is best assessed, see Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. \_\_\_\_ (forthcoming 2015) and Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. \_\_\_\_ (forthcoming 2015).

treatment between subgroups<sup>81</sup>—manifests differently from that experienced by Latinos, both documented and undocumented, and that experienced by Blacks, both immigrant and American slave-descendant. Moreover, the approach suggested here may leave more room for expansive interpretation—not limited to protecting those categories that can provide a direct analogy to race—and avoid the unwanted effects that can stem from a more generalized rule, such as the equating of benign and invidious discrimination.<sup>82</sup>

Finally, to the extent that the current model is vulnerable to the criticism that political power changes over time,<sup>83</sup> the framework proposed here offers two advantages. First is its flexibility: any conclusion regarding political power would be more case-specific and thus less likely to wield far-reaching harm in the event that a court holds that a particular individual or group is not deserving of special protection. In other words, the stakes of changing course would be lower. Second, the model proposed here does not require the Court to make a generalized ruling with regard to political power for an entire group. Doing so raises not only questions of assessment and timing, but also the possibility that intragroup differences (and power differentials) will be ignored.<sup>84</sup>

### C. Relevance

Another factor that has typically been considered in determining whether a classification is suspect is whether the group's definitive trait bears on its members' ability to contribute to or participate in society.<sup>85</sup>

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81. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1143 (2007) (“Scholars have examined how the model minority myth, in particular the view of Asian-Americans as a monolithic group, may have a negative impact on affirmative action for Asian-American students, especially those who are of Cambodian, Hmong, Laotian, and Vietnamese descent.”).

82. See Andrews, *supra* note 18, at 551. Even if the broader assessment utilized under the current framework results in blanket protection as a theoretical matter—as in the case of applying strict scrutiny to race—it may have inapposite effects (for example, in the context of affirmative action) or be over or underinclusive as to certain subgroups included within the larger category (e.g., race).

83. *In re Marriage Cases*, 183 P.3d at 443 (“[I]f a group's current political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect class for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications.” (internal citations omitted)).

84. For example, one might conclude that having two lighter skinned Black males in the offices of President and Attorney General has significant meaning in the context of assessing Black political power. One might harbor the same concern with regard to white, gay men and the larger LGBT community. Such power differentials exist not only among those in a particular subcategory—i.e., middle class blacks and poor blacks or multiracial blacks and monoracial blacks—but also within the larger category of race—i.e., Asians, Latinos, Africans, and African-Americans.

85. See *Frontiero*, 411 U.S. at 686 (“[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no

The less likely that a trait is relevant to a legitimate government end, the more likely prejudice or bias is at work when discrimination occurs on the basis of that trait.<sup>86</sup> The Court has held that age<sup>87</sup> and disability<sup>88</sup> are not suspect classifications in part because, unlike race or gender, they are more likely to be relevant to a legitimate government objective.<sup>89</sup>

In the context of the model proposed here, relevance is the primary criterion on which individual acts of racial discrimination might be held unconstitutional. It may be harder to tie individual actions to larger ramifications regarding political power, but it can surely be proved as an empirical matter that the basis for the discrimination at issue was or was not an irrelevant trait or characteristic. The idea that some characteristics, like left-handedness or weight,<sup>90</sup> should necessarily receive less protection than others, like race, incorrectly presumes that equal protection is a zero-sum game. The limitation to this factor need not come from the decision to establish only some class definitions as suspect; instead, a natural cabining will result from the fact that some traits are more likely to be relevant to state action than others.<sup>91</sup>

Further probing of the relevance factor reveals a distinction in the mode of analysis applied under the current and proposed models. For example, a claim that “I was discriminated against because I am Black” and a claim that “I was discriminated against on the basis of a trait that is irrele-

relation to ability to perform or contribute to society.”); *cf. Cleburne*, 473 U.S. at 442 (1985) (“[I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world.”); *Mass. Bd. of Ret.*, 427 U.S. at 313 (1976) (“[The aged] have not . . . been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”).

86. Strauss, *supra* note 59, at 165.

87. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (“[U]nlike government conduct based on race or gender, [age] cannot be characterized as ‘so seldom relevant to the achievement of a legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.’” (quoting *Cleburne*, 473 U.S. at 440)).

88. *Cleburne*, 473 U.S. at 442 (holding that the mentally disabled “have a reduced ability to cope with and function in the everyday world” and that “the States’ interest in dealing with and providing for them is plainly a legitimate one”).

89. *Kimel*, 528 U.S. at 83; *Cleburne*, 473 U.S. at 442.

90. For example, there may be some instances in which discrimination based on weight is acceptable, given safety concerns or the overall weight capacity of a transporting vehicle. In other instances, however, an individual’s weight would be wholly irrelevant to his or her ability to perform a given task. For a discussion of how weight-based discrimination in currently treated under antidiscrimination law, see Jessica Clarke, *Against Immutability*, YALE L.J. (forthcoming).

91. This argument is not meant to diminish the origins of the Equal Protection Clause in Reconstruction or its deep roots in the history of African American slavery. And that may be reason—under the historical discrimination prong—to be particularly skeptical of some forms of discrimination. (Although it may also be a demonstration of how the notion of racial discrimination has strayed from its roots, given that it is not limited to descendants of slavery, even within the realm of blackness.) That said, equal protection has not remained confined to its origins and should continue to adapt to new invidious forms of discrimination.

vant to my ability to perform the task at hand” trigger different inquiries. The former is vulnerable to questions about whether the claimant is in fact Black or was perceived to be Black by the discriminating party<sup>92</sup> in addition to whether there was a compelling reason for the discrimination. In contrast, the latter inquiry avoids any need to assess the identity of the complainant, or test the validity of her asserted identity. Instead, it directly targets the reason for the discrimination and initiates an inquiry into the basis for the racism, aimed at exposing prejudice or bias. In many cases, this distinction may be irrelevant—for example, in the case of a complainant who is clearly perceived by others to be Black and self-identifies as Black.<sup>93</sup> However, as demographics change and skepticism surrounding racial identification increases,<sup>94</sup> it may be helpful to base doctrine on characterizations that are less prone to dispute, at least prior to a debate on the merits of the claim itself.

A shift away from identity-based doctrine may also avoid unnecessary divisions with regard to the types of harm that receive legal recognition. For example, Nancy Leong has written that courts do not adequately recognize discrimination against multiracial individuals as it pertains specifically to their multiracial background.<sup>95</sup> Some take issue with this argument, arguing that such discrimination is often not based on an external perception of multiraciality—as distinguished from affiliation with a minority race, more generally, or the taint of blackness, specifically—and, even if it were, the specific racial elements of the discrimination are irrelevant as long as the court recognizes that some race-based discrimination has occurred.<sup>96</sup> Under the framework proposed herein, this debate is unnecessary: it does not matter whether the discrimination occurred because the individual was perceived to be multiracial or perceived to be Black; the issue is only that the discriminator demonstrated bias based on a particular

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92. See, e.g., *Perkins*, 860 F. Supp. at 1277; *Butler*, 345 F. Supp. 2d at 844 for examples of plaintiffs whose racial affiliation was questioned in the Title VII context; see also Greene, *supra* note 75, at 106–07, 109.

93. See Greene, *supra* note 75, at 87; Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being “Regarded as” Black, and Why Title VII Should Apply Even If Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (2005).

94. See Appiah, *supra* note 11; see also *Schuetz*, 134 S. Ct. at 1634 (“[I]n a society in which [racial] lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own.”).

95. Leong, *supra* note 8, at 470 (discussing how “our legal system consistently fails to recognize racism directed at those seen as racially mixed”).

96. Tanya Kateri Hernández, *Multiracial in the Workplace: A New Kind of Discrimination?*, in *Gender, Race, and Ethnicity in the Workplace: Emerging Issues and Enduring Challenges*, ed. Margaret F. Karsten (Santa Barbara: Praeger ABC-CLIO, forthcoming 2015) (manuscript at 1–3); Rich, *supra* note 8, at 1533 (arguing that Leong’s analysis is flawed because experiencing discrimination based on one’s racial-identification patterns is not unique to multiracial individuals and because Leong fails to acknowledge that many multiracial individuals shift between multiracial and monoracial identities and, when their physical characteristics allow, will opt into the monoracial category that “best serves their needs in a particular context”).

trait, like skin color; her particular interpretation of the skin color—whether black or multiracial, for example—is irrelevant.<sup>97</sup>

A convincing race-neutral reason offered for the discriminatory act would be fatal under either approach. Under equal protection doctrine as it exists today, it would be extremely difficult to overcome such a proffer, given the intent requirement imposed by *Washington v. Davis*<sup>98</sup> and elaborated upon in subsequent cases like *Personnel Administrator of Massachusetts v. Feeney*.<sup>99</sup> The primary difference between the two approaches is that the one proposed by this Article does not require any inquiry into the nature of the claimed identity.<sup>100</sup> In other words, a plaintiff need not prove that she is Black;<sup>101</sup> she need only describe the basis for the discrimination and demonstrate that the effects of such discrimination satisfy one or more of the suspect classification criteria.

### III. LOOKING BEHIND THE VEIL OF “RACE”

This Part aims to explore possible advantages and critiques of analyzing discrimination claims by applying the suspect classification criteria directly, rather than asking whether such discrimination is based on race. It does not address every possible aspect of implementation—and acknowledges that the proposal would not solve every administrative difficulty of the current model—but it does attempt to address the major differences between the substantive approach described herein and the current approach.

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97. This does not mean, however, that claims must always be made on an individual, rather than a group basis. Claims can certainly still be raised on behalf of a group, but claimants would provide a more substantive description of the shared basis for discrimination—for example, skin color or a shared history of discrimination rather than “race.”

98. *Washington v. Davis*, 426 U.S. 229 (1976) (holding that discriminatory effects, without any showing of discriminatory intent, do not suffice to prove an equal protection violation).

99. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that to demonstrate discriminatory purpose, the plaintiff must show that the decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

100. The shared basis for discrimination will most often be something that can be perceived externally, given the nature of discrimination. Thus, self-description or self-perception of one’s racial affiliation will not provide an independent basis for a claim unless the claim specifically relates to discrimination based on the individual’s decision to self-classify in a particular way.

101. *Cf.*, e.g., *Malone v. Civil Serv. Comm’n*, 646 N.E.2d 150, 151 n.4 (Mass. App. Ct. 1995) (discussing a “workable” test used by the lower court to adjudicate racial identity claims: “(i) visual observation of physical features; (ii) documentary evidence establishing black ancestry, such as birth certificates; and (iii) evidence that the Malones or their families held themselves out to be black and are considered black in the community”); *cf. also Perkins*, 860 F.Supp. at 1276 (stating that African-Americans do not have to demonstrate that their relatives lived in Africa, or that they visit the site of their roots, or that they are involved in any kind of cultural activities associated with Africa. They only have to appear to be African-Americans to be deemed members of that protected class).

A. *Advantages*

Tempering the need to be responsive to current legal and political realities with the need to challenge such realities, this approach is responsive to the dominance of anticlassification theory<sup>102</sup> and still allows considerable room to combat discrimination based in whole or in part on race as we understand it today. Because it places less emphasis on the definition of racial categories, the proposed framework is less susceptible to concerns regarding the ascendant regime of racial self-identification.<sup>103</sup> Furthermore, it allows and potentially forces courts to grapple in a substantive way with intragroup differences, such as color—which, under this model, would provide the specific basis for the claim. Factors like color are often subsumed or rendered invisible by the current model because it has no effective means for providing significance to factors that do not map precisely on to existing categories.<sup>104</sup>

Under the Court's current jurisprudential approach, race has no independent substantive meaning; it merely serves to indicate the presence of impermissible considerations.<sup>105</sup> As a result, race is a malleable concept that is susceptible to superficial interpretation. In other words, if one focuses on the abstract notion of race, without any political or social context, it is easier to diminish its potential relevance or highlight its inherent irrationality as a basis for discrimination (in the context of affirmative action, for example).<sup>106</sup> As Lani Guinier and Gerald Torres have written, "In the view

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102. 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."); see also Tanya Kateri Hernández, Opinion Pages: Room for Debate, *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-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.").

103. Lucas, *supra* note 8, at 1259–63 (describing fears that catering to racial self-identification will undermine legal protections); Rich, *supra* note 8, at 1569 (noting "the growing influence of models of race that privilege the right of racial self-definition, as opposed to privileging involuntary racialization triggered by physical traits and social ascription").

104. See Banks, *supra* note 2, at 1713 (describing courts' inability to develop a coherent approach to colorism claims).

105. See LÓPEZ, *supra* note 1, at 10 ("[L]aw constructs race."); see also *supra* text accompanying notes 35–38.

106. Cf. *Parents Involved*, 551 U.S. at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

of neoconservatives, race is merely skin color and is thus meaningless and ignorable.”<sup>107</sup>

By deemphasizing the categorical role of race, this Article accounts for the fact that race has different meanings to different people and that categorization by race is not a simple matter, regardless of the metric.<sup>108</sup> Racial affiliation cannot be determined based on phenotype or color alone, and self-identification may not always align with external perception.<sup>109</sup> And there may be reasons that members of same racial category should not necessarily receive similar treatment—even if they share a similar phenotype—given their differing backgrounds or experiences. Kevin Brown and Jeannine Bell have argued, for example, that “ascendant” Blacks—those with two native-born Black parents or who have a more direct connection to America’s history of racial discrimination—should be treated differently in the context of affirmative action from multiracials with some Black heritage or Black immigrants. Brown and Bell contend that treating all of these groups as Black, without further categorization, 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.”<sup>110</sup> Angela Onwuachi-Willig has similarly observed that “legacy blacks”—those with four grandparents born in the United States and who descended from American slaves—have been increasingly excluded from elite colleges and universities.<sup>111</sup> She maintains, however, that there are important reasons for the continued inclusion of first and second-generation Blacks and mixed-race students.<sup>112</sup> There are some experiences that everyone raced as Black may share—such as those related to phenotype—but others that will vary widely among members of the group.<sup>113</sup> By the same token, there are some individuals, such as those of Middle Eastern descent or some Latinos, who are legally

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107. GUINIER & TORRES, *supra* note 1, at 13.

108. Even when measured by skin color, the understanding of race can be far from simple. See Hernández, *supra* note 2, at 1102–10, 1118–28 (describing the issues stemming from Latin American census schemes, which are based on skin color).

109. See Lucas, *supra* note 8, at 1263–67 (discussing, for example, the different ways in which multiracial individuals identify and are perceived racially).

110. 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, 1231 (2008).

111. Onwuachi-Willig, *supra* note 81, at 1160.

112. *Id.* at 1180. Onwuachi-Willig’s more nuanced response to the disproportionate representation of first and second-generation blacks and mixed-race students is to suggest that while race is still relevant in the context of admissions as an indicator of an underrepresented perspective, the academy must also revisit its conception of merit and engage in more aggressive recruitment measures. *Id.* at 1225.

113. *Id.* at 1157 (describing that, in the context of admissions, not all blacks are created equal and that studies have shown there are “educational, economic, and cultural differences between legacy Blacks and non-legacy Blacks[.]”).

required under the current framework to identify as white but who “argue that their experiences with race discrimination make their experiences more similar to racial minorities.”<sup>114</sup> Given its emphasis on experience over label, or function over form, the more substantive approach described above provides recourse for those in such a racially liminal position.<sup>115</sup> It would also have the potential benefit of bringing to light specific histories of discrimination that have been overshadowed by more prominent stories and have received less attention.<sup>116</sup>

Under current equal protection jurisprudence, race functions as one unitary category, without the ability to account for intragroup differences or differences in experience between traditionally defined racial groups.<sup>117</sup> By separating out the substantive concerns about classifications based on race, as defined here by the suspect classification criteria, we let the factors themselves determine when a heightened level of protection is warranted. The varying levels of protection that result may not fall neatly along traditional racial lines—in part because there may be reason for subcategories of higher protection within a currently conceived racial group—but they will be substantively justified.

Yet, this model does not erase the relevance of race as a broader phenomenon. While the label of race may seem less prevalent in this model, its essence—as a powerful force in creating and reinforcing social hierarchy—drives the entire framework. Even where discrimination is based purely on external perception, it is rarely, if ever, based on “race” per se—instead, it is based on factors like those used by courts to determine race: physical appearance, broader community recognition, and racial performance.<sup>118</sup> The construct proposed here does nothing to diminish protection

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114. Rich, *supra* note 8, at 1543.

115. Camille Gear Rich uses the term “racial liminals” to refer to those who conscientiously object to American definitions of racial identity. *Id.* at 1542.

116. See, e.g., Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1595-96 (2005) (explaining that some immigrant experiences have been marginalized or excluded from the dominant national narrative regarding immigration and citizenship).

117. In other words, the Court’s view of treatment based on race does not turn on the race at issue; it all falls into the larger, indistinguishable category of race-based discrimination. See, e.g., *Parents Involved*, 551 U.S. at 748 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Crosby*, 488 U.S. at 493 (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

118. See, e.g., D. Wendy Greene, *Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 125 (2013) (“Based upon one’s discernible characteristics, like skin color, hair texture, behavior, dress, accent, speech, language, and names, everyone is perceived by an observer at any given moment as a particular race, color, ethnicity, or gender.”); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145-46 (2004) (explaining the process by which individuals associate certain traits – including physical, visible features – with a certain racial or ethnic group); Lee, *supra* note 1, at 750 (explaining that, in *Shaw v. Reno*, the majority opinion “equated race with skin color” and the dissents “equated

against discrimination based on external perception. It does, however, provide an opportunity to hone our understanding of what such discrimination entails and whom it impacts most.

Turning inwards, another benefit to focusing on the nature of the discrimination rather than racial categorization is that it does not require claimants to declare membership in a group. Nor does it force the drawing of a line (in describing the group) that will include some and exclude others from membership. Moreover, it evades the imposition of identity harms that can result from forcing individuals, either directly or indirectly, to claim affiliation with a particular group.<sup>119</sup> Identity-driven narrative in the law can also negatively inform individual identity as it cements the denigrated status of those possessing a certain trait into doctrine.<sup>120</sup>

A model that focuses on the substantive rather than the categorical importance of race is compatible with the antibalkanization principle identified by other constitutional law scholars.<sup>121</sup> Reva Siegel, for instance, has described antibalkanization—the perspective applied to racial classifications by Justices Kennedy and O’Connor—as favoring those measures that advance social cohesion and discouraging those policies that threaten social cohesion.<sup>122</sup> The model proposed by this piece might have some appeal from the antibalkanization perspective to the extent that racial identity politics are perceived as divisive.<sup>123</sup> Also, like the model described herein, antibalkanization interprets equal protection “purposively and structurally,”<sup>124</sup> concerned with the ends to which race is used more than with the metric of race itself. Also in the spirit of minimizing unnecessary race-based tension, Justin Driver has suggested that there may be some instances in which couching judicial decisions in non-racial terms may better serve

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racial difference with experiences of past discrimination”). The point is that ultimately, both courts and other individuals are relying on something more specific to figure out what “race” means.

119. See Lucas, *supra* note 8, at 1267–68 (describing the psychological and emotional harm generated by refusing multiracial individuals the ability to identify themselves as multiracial).

120. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements*, 150 U. PA. L. REV. 419, 422 (2001) (“Much of what made it intelligible (as well as denigrating) to be a ‘colored person’ or a ‘homosexual’ or a ‘retarded person’ was the line drawn by law and the discourse stimulated by legal actors.”); see also SONU BEDI, *BEYOND RACE, SEX, AND SEXUAL ORIENTATION* 47 (2013) (“Victimhood must be placed front and center to gain suspect class status.”).

121. See, e.g., Siegel, *supra* note 35, at 1281; Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 799–800 (2006); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74–75 (2003).

122. Siegel, *supra* note 35, at 1281.

123. Cf. Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1411 (2008) (arguing that the authenticity judgments inherent in the government’s attempts to delineate racial categories are potentially divisive).

124. Siegel, *supra* note 35, at 1301.

the ends of justice.<sup>125</sup> Thus, there may be both subjective and objective appeal to such an approach.

The potential import of this model can be demonstrated by considering the 2007 case *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>126</sup> under both the current and proposed approaches. By way of brief factual summary, school districts in Seattle, Washington, and Louisville, Kentucky, had formulated student assignment plans that relied in part on racial classifications.<sup>127</sup> The two districts had different histories with regard to racial segregation—Seattle having not experienced de jure discrimination<sup>128</sup> and Louisville having been subject to a desegregation order and subsequently found to have achieved unitary status<sup>129</sup>—but both districts were characterized by a fair amount of de facto segregation.<sup>130</sup> It was in this context that the school districts formulated the student assignment plans; the goal of such plans was to address such racial segregation.<sup>131</sup>

In an opinion authored by Chief Justice Roberts, the Court struck down both assignment plans as unconstitutional.<sup>132</sup> The reasoning of his opinion tracked the current state of equal protection doctrine. The Court first focused in on the fact that race was a determinative factor in assigning students to schools.<sup>133</sup> Unsurprisingly, and as a result of past precedent, the Court found it unnecessary to consider the way in which race was being used—i.e., as a benign or invidious consideration.<sup>134</sup> As a result, the Court applied strict scrutiny and rejected the notion that “racial balancing” (even if labeled as “racial diversity”) could constitute a compelling interest to justify the use of race.<sup>135</sup> The Court also criticized the means used by the

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125. Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012). Driver also acknowledges that there are other instances in which specifically acknowledging racial identity may serve an important purpose. His main point is that judges should be more thoughtful about how and when they invoke racial identification.

126. 551 U.S. 701 (2007).

127. *Id.* at 711-12, 715-17.

128. *Id.* at 712; *see also id.* at 806-07 (Breyer, J., dissenting) (“In Seattle, the plaintiffs alleged that school segregation reflected not only generalized societal discrimination and residential housing patterns, but also *school board policies and actions* that helped to create, maintain, and aggravate racial segregation.” (emphasis in original)).

129. *Id.* at 715-16.

130. *Parents Involved*, 551 U.S. at 806 (Breyer, J., dissenting) (“In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact.”).

131. *Id.* at 806 (Breyer, J., dissenting) (“The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression.”); *see also id.* (“In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact.”).

132. *Id.* at 748.

133. *Id.* at 723.

134. *Id.* at 725.

135. *Id.* at 730-33.

school districts, explaining that the school districts' failure to consider race-neutral alternatives and the racial categorizations used by the assignment plans failed to satisfy strict scrutiny's narrow tailoring requirement.<sup>136</sup>

Under the proposal made herein, a wholly different inquiry would occur. The primary focus for the Court's analysis would be whether the student assignment plans' operation stemmed from or perpetuated a history of past discrimination, affected the claimant's ability to access the political process (as a means to provide for legal protection), or was based on a trait irrelevant to the claimant's ability to contribute to or participate in the context at issue. A White plaintiff could no longer make a claim based on "race" alone; she would have to claim one of the above factors as the basis for her claim. Given the history of Seattle and Louisville, it likely would be difficult for her to establish the first; it is also unlikely that she would attempt to argue that her assignment somehow obstructed or diluted her ability to effectively utilize the political process (especially given the broader demographics of both districts, both of which have a substantial white majority).<sup>137</sup> Therefore, the third factor would likely appear most promising. Here, however, is where the shift away from "race" as it is currently utilized becomes particularly salient. Unlike in the majority's analysis, the goal of racial balancing or racial diversity would not be proscribed as a de facto matter, because "race" alone would no longer serve as the trigger for constitutional illegitimacy. Clearly, selection on the basis of race is not irrelevant to the goal of racial diversity.<sup>138</sup>

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136. *Id.* at 733-35. In this context, the narrow tailoring requirement lends itself to a host of perverse results. Should the school district's use of race have too great an impact, that may suggest the use of racial classification is impermissible; however, if the use of race has too minimal an impact on school enrollment, that may also "cast[ ] doubt on the necessity of using racial classifications." *Id.* at 734. Similarly, making distinctions among races (or choosing to be particularly concerned about particular racial distinctions) may raise concerns under the current approach. *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.").

137. See U.S. CENSUS BUREAU, *American Community Survey Demographic and Housing Estimates: 2005-2007*, <http://factfinder.census.gov> (report generated Jan. 25, 2015) (estimating the population of Seattle, Washington to be 73.6% white from 2005 to 2007); U.S. CENSUS BUREAU, *American Community Survey Demographic and Housing Estimates: 2008-2012 American Community Survey 5-Year Estimates*, <http://factfinder.census.gov> (report generated Jan. 25, 2015) (estimating the population of Louisville/Jefferson County, Kentucky to be 77.4% white from 2008 to 2012).

138. Cf. *Parents Involved*, 551 U.S. at 733 (citing the Ninth Circuit's en banc opinion ("[W]hen a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution.")).

The clear next question posed by a devil's advocate would be: why then could a state-sponsored white supremacist group not claim its own parallel rationale, holding the exclusion of African-Americans to be a necessary means toward its own ends. The answer lies in the fact that a plaintiff could likely challenge such discrimination under the first (or possibly second) factors. Moreover, courts could easily distinguish between measures that are purely exclusionary and

As mentioned above, there are also institutional reasons to support such a substantive approach. Requiring courts to analyze empirical data or evidence regarding whether a certain phenomenon, such as historical discrimination, has been shown utilizes judicial ken more appropriately than the task of defining race or deciding who qualifies as a member of a given race. And, given the Court's current hesitance to bestow suspect classification status on any new group, creating doctrinal stagnation, this model allows the law to evolve in more interesting ways, providing a basis for more expansive protection.<sup>139</sup>

Last, and as alluded to in Part II, this model can serve an important educative function for the courts and the public. Many people are rarely exposed to the discussions underlying the designation of a suspect class and thus have little occasion to think about why we care about discriminating on the basis of race (or any other category for that matter). This approach would force litigants to frame their arguments to emphasize the nature of discrimination and to include a demonstration of how such discrimination operates in practice. Thus, it forces courts to grapple with the substantive impact of discrimination. It also facilitates public exploration of various forms of discrimination and its effects in a way that the current model—because it subsumes that inquiry in the term “race,” which is all the public sees—does not require.

### B. Critiques

One major critique of this approach centers on the role that identity-focused doctrine may play in collective organizing or mobilizing. As Kimberlé Crenshaw has written, “History has shown that the most valuable asset of the Black community has been its ability to assert a collective identity and to name its collective political reality.”<sup>140</sup> Although this statement may be true, there are still valid reasons to embrace a framework for equal protection that is not rooted in identity. Moreover, it is not necessarily true that the understanding of race that is most politically or socially advantageous is also the best from a legal standpoint.<sup>141</sup>

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those that may exclude some, but have an independent substantive rationale, such as diversity or integration.

139. Cf. Pollvogt, *supra* note 64, at 802 (describing how the categorical approach “‘freezes’ our understanding of discrimination and prejudice, reducing sensitivity to societal evolution in those areas” whereas “trait-relevancy analysis is fact- and context-specific, allowing more nuanced and nimble determinations over time”).

140. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988). See also Andrews, *supra* note 18, at 511 (noting that “many liberal and critical race theorists argue [ ] that, to ensure redress of substantive conditions of oppression, the last thing we need is less of a focus on race. Instead, we need to focus more attention on explicitly racial concerns.”).

141. Lucas, *supra* note 8, at 1291–92 (arguing against the conflation of identity and doctrine, given the different purposes served by each); cf. Rich, *supra* note 8, at 1561 (“The state should not assume that the racial-designation decisions it causes individuals to make for adminis-

The centrality of identity to race-based organizing makes sense against the backdrop of a movement and corresponding doctrinal shifts that were also based on identity. But because we live in a world where issues of categorization have become more complex and intersectionality must be increasingly recognized, organizing methods may need to adapt regardless. It may no longer make sense for bonds to be forged based purely on a more superficial or phenotypical understanding of race (i.e., skin color); instead, as Guinier and Torres argue, it may make sense to organize around race as a political concept.<sup>142</sup> Existing understandings of race can and should still be a part of that story—in part because they inevitably inform how race operates within the sociopolitical sphere—and a shift to the proposed framework does not imply their irrelevance, nor does it stand in the way of those who wish to form a collective identity. The approach suggested herein recognizes the impact of racial discrimination and attempts to provide substance to the legal construct of race that could just as easily be embraced by those organizing in the name of racial justice.

Yet, it does not single out race by name. This is not to diminish the role or importance of race, but instead to acknowledge that the notion of “race” alone has no substantive meaning in the context of equal protection doctrine as currently constructed by the Supreme Court. Moreover, focusing on the more superficial aspects of race makes it easier for proponents of colorblindness to argue that the salience of race is unnecessary. To the extent that race is a political identity, the law does not currently embrace such a notion of race. Yet under the model suggested here, it is possible not only for race to assume a political dimension in the context of law but also for broader alliances to be formed among similarly marginalized groups of individuals.

And what of the fact that private citizens and state actors discriminate on the basis of race every day? Doesn’t that make “race” real and require its inclusion as a cognizable basis for a constitutional claim? Even that statement requires further elucidation of what is meant by race. It might mean, for example, that an actor is discriminating because he perceives an individual to possess certain physical attributes signaling affiliation with a particular group. Yet that alone is not sufficient to violate equal protection: for example, someone might discriminate against a person with blond hair, perceiving her to be less intelligent than a person with brown hair. There

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trative purposes prevent the individual from preserving her private-race understandings and the ability to control her public race.”). The law’s use of race can also have negative effects in the context of identity; *see, e.g.*, James, *supra* note 42, at 425 (explaining how the diversity rationale used to support affirmative action cultivates white identities grounded in a sense of entitlement and victimhood, thus further subordinating people of color). To avoid this phenomenon, James suggests that universities provide a more substantive conception of diversity, rather than abandon race altogether. *Id.* at 505–11.

142. Note that organizing based on political concepts and phenotype (observable, shared characteristics) need not be mutually exclusive.

is something different about race—namely the factors that lead to its designation as a suspect classification. Thus, the real salience of race in the doctrinal context is ultimately about its roots in past historical discrimination, its linkage to political powerlessness, and the fact that it has no bearing on the ability of individuals to contribute to or participate in society. Hence, the framework prescribed herein.

A devil's advocate might inquire as to whether, under this framework, a state actor that wishes to discriminate need only come up with some reason that the alleged basis for the discrimination (i.e., skin color) *is* in fact relevant. Because discrimination is only problematic when it runs afoul of one of the substantive criteria, one might view the framework as more susceptible to such logic—for example, that a particular trait *does* actually affect one's ability to contribute to society and thus discrimination on the basis of that trait is justifiable. Although under this framework courts would not have made such a preliminary judgment as a categorical matter, such claims would still be disprovable as an empirical matter. Moreover, a framework based on rooting out more pernicious types of discrimination would not accept other forms of discrimination as a defense for discrimination in the instant case. In other words, an employer could not rightfully prefer a White employee over a non-White employee because the latter's minority status may render her networks smaller and her access more limited (as a result of external or societal discrimination).

Unlike other models, which posit that other group-based characteristics, such as class, can approximate race (for example, for purposes of assembling a racially diverse university cohort), this model does not purport to rely on some other element that correlates to race.<sup>143</sup> To the contrary, this Article would endorse Justice Blackmun's statement that, "In order to get beyond racism, we must first take account of race. There is no other way."<sup>144</sup> Viewed in that light, this framework might be understood as not supplanting race, but offering another means to "take account of race" by assigning it a particular substantive meaning. This is a different path towards eradicating racial discrimination, but from a pragmatic perspective, may be just as effective. It also casts a wider net and may capture individuals who would not be explicitly recognized under the current regime.

Even though race is a social and legal construction that has been used to subordinate and oppress, as mentioned at the outset of this section, the ability to organize along racial lines has historically served as an incredible political asset. Yet the use of race in the legal arena may no longer be serving its intended purpose—or at least not the purpose that many groups

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143. Cf. Fitzpatrick, *Is the Future of Affirmative Action Race Neutral?*, *supra* note 28, at 10, 14–17 (questioning the constitutionality of race-neutral plans that use characteristics intended to correlate to race, such as family income or residence in urban areas, in lieu of explicit racial classifications).

144. *Bakke*, 438 U.S. at 407 (1978) (Blackmun, J.).

organizing along such lines would desire. Racial demographics are changing and social understandings of race are evolving, due in part to shifting political winds and the increasing dominance of colorblindness. While the solution proposed here is imperfect, it is certainly worth discussing, if for no other reason than to continue to generate new ideas in a political climate that has become increasingly hostile to the use of racial classifications.

#### CONCLUSION

Race matters for many different reasons and the nature of its importance may differ, given the context. In the context of equal protection doctrine, race matters because of the ways in which it has been and can be used to subordinate and oppress groups of people and, ultimately, individuals. Yet, without defining race, it is difficult to ensure that racial classifications serve their intended purpose. Moreover, a superficial understanding of race leaves it vulnerable to those who would diminish its greater role in sustaining systemic disadvantage. In this piece, I have attempted to appropriate characteristics developed by doctrine itself to give race substantive meaning that can be gratified directly, without relying on the filter of race. In doing so, I propose a model that emphasizes the political and historical aspects of race, but also leaves room for other groups—not to forcibly analogize their own distinctive experiences to those of African Americans, but instead to explain how their own experience with discrimination justifies particular treatment under the Equal Protection Clause.<sup>145</sup> Ultimately, this approach not only offers the possibility of continued work towards racial justice in the era of perceived post-racialism, but also an educative space to explore the many faces of discrimination.

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145. See *Plyler*, 457 U.S. 202; *Hernandez*, 347 U.S. at 478.