CRITICAL MASS AND THE PARADOX OF COLORBLIND INDIVIDUALISM IN EQUAL PROTECTION

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INTRODUCTION

Although it is the dominant paradigm in equal protection,[1] colorblind individualism bears little resemblance to the lived experiences of race.[2] Within the colorblind individualist framework, race-conscious selection policies presumptively violate equal protection because they place the racial group above the individual.[3] And yet, a

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1 *See* Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1091 (2002) ("It is now abundantly clear that a majority of the current Supreme Court views the Equal Protection Clause as a font of individual rights protection rather than as a safeguard for minority group interests."); Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1198 (2000) ("[T]he central principles that characterize [colorblind individualist] discourse include the notions that individuals, and not groups, are the primary political units and bearers of rights . . . ."). *See also* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4, 6 (1977) (contending that equal protection "presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member" and, therefore, "presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant"); *cf.* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993) (discussing the liberal individualist critique of race-conscious voting legislation on the grounds that it emphasized the group above individual rights).

2 *See generally* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (exploring the role that "color blindness discourse" plays in legitimating and rationalizing racial stratification).

3 Higgins & Rosenbury, *supra* note 1, at 1198; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) (observing that "[a]t the heart of the Constitution's

substantial body of social science points to the importance of racial minority groups for cultivating the "individuality" of the persons who comprise them.[4] This research shows, for instance, that having a meaningful number of racial minorities in institutional settings can affect the likelihood that minorities in those institutions will perceive themselves, and be perceived by others, in individual terms.[5]

This Article explores this connection between individuality—what I define here as the personal expression and growth that occurs in an environment free of tokenism, racial stereotypes, and stigma[6]—and the environmental presence of other people of color. Contrary to the normative assumptions that underlie colorblind individualism in equal protection, using racial classifications as a tool for building racial *groups* in institutions can *reduce* the salience of race.[7] Having a minority group presence creates a social context in which persons of

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guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class" (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995))) (emphasis added) (internal quotation marks omitted); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Because the Fourteenth Amendment 'protect[s] *persons*, not *groups*,' all 'governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (questioning "judicial protection against classifications based upon . . . racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group").

4 *See* Jay Rothman & Michal Albertstein, *Individuals, Groups and Intergroups: Theorizing About the Role of Identity in Conflict and its Creative Engagement*, 28 OHIO ST. J. ON DISP. RESOL. 631, 641 (2013) ("When outside forces, such as culture and community, have the most powerful shaping influence on an individual's identity, then its social quality provides the most relevant perspective."); Linda R. Tropp et al., *The Use of Research in the* Seattle *and* Jefferson County *Desegregation Cases: Connecting Social Science and the Law*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 93, 101 (2007) ("Members of racial minority groups, who have long been subjected to racial stereotyping, prejudice and discrimination, are likely to encounter negative effects of racial categorization in their everyday lives."); Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1067 (2004) ("Interactions in a range of such settings in which racial discrimination is a perpetual concern—such as employment, health care, and the criminal justice system—tend to be characterized by the presence of factors that promote behavioral confirmation and the absence of factors that might disrupt the process.").

5 *See infra* Part II.

6 This definition tracks the Court's interpretation of the equal protection guarantee in cases adjudicating the constitutionality of racial classifications in affirmative action. *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 493–94 (1989) (reaffirming that the purpose of equal protection is to avoid use of racial classifications that convey racial prejudice, stereotypes and stigma); *cf. Grutter*, 539 U.S. at 333 (identifying tokenism as one harm of low minority representation, which leads minorities to function as "spokespersons for their race").

7 *See infra* Part II.

color are more likely to view themselves, and to be viewed by others, in terms that move beyond racial categories, consistent with equal protection's normative goals.[8] For racial minorities, therefore, achieving equal protection's "colorblind" notions of individuality paradoxically depends on a racial predicate—that institutions race-consciously seek to enroll racial groups that are large enough to minimize the significance of race.[9]

This Article unpacks this paradox in the context of efforts to achieve a meaningful presence of underrepresented racial minority groups—referred to here as "critical mass"—in institutions of higher education.[10] Higher education is a natural focus for this discussion because of the acknowledged role that critical mass plays in securing the educational benefits of diversity[11] and because higher education is the site for continuing disputes about its constitutionality.[12] Tracking Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*,[13] Justice Sandra Day O'Connor in *Grutter v. Bollinger* acknowledged the role that critical mass could play in enriching the educational environment in colleges and universities.[14] Yet in the recent case of *Fisher v. University of Texas at Austin*, the concept of critical mass has come under attack.[15] Although the Supreme Court in *Fisher* endorsed diversity as a compelling state interest for purposes of higher education,[16] the Court scarcely mentioned "critical mass" in its opinion,[17] suggesting that the concept's future may be uncertain.

Thus, this Article builds on emerging scholarship on critical mass[18] by contesting the commonly presumed tension between indi-

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8 *See infra* Part II.

9 *See infra* Parts II & III.A.

10 Grutter v. Bollinger, 539 U.S. 306, 333–35 (2003).

11 *See infra* Part III.A.

12 *See infra* Part III.A.

13 438 U.S. 265 (1978).

14 539 U.S. 306, 329–31 (2003).

15 133 S. Ct. 2411 (2013).

16 *Id.* at 2418 ("The attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.").

17 *Id.*

18 *See, e.g.*, Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97, 133–34 (2007) (observing that the creation of "critical mass" depends on empirical observation of the student body and the students' interactions in a unique institutional context); Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1134 (2013) (discussing how a focus on intraracial diversity—namely, diversity focusing on the interests and types of individuals within a diverse group—may be succesfully used in the admission process and considering the potential consequences); Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J.

vidualism and groupism.[19] At bottom, my point is that our constitutional analysis need not always choose between the two: the former often depends on the presence of the latter and particularly so in the context of race.[20] Moreover, acknowledging the areas of overlap between individual—and group—identity creates opportunities to advance narratives that situate race-conscious objectives within the conventional equal protection framework.[21]

Part I discusses colorblind individualism as the dominant paradigm in equal protection, and the (wrongly) presumed tension within this framework between individual rights and racial classifications that by definition rely on group categorizations.[22] This Part lays the foundation for understanding how holistic university admissions policies that strive to create critical mass and intraracial diversity satisfy equal protection's normative concerns.[23]

Part II explores social science findings that erode the doctrinal basis for equal protection's presumed conflict between individual rights and the use of race to achieve critical mass. This Part contends that blindness both to racial groups and to the diversity within those groups paradoxically perpetuates the very stereotypes that equal protection condemns and can increase—rather than diminish—the salience of race.

Part III explains how efforts to achieve critical mass through race-conscious admissions in higher education can be reconciled with the objectives of colorblind individualism by alleviating the salience of race for individuals. Part III.A begins by describing the origins of critical mass in *Grutter* and the dispute over critical mass more recently in *Fisher*.

CONST. L. 463, 467 (2012) (contending "that diversity within racial groups is key to understanding the constitutionality of race-cosncious admission policies").

19 *See, e.g.*, William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, 1001 (1984) (identifying conflict between individualism and racial group orientation).

20 *See* John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 325 (1994) ("[R]elating to persons without regard to social relationships requires ignoring a significant part of their life and experience that makes them unique.").

21 *Cf.* Harpalani, *supra* note 18, at 466–71 (reconciling the group concept of "critical mass" under equal protection doctrine).

22 Legal scholars have long explored the distinction in equal protection between individuals and groups. *See, e.g.*, Adams, *supra* note 1, at 1100–09 (discussing the role of group identity in the formation of individual identity and behavior); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (urging a more robust acknowledgement of groups in equal protection in order to take "fuller account of social reality").

23 *See infra* Part III.

Part III.B turns to the particular dimensions of critical mass. Here I contend that critical mass can be conceived both in terms of the *size* of the minority student body as well as the *kind* of diversity *within* underrepresented racial minority groups[24] or "intraracial diversity." Because intraracial diversity depends on individual variation among persons of color, it aligns with equal protection's normative emphasis on individuality.[25] To illustrate this point, Part III discusses equal protection cases that reject stereotypical presumptions of the "sameness" of racial minorities. These cases articulate norms of intraracial differentiation that support the constitutional premise of intraracial diversity.

In Part III.C, I contend that requiring the state to ignore race—in a context in which it has structured the lives of individual applicants—may paradoxically violate the principles of colorblind individualism. I conclude with some thoughts about how to operationalize critical mass through intraracial diversity and what it means for equal protection.

I. COLORBLIND INDIVIDUALISM IN EQUAL PROTECTION

Equal protection presumptively rejects the use of race as a criterion for government selection policies.[26] The reasons for this stem from principles of colorblind individualism, which hold that the individual—rather than the racial group to which she belongs—is the "primary political unit[] and bearer[] of rights."[27] The assumption is

24 *See* I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 122 (2004) ("[C]ritical mass is not solely numerical. Rather, a critical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group."); Carbado, *supra* note 18, at 1133–34 (observing the same, but raising concerns about the potential for racial typecasting); Harpalani, *supra* note 18, at 468 (noting quantitative and qualitative aspects of critical mass); Sheldon Bernard Lyke, *Catch Twenty-Wu? The Oral Argument in* Fisher v. University of Texas *and the Obfuscation of Critical Mass*, 107 NW. U.L. REV. COLLOQUY 209, 216 (2013) (arguing that critical mass "has both quantitative and qualitative elements").

25 *See* Elise Boddie, *Commentary on* Fisher*: The Importance of Diversity Within Diversity*, SCOTUSBLOG (Oct. 11, 2012, 10:50 AM), http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity ("These students advance the University's educational mission by helping to defeat racial stereotypes that all minorities have experiences and perspectives that are functionally indistinguishable.").

26 *See* Adarand Constructors v. Pena, 515 U.S. 200, 224 (1995) (applying strict scrutiny to race-conscious affirmative action); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986) (applying strict scrutiny in reviewing the constitutionality of a provision in a collective bargaining agreement for race-based protection against layoffs); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (concluding that strict scrutiny applies to all racial classifications).

27 *See* Higgins & Rosenbury, *supra* note 1, at 1198.

that using racial groups as an organizing principle for government policy leads to racial stereotypes and stigmatizes individuals on the basis of race.[28] Such express considerations of race are further presumed to lead to racial balkanization, characterized by separateness and discord[29] that distracts us from our shared individuality.[30]

As conceived by the colorblind individualist, "equality" is a thin, formalistic concept that regards the relative disadvantage and opportunity differences between racial groups as largely irrelevant to equal protection.[31] What matters instead is the state's racially even-handed treatment of individuals as they pursue their respective visions of the good life.[32] A central component of colorblind individualism is that the state "remain neutral among competing conceptions" of the good and not privilege any particular vision above another.[33] Within this framework, individuals are presumed to be "fully self-determining, freely choosing subject[s]."[34] The differences among individuals that invariably result from this unfettered choice are to be competitively resolved in the private sphere, without interference by the state.[35]

Because the state is supposed to be agnostic about racial differences, race is deemed to be "irrelevant to the public self."[36] From this vantage point, race-conscious selection policies are constitutionally problematic because they require the state to referee contests among individuals on the basis of race.[37] Conversely, the state's "colorblind" refusal to take race into account in government decisionmaking

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28 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (observing that "[c]lassifications based on race carry a danger of stigmatic harm"); *Bakke*, 438 U.S. at 298 (noting that preferential programs based on race "reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth") (internal quotation marks omitted).

29 *See generally* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (observing that equal protection's presumptive rejection of racial classifications reflects the Court's concern about their impact on "social cohesion").

30 *Id.* at 1300 ("In prohibiting race-based civil rights initiatives, race conservatives are conventionally understood as reasoning from the anticlassification principle concerned with threats to individualism, while race progressives who uphold affirmative action and other race-conscious civil rights initiatives are understood to reason about equality with attention to subordination or group status."); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (discussing the balkanization critique as a form of "pluralism anxiety" that has transformed equal protection).

31 *See Bakke*, 438 U.S. at 310.

32 *See* Higgins & Rosenbury, *supra* note 1, at 1197–1204.

33 *Id.* at 1198.

34 *Id.*

35 *Id.* at 1199.

36 *Id.*

37 *Id.* at 1199–1200.

aligns with equal protection's normative goals.[38] Under the colorblindness rubric, individuals compete against one another based on their personal characteristics and experiences, including the purportedly "race-neutral" advantages and disadvantages that they have accumulated in the private sphere.[39]

The primacy of the individual and the resulting conception of state neutrality help to explain the Supreme Court's low tolerance for group-based distinctions in equal protection. For instance, the Court has long rejected the cognizability of equal protection claims that are based solely on disproportionate adverse racial impact,[40] and instead requires proof of discriminatory treatment against persons.[41] This view presumes the irrelevance of racialized group disadvantage as a constitutional matter and emphasizes the importance of the individual to equal protection.

The same normative assumptions that have led the Court to reject group inequality as an equal protection concern also animate its view that all racial classifications trigger strict scrutiny, even if they are intended to help racially disadvantaged groups overcome pervasive discrimination.[42] From the colorblind individualist perspective, whether a government program is designed to benefit or to burden persons of color is immaterial because equal protection should not permit the state to take account of differences among racial groups.[43] Thus, the level of scrutiny under equal protection does not depend on a particular racial group's status: Any state consideration of race is subject to rigorous judicial review.[44]

Here I turn to a key premise of colorblind individualism, which is that colorblind decisionmaking can in fact disassociate "the individual" from her racial "group."[45] As Professor Reva Siegel has observed, this assumption depends in turn on the formalistic premise that "race is socially and morally irrelevant, a matter of appearance or skin color only."[46]

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38 Higgins & Rosenbury, *supra* note 1, at 1199–1200.

39 *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (rejecting "racially disproportionate impact" as an equal protection violation unto itself).

40 *See id.*

41 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

42 *See, e.g.*, *id.* at 493–94; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978).

43 *See* J.A. Croson Co., 488 U.S. at 493–94; *Pena*, 515 U.S. at 222; *Bakke*, 438 U.S. at 291.

44 *See* J.A. Croson Co., 488 U.S. at 493–94; *Pena*, 515 U.S. at 222; *Bakke*, 438 U.S. at 291.

45 *See* Morrison, *supra* note 20, at 324–30 (critiquing this view).

46 *See* Siegel, *supra* note 2, at 88.

To unpack this further, let's consider an admissions process at a selective public university. As just discussed, under the colorblind individualist framework, the university would be prohibited from explicitly factoring race into admissions decisions. We might imagine that it selects individuals instead based on their academic records, extracurricular activities, and teacher recommendations. But no judgment could be made about how that particular individual might "fit" into the overall racial composition of entering first year students. Within this paradigm, race makes no difference because it is presumed to be immaterial to the public self.[47]

The mistake here lies in the premise that the state's selection process is actually "free" of race.[48] Although the state does not explicitly rely on race in choosing among individual applicants, the *effects* of its "colorblindness" are hardly race-neutral. Understanding this point requires some exploration of social science, which identifies a symbiotic relationship between the *presence* of racial minority groups and the development and expression of individuality for persons of color.[49] Without a critical mass of other people of color, racial minorities are more likely to experience racial tokenism, stereotypes, and stigma.[50] This racial dynamic undermines their ability to develop a sense of themselves beyond the context of being the racial "other."[51] The resulting oppositional identity—which is borne from an experience of racial isolation and racial salience—inhibits the emergence of an individual identity that is less fully dependent on race.[52] The state's refusal on the front end to take account of race for purposes of building critical mass, in other words, has racial repercussions on the back end for the individualism of minority students in the university environment.[53]

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47 *See* Higgins & Rosenbury, *supra* note 1, at 1199 ("The solution [to social differences] . . . is accomplished by defining difference as irrelevant to the public self, the citizens, and relegating it to the private.").

48 Formally excising race from the admissions process fails to account for the ways in which race may unwittingly seep into an application—in part due to the difficulty that individual applicants may have denying or ignoring the formative role that race played to their personal experiences and identity. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008) (discussing the practical and theoretical challenges of racial "neutrality" in the admissions context).

49 *See infra* Part III.

50 *See infra* Part III.

51 *See infra* Part III.

52 *See infra* Part III.

53 *See infra* Part III. *But see* Deirdre M. Bowen, *American Skin: Dispensing with Colorblindness and Critical Mass in Affirmative Action*, 73 U. PITT. L. REV. 339, 375–77 (2011) (observing the benefits of critical mass but contending that institutions of higher education are min-

The consequences of this not only can be felt by individual persons of color, but also ripples across the institution itself. The diminished sense of belonging and security can erode the willingness of racial minorities to engage in university life.[54] As discussed below, this in turn undermines both the quantity and quality of interactions between white students and students of color.[55] The result can be a self-perpetuating cycle of awkward, racialized encounters that limit the appetite for future cross-racial interactions and/or leave both racial minorities and whites in a state of perpetual estrangement and mutual distrust.[56]

The critical point here is that state institutions are complicit in both the creation and maintenance of this racially compromised social architecture because colorblindness heightens social sensitivity to and awareness of race. Thus, the state is not a neutral, racially impartial decisionmaker as the colorblind individualist paradigm assumes, but rather is an instigator of racial mistrust and dysfunction. The state's efforts to deny race only make the problem worse.[57]

As will be discussed in Part III, the Supreme Court acknowledged the limits of colorblind individualism in *Grutter*, which embraced the use of racial classifications for purposes of achieving critical mass in order to realize the educational benefits of diversity.[58] Critical mass has come under attack recently, however, in *Fisher*. Before we turn to *Fisher* though, we need to understand why having sufficient numbers of racial minorities helps to foster social conditions that mitigate the salience of race. The next Part explores the social science research that underscores the importance of racial groups to individuality for persons of color.

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imally equipped to achieve the benefits of diversity, even with critical mass, where colorblindness discourse dominates).

54 *See infra* Part III. Deirdre Bowen observes the complexity of these dynamics and the potential for interactions among diverse groups of students—who "carry different vestiges of status and power"—to run aground when they are not carefully managed. *See* Bowen, *supra* note 53, at 379–83.

55 *See infra* Part III.

56 *See* Bowen, *supra* note 53, at 379–83 (describing this dynamic).

57 *Cf.* Bowen, *supra* note 53, at 388 ("Colorblindness's functionality as a way to minimize conflict and discomfort actually does the opposite."); *see also* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) [hereinafter Bowen, *Brilliant Disguise*] ("Underrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.").

58 *See* Grutter v. Bollinger, 539 U.S. 306, 336 (2003).

II. WHY RACIAL GROUPS MATTER

This Part discusses social science research that explains the dynamic racial consequences of colorblind individualism. This research erodes the important premise of colorblindness—that state action is necessarily racially neutral when it explicitly excludes race from a selection process. In fact, the state's blindness to race can produce the very racial dynamics that equal protection purports to condemn by heightening the racial salience and visibility of persons of color in the subject institution. On the other hand, state actors can mitigate the effects of racial difference by selectively taking race into account in a way that builds critical mass, thereby reducing the institutional visibility of persons of color and the associated problems of tokenism, stereotype, and stigma.[59] Properly understood, therefore, calibrated race consciousness, rather than enforced race neutrality, is more faithful to the objectives of equal protection. This Part examines social science research to document how the sensitive acknowledgement of racial groups can promote individuality and, conversely, how the absence of sufficient diversity, including intraracial diversity, diminishes persons of color.

A. The Effects of Tokenism

Let's return to our purportedly colorblind admissions process. Assume that only 2% (or twenty) of the 1,000 students admitted to the first year class of a selective public university are African-American. The colorblind individualist views this as the happy consequence of racial neutrality.[60] From this perspective, because the state has not inserted race into the admissions process, the individuality of the twenty black students was not compromised in any way: they were evaluated and admitted based solely on "who they are" as individuals, which is presumed to be wholly separate from their racial group identity. Accordingly, the state has not stereotyped or stigmatized these students by using race as a factor in the selection process

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59 Achieving these educational benefits also requires universities to take account of a status and power dynamic among racial groups that moves beyond the numbers. Bowen, *supra* note 53, at 384–85 (observing that numbers alone "do not equate to social standing"). Bowen argues that such an outcome cannot be achieved through diversity if colorblindness is the dominant paradigm. *Id.* at 387–88 ("[D]iversity in a colorblind society creates invisibility . . . . It creates a schizophrenic environment in which race is consumed for education but otherwise ignored.").

60 *See Grutter*, 539 U.S. at 349–50 (Thomas, J., dissenting) (contending that underrepresented minorities would be better off if they were denied admission to elite law schools than if they were admitted under race-conscious selection policies).

and, therefore, it has preserved its role as a racially-neutral arbiter of individual merit.

Closer inspection of the racial dynamic that unfolds as a result of this admissions process, however, yields different insights. It reveals that a number of the African-American students who were admitted declined to attend the "colorblind" institution, and chose instead to matriculate at another selective university that had a larger black population.[61] It also shows that the students who *did* choose to attend feel racially isolated and alienated from their environment as a consequence of their low numbers and the resulting high visibility of their race in their classrooms, their dorms, and in other social and academic spaces.[62] These black students come to perceive themselves and are perceived by others as "the representative" of "the" African-American experience.[63] As a result, they suffer the harms of tokenism and the very racial stereotypes and stigma that they were supposedly spared under the "race neutral" admissions policy.[64]

Research on gender tokenism suggests that low minority representation not only affects students of color, but can also lead to a range of negative downstream consequences for the institution as a whole.[65] Underrepresentation fosters divisions between racial "ingroups" and "outgroups" and leads individuals within each group to reciprocally stereotype and "otherize" persons on the basis of racial difference.[66]

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61 *See* William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the* Fisher *Case*, 39 J.C. & U.L. 53, 56 (2013).

62 *Id.* at 58.

63 *See* Bowen, *Brilliant Disguise*, *supra* note 57, at 1234 (describing heightened stigma and racial isolation among minority students in anti-affirmative action states and the "open hostility" they face "[d]espite being admitted on purely white, normative admissions standards").

64 *Id.*

65 *See* Eden B. King et al., *Understanding Tokenism: Antecedents and Consquences of a Psychological Climate of Gender Inequity*, 19 J. MGMT. 482, 484 (2010) (noting consequences of tokenism in the context of work). *Cf.* Mischa Thompson & Denise Sekaquaptewa, *When Being Different is Detrimental: Solo Status and the Performance of Women and Racial Minorities*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 183, 185–93 (2002) (discussing the negative impact of "solo status" on performance outcomes and observing that racial minorities' "solo status" can lead to "overly cautious" styles of communication).

66 *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CALIF. L. REV. 1251, 1275 (1998) ("Taken as a whole, research in social identity suggests that reducing the salience of intergroup boundaries can reduce intergroup bias, while increasing category salience can exacerbate it."). Professor Krieger observes that although racial preferences can exacerbate discrimination against racial outgroups, *id.* at 1274–75, affirmative action can improve intergroup relations where it creates opportunities for students to develop multiple, "cross-cutting" identities. *See id.* at 1275–76 (observing that where "structures provide opportunities for recategorizing members of otherwise distinct social groups. . . . [the] multiplication of potential categorical structures renders

Predictably, this increases intergroup anxiety, which itself leads to hostile or distrustful cross-racial interactions.[67] Simply put, the failure to create racially inclusive and diverse environments is more likely to increase, rather than minimize, the significance of race. Preserving the individuality of racial minorities thus first requires attention to their status as a group.

To appreciate these points more fully, we start with a basic observation about the important constitutive role that racial group identity plays in the formation of individual identity.[68] Henri Tajfel's early work on social identity theorized that group membership is a fundamental component of an individual's self-knowledge and awareness and that such membership carries "emotional value and significance."[69] Social groups "fulfill a fundamental human need for social connectedness and serve as a primary source of individuals' self perceptions."[70] Individuals both conceive of themselves as members of a group[71] *and* seek to attribute positive characteristics to themselves as a result of their group affiliation.[72]

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each less significant and thus less influential in intergroup perception, judgment, and behavior").

67 *See* Frances E. Frey & Linda R. Tropp, *Being Seen as Individuals Versus As Group Members: Extending Research on Metaperception to Intergroup Contexts*, 10 PERSONALITY & SOC. PSYCHOL. REV. 265, 272–73 (2006) (stating that intergroup anxiety exists where people feel "threatened and uncomfortable" and concerned that others hold racially negative perceptions of them); *see also* Phillip A. Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 104 (2008) (discussing the role that the fear of appearing racist plays in heightening white anxiety in interactions with blacks, leading whites to "physically distance themselves" from blacks when they encounter a "racially contentious topic" in conversation).

68 *See, e.g.*, Rothman & Alberstein, *supra* note 4, at 640 ("This self-perception assumes individuality, but even in its uniqueness, the self is seen as incorporating the larger context and existing in relationship with the other.").

69 HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES 255 (1981).

70 *See* King et al., *supra* note 65, at 488 ("Social identity theory . . . suggests that individuals associate with others who are similar to them along meaningful dimensions . . . .").

71 This does not mean that individuals necessarily see themselves *solely* in racial group terms. *See* TAJFEL, *supra* note 69. Nor does this dynamic necessarily affect every person in the same way. Rather, it describes a generalizable principle that challenges the default paradigm of colorblindness in equal protection. My point here is that empirical research suggests that this default is the wrong one, particularly given the goals of individualism that underwrite the constitutional regime.

72 This racial self-conception is not necessarily internally consistent or uniform. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 284 (1995) ("This 'white' identity requires its bearers to suppress 'the blackness within' . . . .").

Group identification and sorting is both a conscious and unconscious human response.[73] Indeed, "merely perceiving group distinctions can propel biased evaluations, even in the absence of overt conflicts or structural inequalities."[74] Through cognitive processes individuals divide themselves and others into favored "ingroups" and disfavored "outgroups."[75] Ingroups can "powerfully enhance an individual's self-evaluation and self-conception."[76] Outgroups, on the other hand, are "homogenized, distanced and stereotyped."[77]

Racial group identification and sorting, therefore, are part of the human condition. But these dynamics are exacerbated where racial minorities are underrepresented.[78] Research on the effects of tokenism in the gender context is instructive. For example, Rosabeth Moss Kanter's seminal studies on women in senior management positions revealed that tokenism enhanced perceived gender differences between men and women, creating greater social distance between the two groups.[79] As a result, women felt pressured to conform to gender stereotypes[80] and more "scrutinized,"[81] were more distressed and alienated from their work environments, and tended to operate within

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73 *See generally* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (explaining the role of stereotypes and unconscious biases in shaping perceptions of different racial groups); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 469 (2010) (explaining that social cognitions can be both implicit and explicit).

74 Tropp et al., *supra* note 4, at 101–02.

75 *See* Michael A. Hogg, *Intragroup Processes, Group Structure and Social Identity*, *in* SOCIAL GROUPS AND IDENTITIES: DEVELOPING THE LEGACY OF HENRI TAJFEL 67 (W. Peter Robinson ed., 1996).

76 Adams, *supra* note 1, at 1102.

77 *Id.* at 1101.

78 *See* King et al., *supra* note 65, at 488 ("[M]embers of social identity groups attend to their identities and relevant experiences, particularly in contexts in which their identities are salient."). Although the findings are not uniform, research indicates that persons of color are more likely to experience racial discrimination where there is low minority representation. This suggests that underrepresentation may also influence whites' perception and treatment of racial minorities. *Id.* at 485 ("Empirical evidence also demonstrates that women and ethnic minorities are more likely to experience discrimination in contexts where they are underrepresented than in contexts that are more balanced."). With respect to gender, some research indicates that "social status, occupational deviance, and job prestige" may also influence "tokenism dynamics." *Id.* at 486; *cf.* Valerie Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERSONALITY & SOC. PSYCHOL. 615, 616 (2008) (hypothesizing how environmental "cues" can trigger different racialized perceptions, including distrust and identity threat).

79 King et al., *supra* note 65, at 484.

80 *Id.* at 485.

81 *Id.* at 492.

a psychological schema that amplified the importance of gender.[82] These cumulative stressors "stifled emotional expression"[83] and left women less likely to strive to "fit" into their organizations.[84]

The same dynamics operate in the context of race. For example, a study of racial perceptions of a corporate environment showed that having less employee diversity reduced African Americans' level of trust toward "colorblind" policies which were intended to convey that race was "immaterial" to their institutional success.[85] Conversely, where minority representation was high, African-American professionals "trusted the setting regardless of the stated diversity philosophy."[86] In racially diverse environments, African Americans were more likely to regard a company's professed colorblindness goals as benign and to feel a sense of comfort and belonging.[87] Similarly, numerous studies confirm that the "solo status" of racial minorities—in which they are "the only representative of [their] social category"—weakens their performance along a range of indicators, even controlling for racial discrimination.[88] Racial minorities in these contexts are likely to be perceived, and to perceive themselves,[89] as racial tokens, which makes them the subject of unwanted attention and scrutiny that in turn dampens their success.[90]

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82 *Id.* at 488 ("[A] woman whose gender identity is salient may be particularly attuned to dynamics she encounters that do not reflect positively on women; to the extent that women are tokens, gender-related issues will become salient and the organization will be perceived through a gender-focused schema.").

83 *Id.* at 484.

84 King et al., *supra* note 65, at 498, 503.

85 *See* Purdie-Vaughns et al., *supra* note 78, at 621 (finding that when minority representation was low, minority individuals were more likely to distrust the colorblind policy); *see also* Frey & Tropp, *supra* note 67, at 268 ("By virtue of being in the numerical minority, people sense that they are subjected to greater scrutiny as representatives of their groups, which contributes to a heightened awareness of group membership." (internal citations omitted)).

86 *See* Purdie-Vaughns et al., *supra* note 78, at 621 ("When minority group representation was high, participants trusted the setting regardless of whether the stated diversity philosophy was colorblind or valuing diversity . . . .").

87 *Id.*

88 *See generally* Thompson & Sekaquaptewa, *supra* note 65, at 186 ("This suggests that something in the situational context impedes the expression of knowledge and skills in performance for disadvantaged-group solos.").

89 In group salient situations, people tend to stereotype both outgroups and their *own* ingroups. They presume that ingroup members are more similar to them and that outgroup members are more different. *See* Frey & Tropp, *supra* note 67, at 270 (discussing how people in group salient situations make "assumptions of ingroup similarity and outgroup dissimilarity").

90 *See* Thompson & Sekaquaptewa, *supra* note 65, at 185–86 ("[M]embers of disadvantaged groups working in White male-dominated environments report feeling isolated, receiving low responsibility positions and being showcased as representatives of their group . . . .

Understanding these dynamics requires an appreciation of the relationship between the *salience* of racial groups and the *size* of those groups. Low minority representation increases the salience of race for racial minorities while high minority representation minimizes it.[91] This might make intuitive sense to anyone who has ever been in a situation where her social identity was visibly underrepresented. Women in an all-male environment are likely to be more cognizant of their gender.[92] A person with a disability may be more aware of her physical limitations in a setting dominated by people who are not disabled.[93] Race works the same way. However, because the opportunity for cross-racial interactions is generally low,[94] the stakes that attend these interactions in particular institutional settings are necessarily higher and more consequential.

Thus, having fewer numbers of racial minorities heightens sensitivity and awareness of racial difference.[95] On the other hand, having larger numbers tends to minimize the significance of race and to promote a sense of individuality among minority populations.[96] Ap-

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Because many avenues to raises and promotions are based on informal networks, [minority] solos may be left out of the loop, damaging their opportunities for advancement." (internal citations omitted)).

91 *See supra* notes 85–90 and accompanying text.

92 *See generally* Thompson & Sekaquaptewa, *supra* note 65, at 193 ("In addition to altering one's expectations about an upcoming task, solo status can also increase awareness of one's social identifications, i.e., racial and gender group memberships.").

93 Research also suggests that the relative "salience" of people with disabilities in their environment may lead non-disabled people to misperceive the actual abilities of disabled persons. *See* Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes"*, 55 VAND. L. REV. 481, 523 (2002).

94 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 963 (9th Cir. 2004) ("'Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race. Continuing patterns of residential segregation, for example, mean that the daily events and experiences that make up most Americans' lives take place in strikingly homogenous settings. As a result, most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity. This separation . . . provides little opportunity to disrupt racial stereotypes . . . .'" (citing Brief for Respondents at 11, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), *reh'g granted en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 551 U.S. 701 (2007)); *see also* Christopher Ingraham, *Three Quarters of Whites Don't Have Any Non-white Friends*, WASH. POST WONKBLOG (Aug. 25, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends (commenting on the average person's tendency to have friends predominantly of the same race).

95 *See supra* notes 86–91 and accompanying text.

96 *Id.*; *but see* Bowen, *Brilliant Disguise*, *supra* note 57, at 1233–44 (describing the complexity of interracial interactions and noting the importance of carefully managing them to achieve the benefits of diversity); Bowen, *supra* note 53, at 375–77, 386–91 (observing the

preciating this connection requires some additional understanding of how people categorize themselves. Again, social science is instructive. It indicates that the degree to which a person thinks of herself in individual or group terms depends on how she thinks that others perceive her, otherwise known as "metaperceptions."[97] People perceive themselves as individuals, or as racial group members, when they expect to be viewed as such by others.[98] Critically, these individual and group identities are "'functional[ly] antagonist[ic].'"[99] This means that those who view themselves in individual terms are "less inclined to think of themselves in terms of their group memberships; conversely, when people think of themselves as group members, they are less likely to regard themselves as unique individuals."[100]

Colorblind individualists here assume that the use of racial classifications in government selection policies necessarily makes race more consequential and leads people to think of themselves solely in racial terms.[101] This view holds that relying on race to distinguish among various applicants gives race significance and status that should be unwarranted in a liberal democratic society which (at least theoretically) judges people by their individual merit.[102] Indeed, individual Justices of the Supreme Court frequently contend as much in opinions that condemn the use of race-conscious affirmative action.[103]

The problem with these arguments is that they rest on a basic misunderstanding about the racial consequences of tokenism and the importance of building critical mass in order to construct environments in which students of color feel freer to cultivate and to express their individual identities. Studies indicate that whether one catego-

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difficulty of achieving diversity's educational benefits where "colorblindness" discourse dominates the environment).

97 *See* Frey & Tropp, *supra* note 67, at 265, 268 (defining metaperceptions as an "interest in what people think others think of them" and discussing factors that contribute to the degree to which "people expect to be viewed as individuals or as group members").

98 *Id.* at 268.

99 *Id.* (quoting JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 49 (1987)).

100 *Id.*

101 *See* Siegel, *supra* note 29, at 1287 ("[P]roponents of the anticlassification principle associate the rule against classifying by race with a value commonly associated with colorblindness claims: protecting individuals from the harm of categorization by race.").

102 *See* Morrison, *supra* note 20, at 330–34.

103 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government . . . makes race relevant to the provision of burdens or benefits, it demeans us all.").

rizes herself in terms of her personal or group identity significantly depends on the social environment.[104] Once again, the level of minority representation in an institution is crucial: it affects whether people "expect to be viewed as individuals" or as members of a racial group.[105] People are most likely to think of themselves in racial group terms in tokenism contexts where the salience of racial groups is high.[106] On the other hand, in social situations where group salience is low, individuals are more likely to "project their own views of themselves onto others."[107] In other words, low racial salience improves the chances that persons of color will perceive similarities between themselves and individuals who comprise other racial groups,[108] leading to a shared appreciation of common interests and experiences across racial lines. Putting this all together, having greater minority representation enhances the likelihood that individual persons of color will focus on their similarities with individual whites, while low representation leads them to dwell more on racial differences.

To understand this further, let's assume for a moment that a white student decides to attend an historically black college. Being in a predominantly black environment, we might reasonably expect that he would become more aware of being white and that this awareness

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104 "Social identity theory" holds that identity operates on a personal and social level. "Personal identity" focuses "on one's individuating attributes," or the characteristics that are distinct to people as individuals, while "social identity" focuses on "one's group memberships." Frey & Tropp, *supra* note 67, at 268. *See also id.* (discussing "social identity theory" in the context of "self-categorization theory," which "provid[es] a useful framework for understanding how and why different levels of self-categorization might emerge in different social situations").

105 *See id.* at 267 ("[S]ituational and individual factors . . . might influence whether people expect to be viewed as individuals versus as group members.").

106 *Id.* at 268 ("[W]hen group membership is salient, people are more likely to think of themselves and others as group members, whereas when group membership is not salient, people are more likely [to] think of themselves and others as individuals."); *see also* Purdie-Vaughns et al., *supra* note 78, at 621 (discussing how low minority representation triggered concerns among African Americans that they would be "devalued due to racial identity").

107 Frey & Tropp, *supra* note 67, at 269.

108 *See id.* at 269–70 ("[W]e expect that where there is an absence of cues to make group membership salient in the social context, people should generally tend to project their own views of themselves onto others. However, as group memberships become increasingly salient, we believe the bases of people's metaperceptions should shift, such that they begin to make predictions about others' views in terms of the perceived values, characteristics, and attributes that define their groups."). Research, however, indicates that the effects of tokenism are diminished for individual members of socially dominant groups. *See* King et al., *supra* note 65, at 485–86 (discussing the results of sociological research "examining the experiences of underrepresented individuals," which suggested that "some tokens do not face . . . difficulties," including male nurses who did not report feeling "more socially isolated than the women who dominated their occupation").

would be different in both kind and degree than if he were enrolled instead at a predominantly white institution.[109] We can also safely assume that he would be the subject of some curiosity as a white person who stands out in a predominantly African-American environment.[110] He might even be stereotyped as a result of his whiteness, with some questioning his motives for attending a majority-black school.[111]

The point here is that the size of the racial minority group is a factor in the production of racial stereotypes—both in terms of how one is viewed by his peers and in terms of how he views himself.[112] Racial stereotypes are particularly acute for racial minorities in environments where there are few persons of color.[113] For instance, minority faculty who teach at predominantly white institutions report that they are frequently stereotyped "as having interests only in minority affairs," which limits their exposure to other opportunities and dampens their chances for advancement.[114] As Claude Steele and others have persuasively demonstrated, concerns about being judged in accordance with prevailing stereotypes—commonly known as "stereotype threat"—undermines performance and achievement,[115] a prob-

109 An interview of a white student who attended an historically black college discussed the dynamics of being racially visible in a minority-serving institution. *See* Marybeth Gasman, *Being White at a Black College: An Interview*, HUFFINGTON POST (July 31, 2012, 7:31 PM), http://www.huffingtonpost.com/marybeth-gasman/being-white-at-a-black-college_b_1713729.html.

110 *See id.* (discussing the experience of being approached numerous times by students who wanted to know how he "felt being at [a historically black college] as a white guy, why [he] decided to attend, and what [he] thought about certain controversial topics related to race"). *But see* Thompson & Sekaquaptewa, *supra* note 65, at 183–86 (noting that "members of privileged groups, such as Whites and males" tend to be less "debilitated" by their "solo status" in institutions).

111 *See* Gasman, *supra* note 109 (discussing queries from other students about why he would choose to attend an historically black college and how it "felt being at a[] [Historically Black College or University] as a white guy").

112 Low institutional representation of persons of color can set a range of negative dynamics in motion that "perpetuate our tendency to perceive outgroup members in stereotypical terms." Frey & Tropp, *supra* note 67, at 273. These "assumptions of ingroup similarity and outgroup dissimilarity may also lead one to expect that one's true characteristics will be less transparent to outgroup members than to ingroup members." *Id.* at 270.

113 *See generally* Thompson & Sekaquaptewa, *supra* note 65, at 184–85 (discussing studies finding weakened performance of racial minorities where they were "the only representative of [their] social category" in a given group).

114 For a detailed discussion of these findings, *see id.* at 186.

115 *See* Joshua Aronson et al., *Stereotype Threat and the Academic Underperformance of Minorities and Women*, *in* PREJUDICE: THE TARGET'S PERSPECTIVE, 83, 84–86 (Janet K. Swim & Charles Stangor eds., 1998) ("The mere existence of such stereotypes poses for targets the additional risk of being seen and treated stereotypically . . . . And, in situations where the stakes are high, [this threat] may cause enough distress to interfere with their performance . . . of the activity."); *see also* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC.

lem that is compounded where minorities are underrepresented.[116] Creating an environment in which race matters less on the backend, therefore, requires institutions to develop a meaningful minority presence on the front end.

B. The Anti-Balkanizing Benefits of Positive Intergroup Contact

Social science demonstrates the importance of positive intergroup contact to reducing racial stereotypes and stigma.[117] Gordon Allport's early "contact hypothesis" theorized that intergroup interactions between people from different racial backgrounds could reduce social prejudice.[118] His hypothesis has since evolved "into a full-blown theory of considerable complexity."[119] However, a significant body of work validates Allport's original findings that positive intergroup interactions alleviate anxiety and fear of other groups and increase social empathy, which improves relations among groups.[120]

That said, intergroup contact is not sufficient *by itself* to generate positive cross-racial interactions. The simple presence of different racial groups can heighten sensitivity to racial differences,[121] because

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PSYCHOL. 797, 807–10 (1995) (examining studies focusing on "stereotype threat", which showed that "making African American participants vulnerable to judgment by negative stereotypes about their group's intellectual ability depressed their standardized test performance . . . while conditions designed to alleviate this threat, improved their performance . . . .").

116 *See generally* Thompson & Sekaquaptewa, *supra* note 65 (discussing various studies indicating that performance may suffer in situations where minorities find their group underrepresented).

117 Other factors contribute to the group salience of race. For example, the "mere presence of an outgroup member," conflict between racial groups, and stigmatized identity can increase the salience of race. *See* Frey & Tropp, *supra* note 67, at 268–69.

118 *See* Thomas F. Pettigrew et al., *Recent Advances in Intergroup Contact Theory*, 35 INT'L J. INTERCULTURAL REL. 271, 272 (2011) (discussing recent advances in social psychology regarding intergroup contact, including Allport's "contact hypothesis").

119 *Id.* For a discussion of some of the nuances of the theory of positive "interracial contact and its beneficial outcomes," within the context of schoolchildren in integrated schools, see generally Tropp et al., *supra* note 4, at 107–08.

120 For example, Thomas Pettigrew and Linda Tropp determined that, out of 515 studies addressing intergroup contact's effect on reducing prejudice, 94% reported that "greater contact is routinely associated with *less* prejudice." *See* Pettigrew et al., *supra* note 118, at 274. *But see* Blasi, *supra* note 73, at 1247–50, 1279 (arguing that the contact hypothesis is "wildly overoptimistic" because only under "very limited, often counterintuitive conditions" does contact with outgroup members have any positive effect on stereotyping).

121 *See* Frey & Tropp, *supra* note 67, at 268 ("[T]he mere presence of an outgroup increased people's tendency to categorize themselves and others in terms of group membership, such that they assumed greater similarities between themselves and other ingroup members and perceived greater differences between themselves and outgroup members."); *see also* Bowen, *Brilliant Disguise*, *supra* note 57, at 1233–44 (observing the complexity of interactions among diverse groups of students).

people tend to view members of their own "ingroup" more positively than people outside their group.[122] In these situations, individuals are more likely to perceive similarities between themselves and other members of their ingroup and greater differences with individuals from outside their group.[123]

This brings us back to the importance of a healthy racial minority presence for achieving positive interracial contact. The greater the size of the racial minority group, the more likely it is that individual members of that group will feel the kind of institutional belonging and trust that leads them to engage with white students. Low minority presence, on the other hand, generates a perception—both for individual minorities and their white peers—that students of color are "representatives of their [races]."[124] This context raises the stakes of cross-racial interactions, and—because of the attendant anxiety for both groups—can produce "unwitting" negative, non-verbal behaviors,[125] such as "decreased eye contact, greater social distance, and increased fidgeting and hesitant speech."[126] Because individuals in both groups fear that they are being evaluated negatively as a result of the-

122 Frey & Tropp, *supra* note 67, at 270. Indeed, as Michelle Adams has observed, among the worst possible outcomes of intergroup contact is competition and conflict that locks in the intergenerational, structural advantages that whites have over blacks in particular. *See generally* Adams, *supra* note 1, at 1109–21 (analyzing the "process by which [blacks and whites] compete" for economic and social advantage and the unequal "social structure" that results from this competitive behavior).

123 *See* Frey & Tropp, *supra* note 67, at 268 (discussing studies which found that individuals in situations where an outgroup member was present "assumed greater similarities between themselves and other ingroup members and perceived greater differences between themselves and outgroup members").

124 *See* Thompson & Sekaquaptewa, *supra* note 65, at 193 ("Research indicates that solos often feel as if they are seen as representatives of their entire group."). Having strong group identification can also lead people to emphasize racial salience. *See* Frey & Tropp, *supra* note 67, at 269 ("[G]reater levels of [group] identification should lead people to not only see themselves as group members but also expect to be seen by others in terms of their group membership.").

125 *See* Frey & Tropp, *supra* note 67, at 273 (describing this phenomenon).

126 *Id.* Nevertheless, "people will likely continue to be aware of differences between their groups and expect to be perceived as group members, even when attempts are made to reduce the salience of group membership," though "reductions in group membership salience . . . could potentially improve metaperceptions among individual members of different groups." *Id.* at 274. On the other hand, positive cross-racial interactions can have a lasting constructive impact. For instance, a study of racial "friendship networks" observed that black students even on diverse campuses expected white students with all-white social networks to perceive them negatively. *See* Daryl A. Wout et al., *When Your Friends Matter: The Effect of White Students' Racial Friendship Networks on Meta-Perceptions and Perceived Identity Contingencies*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 1035, 1039 (2010). However, black students expected more comfortable interactions with white students who had racially diverse groups of friends, which, in turn, made them more likely to interact with those white students. *See id.* at 1039–40.

se unpleasant exchanges, they tend to respond by negatively judging individuals from the opposite group.[127] The result is a spiral of "avoidant behaviors and attitudes," with lasting effects for individuals in both racial communities[128] as students of color and whites isolate themselves from the other, leading to the very "balkanizing" effect[129] that equal protection condemns.

To put this in practical terms, consider what it might be like for a handful of African-American students at a predominantly white school. Their small numbers (combined with the limited experience that most white students have interacting with blacks)[130] makes cross-racial interactions awkward and uncomfortable and, therefore, infrequent. This leads to even greater social distance between whites and blacks on campus and further weakens black students' social ties to the institution. As a result of their social isolation, black students come to view themselves as institutional outsiders and withdraw from university life, which limits their personal development and growth. Because they experience the university as racial "others," they lose the opportunity to cultivate their sense of personhood and, thus, their individuality in a way that is more independent of their minority status.

Appreciating these group dynamics helps us to understand the source of racial stigma.[131] Opponents of affirmative action commonly

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127 *See* Frey & Tropp, *supra* note 67, at 272–73 (discussing the effects of expecting to be viewed negatively by outgroup members).

128 *See* Goff et al., *supra* note 67, at 91–92 (discussing the contribution of "avoidant behaviors and attitudes" to "intergroup distancing"); Wout et al., *supra* note 126 at 1035–36, 1039–40 (noting that people's expectations that outgroup members "will perceive them negatively can have serious negative consequences," and discussing studies demonstrating that when black students encountered white students with racially homogenous friend groups, those black students "expected [the] White student . . . to perceive them more negatively," and, in turn, "expected more interpersonal challenges during the upcoming interaction with this [white] student").

129 Researchers describe the "possible judgments, stereotypes, opportunities, restrictions, and treatments that are tied to one's social identity" as "social identity contingencies." *See* Purdie-Vaughns et al., *supra* note 78, at 615.

130 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 963 (9th Cir. 2004) (citing Brief for Respondents at 11, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)), *reh'g granted en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 551 U.S. 701 (2007) (noting how many students have had few interactions with individuals of other races and ethnicities prior to college); Ingraham, *supra* note 94 (discussing data which showed that "a full 75 percent of whites have 'entirely white social networks without any minority presence.' . . . [And t]he same holds true for slightly less than two-thirds of black Americans").

131 *See* R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004) (describing "racial stigma" not as "racial slurs or insults, stereotypes, or even the denial of a particular opportunity," but as "a problem of negative social

argue that its beneficiaries feel stigmatized by race conscious policies and that the elimination of affirmative action would make students of color *more* receptive to institutions that have abolished it.[132] However, studies point to a different conclusion—that low minority representation is a more likely source of racial stigma.[133] For example, a study of enrollment patterns among students of color who had been offered admission to colleges within the University of California system following the ban on race-conscious admissions under the state constitution illustrated that higher-achieving minority students were *less* likely to enroll in the more elite state institutions with low minority representation.[134] This finding corroborated conclusions from other studies[135] that low minority representation signaled to admitted students of color that they would be more isolated and less welcome, making them more distrustful of the institution and less likely to enroll.[136] Conversely, higher minority representation at elite institutions that were not affected by the state ban led to higher minority enrollment.[137] Again, this comports with our understanding of the impact of critical mass. Minority students are more likely to perceive that they are respected by their peers and to feel institutional belonging where they have a meaningful on-campus presence. Because they are less visible and less tokenized, they are less likely to experience racial stigma.[138]

The lesson here is that the size of the minority presence in institutional settings matters. It cues perceptions of the environment that in turn determine whether students of color will engage with the broader campus community or will "bunker" in the relative safety of their own groups.[139] Although size alone does not guarantee institu-

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meaning," which "involves becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community").

132 *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 369 (2004) (identifying the "costs" of affirmative action as the "stigma and stereotypes that might result from differential admissions standards").

133 *See* Kidder, *supra* note 61, at 55; Bowen, *Brilliant Disguise*, *supra* note 57.

134 *See* Kidder, *supra* note 61, at 84.

135 *See* Purdie-Vaughns et al., *supra* note 78, at 621 (discussing how low minority representation in non-educational settings, such as corporations, leads African Americans to "expect[] to be passed over for promotions, feel[] excluded from social events, and feel[] that their race would be relevant to how others view them").

136 *Cf.* Kidder, *supra* note 61, at 78–79.

137 *Id.*

138 *Cf. id.* at 69.

139 *Id.*; *see, e.g.*, Goff, *supra* note 67, at 105; Purdie-Vaughns et al., *supra* note 78, at 615; Linda R. Tropp et al., *How Peer Norms of Inclusion and Exclusion Predict Children's Interest in Cross-*

tional success, social science strongly indicates that it is an essential precondition for healthy racial dynamics. However, achieving minority presence requires attention in the first instance to admitting and enrolling students of color and then to promoting conditions for positive interactions between racial groups once they are on campus.[140] This necessarily depends on a degree of race-consciousness and the use of tools that are explicitly oriented to these goals.

III. RECONCILING RACE & INDIVIDUALITY IN EQUAL PROTECTION

Part I discussed equal protection's paradigm of colorblind individualism, which is hostile to government selection policies that distinguish individuals on the basis of race. Part II explored social science research that explains the importance of minority presence in predominantly white institutions to the individuality of persons of color. The absence of a critical mass of racial minorities increases the visibility of persons of color and heightens the salience of race. It also reduces the likelihood of healthy cross-racial interactions that enable people to perceive each other in terms that move beyond racial categories. The important point here is that the goal of achieving critical mass is consonant with the objectives of colorblind individualism because it reduces the visibility of race and the associated harms of tokenism, thereby promoting opportunities for the individual growth of people of color.

This Part discusses *Grutter v. Bollinger*, which reconciled the tension between the use of racial classifications and individual rights through the concept of critical mass. It then discusses the rationale for intraracial diversity as a component of critical mass through the lens of *Fisher v. University of Texas at Austin*.

A. Grutter, Fisher *& Critical Mass*

As discussed in Part I, equal protection is conventionally suspicious of distinctions based on racial groups and, therefore, presumptively rejects state interests that depend on producing certain "numbers" of racial minorities.[141] In *Grutter v. Bollinger*, however, the

Ethnic Friendships, 70 J. SOC. ISSUES 151 (2014) (discussing the important role of perceived peer values for encouraging cross-ethnic friendships); Wout, *supra* note 126, at 1037–40.

140 *See* Bowen, *supra* note 53, at 386–92 (observing that "colorblindness" discourse undermines diversity benefits); Bowen, *Brilliant Disguise*, *supra* note 57, at 1233–44 (noting the need to manage interracial dynamics in order to achieve diversity benefits).

141 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (observing that equal protection guarantees its protections to "individuals").

Supreme Court reconciled the presumed tension between groups and individuality through its endorsement of critical mass in the context of higher education admissions.[142] There the Court upheld a race-conscious admissions policy at the University of Michigan Law School after concluding that it was narrowly tailored to the school's compelling interest in securing "the educational benefits of a diverse student body."[143] The hallmark of the plan was its limited, holistic use of race that was flexibly applied to ensure "truly individualized consideration."[144]

Acknowledging the harms of low minority representation, the Court also endorsed the law school's individualized use of race to produce a critical mass of persons of color. Achieving a "'critical mass'" of underrepresented minorities promoted the law school's educational mission by "help[ing] to break down racial stereotypes"[145] and diminishing the individual harms of tokenism. Enhancing the size of racial minority groups, in other words, (paradoxically) diminishes the salience of race. As framed by *Grutter*, therefore, the objectives of critical mass align with the normative underpinnings of colorblind individualism in equal protection.

The question of how to define the constitutional parameters of critical mass with greater particularity surfaced more recently in *Fisher v. University of Texas at Austin*. *Fisher* challenged the University of Texas's race-conscious undergraduate admissions policy, which sought to build critical mass by enhancing diversity within the racial minority population itself.[146] Texas law requires the University to admit all public high school students who graduate in the top ten percent of their class.[147] Because significant residential segregation in the state produces racially segregated high schools, the law ensures some level of racial diversity on campus.[148] But the University determined that the source of that diversity—racially segregated neighborhoods and schools—"systematically hinder[ed] [its] efforts to assemble a class that is broadly diverse, and academically excellent,

142 539 U.S. 306, 335–36 (2003).

143 *Id.* at 333.

144 *Id.* at 334.

145 *Id.* at 329–30 (citing Brief for Respondents, Grutter v. Bollinger, 539. U.S. 306 (2003) (No. 02-241)).

146 Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 653–54 (5th Cir. 2014) ("UT Austin persuades that . . . reach[ing] into the applicant pool is[] . . . a search for students of unique talents and backgrounds who can enrich the [student body's] diversity . . . .")

147 Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 224 (5th Cir. 2011).

148 *Fisher*, 758 F.3d at 650–51 ("The sad truth is that the Top Ten Percent Plan gains diversity from . . .[t]he de facto segregation of schools in Texas . . . .")

across the board[,] including *within* groups of underrepresented minorities."[149] Therefore, it supplemented the ten percent plan with an admissions policy that allowed a student's race to be evaluated in the context of his or her lived experiences.[150] Importantly, race was not *necessarily* a factor in the assessment of any individual applicant under the policy; rather, its consideration depended on the relative salience of race to the student's identity or background.[151]

Admissions data demonstrated that this individualized component of the University's admissions policy increased intraracial diversity among underrepresented minority groups—specifically, that African-American and Latino students admitted at this stage of the process were "on average, more likely than their top 10% counterparts to have attended an integrated high school[,] . . . less likely to be the first in their families to attend college[,] tend[ed] to have more varied socioeconomic backgrounds; and, on average, [had] higher SAT scores than their top-10% counterparts."[152] The University pointed to "the great potential" these students had for "bridg[ing]" racial divides on campus by "promoting cross-racial understanding, as well as in breaking down racial stereotypes," particularly stereotypes that may have been reinforced by the Top 10% plan.[153] By "increasing diversity within diversity[,]" the University could dispel stereotypes that all racial minorities share the same backgrounds, experiences, and perspectives.[154]

Thus, in fashioning its policy, the University sought to recognize the individuating characteristics of students of color.[155] But the plaintiff in Fisher argued that the ten percent plan admitted sufficient numbers of African Americans and Latinos to satisfy the University's diversity-based educational objectives.[156] According to the plaintiff, the University could not constitutionally factor race into a separate admissions process—even in ways that were designed to acknowledge

149 Brief for Respondents at 33, Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411 (2013) (No. 11-345) (emphasis in original).

150 *Fisher*, 631 F.3d at 228.

151 *Id.*

152 Brief for Respondents, *supra* note 149, at 33–34; *see also Fisher*, 758 F.3d at 653 (observing that the Top Ten Percent Plan's holistic review policy "was a necessary and enabling component . . . to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills").

153 Brief for Respondents, *supra* note 149, at 34.

154 *Id.*

155 Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 654 (5th Cir. 2014) (concluding that the University's "holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus on individuals").

156 *Id.* at 644–45.

individual differences within the racial group itself as a component of critical mass.[157] The plaintiff's contention framed the University policy through the lens of colorblind individualism—that seeking to achieve intraracial diversity simply aggrandizes, rather than diminishes, the salience of race.[158]

Fisher's litigation position exposes yet another dimension of the "colorblindness" paradox: the failure to acknowledge individual variation within underrepresented racial groups entrenches presumptions of racial "sameness" that equal protection routinely rejects.[159] Intraracial diversity, on the other hand, aligns with the normative underpinnings of colorblind individualism. Drawing distinctions *among* people of color promotes the *individualization* of their identity. It necessarily reduces the salience of race because its whole point is that not all persons of a particular racial background are alike.[160] It rejects as a matter of principle the presumed "sameness" of persons of color.

As of this writing, *Fisher*'s future—and the future of critical mass—is uncertain. The Supreme Court's decision in *Fisher* two terms ago omitted any substantive reference to critical mass.[161] Instead, it vacated the court of appeals judgment upholding the University of Texas policy and remanded on the grounds that the lower court had not appropriately applied a narrow tailoring analysis.[162] On remand, the court of appeals upheld the policy[163] for a second time, setting the stage for a potential return to the Supreme Court.[164] The sections below further explore why critical mass aligns with the objectives of colorblind individualism and why the Court should continue to embrace critical mass. As discussed below, critical mass can assume both

157 *Id.* at 644.

158 *Id.* at 645 (observing the argument by the plaintiff in Fisher that UT's admissions policy was "no more than an exercise in gratuitous racial engineering").

159 *See infra* Part III.B.

160 *See infra* Part III.B.

161 Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411 (2013).

162 *Id.* at 2415. The court of appeals initially upheld the University's policy, but deferred to the University's "presumably expert academic judgment" about whether it had "attained critical mass" or whether race-conscious efforts were still necessary to reach that objective. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 232 (5th Cir. 2011).

163 Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 660 (5th Cir. 2014) (affirming district court's judgment for the University).

164 Daniel Fisher, *Fisher vs. Texas Dismissed Again; Is It Headed Back to Supreme Court?*, FORBES (July 15, 2014, 6:19 PM), http://www.forbes.com/sites/danielfisher/2014/07/15/fisher-vs-texas-dismissed-again-is-it-headed-back-to-supreme-court (suggesting Fisher's intention to seek Supreme Court review of court of appeals decision).

a quantitative as well as a qualitative dimension that promotes individuality[165] in keeping with equal protection's normative frame.

B. Intraracial Diversity & Differentiation Norms

Below I discuss *Regents of the University of California v. Bakke*, which embraced intraracial diversity explicitly in the context of higher education—both for white students and for students of color.[166] I then move on to cases outside the higher education context that focus on norms of intraracial difference. I refer to these as "differentiation norms."[167] Differentiation focuses on the individuating characteristics among members of different racial groups. *Bakke* and the rest of these cases support the constitutional premise of intraracial diversity.

1. Higher Education

The Court's endorsement of intraracial diversity begins with Justice Powell's opinion in *Bakke*. As is well known, *Bakke* involved an equal protection challenge to the admissions policy at the University of California at Davis Medical School. UC Davis operated a two-tier admissions track, one that was open to all applicants and a second track that reserved a fixed number of seats for minority applicants.[168] The Court struck down the admissions policy, but in a separate opinion, Justice Powell concluded that a more refined consideration of race, one which was designed to realize the educational benefits of student diversity, could pass constitutional muster.[169] According to Justice Powell, the constitutional harm of the UC Davis policy was its quota system, rather than its consideration of race per se.[170] The problem with the policy as designed was that it precluded white applicants from competing with the University's racially disadvantaged applicant pool.[171] By setting aside a fixed number of seats for racial minorities and insulating minority applicants from holistic review,

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165 Here I should be explicit that promoting individuality does not mean that race ceases to be a part of a person's identity—only that creating a meaningful minority presence in institutions of higher education can help liberate students of color to develop their individual identities both within and outside their racial group.

166 *See* Regents of Univ. of Cal. V. Bakke 438 U.S. 265, 316–24 (1978).

167 *See also* Carbado, *supra* note 18, at 1135 (discussing "differentiation").

168 *Bakke*, 438 U.S. 265, 276 (1978).

169 *Id.* at 315–19.

170 *Id.* at 316–20.

171 *Id.* at 318 n.52 ("The denial [to Alan Bakke] of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program.").

race had too decisive an impact.[172] This violated a fundamental tenet of equal protection that placed the individual at the center of its domain.[173]

On the other hand, a policy that used race as a simple "plus" factor, to be weighed along with other dimensions of each applicant, was different. As Justice Powell explained, this kind of racial consideration "treats each applicant as an individual in the admissions process."[174] Justice Powell reasoned further that an applicant who is denied admission under such a process would not have been foreclosed from competitive consideration and, therefore, would have no constitutional grievance. [175] Race-sensitive admissions policies faithfully adhered to equal protection's focus on individual, as opposed to group, rights.[176]

Justice Powell's *Bakke* opinion formed the basis for the Court's later decision in *Grutter* that an individualized, race-conscious admissions policy satisfies equal protection.[177] However, an often overlooked portion of Justice Powell's opinion also fully ratified the principle of intraracial diversity as a logical extension of diversity's educational benefits. [178] Diversity had long been a tenet of the Harvard College admissions process that Justice Powell endorsed as a model for constitutional consideration of race. But he noted that diversity had been limited to "students from California, New York, and Massachusetts, city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians," with "few ethnic or racial minorities."[179]

In other words, intraracial diversity among white students had long been an institutional norm at Harvard. Admissions officers there well recognized that a "farm boy from Idaho" could contribute something different to Harvard College "that a Bostonian [could] not offer."[180] Higher education had accepted the premise that admissions

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172 *Id.* at 317–18.

173 *Id.* at 298–99.

174 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

175 *Id.* at 318. *See also id.* at 319 ("So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.").

176 *Id.*

177 Grutter v. Bollinger, 539. U.S. 306, 323 (2003) ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

178 *Id.* at 324.

179 *Bakke*, 438 U.S. at 322.

180 *Id.* at 323.

policies should evaluate the different experiences of white students in determining whom to admit. Justice Powell simply sought to apply the same principle to students of color. [181]

For instance, the Harvard College admissions plan that Justice Powell endorsed observed that "the child of a successful black physician in an academic community with promise of superior academic performance" and a lower income black child who grew up in the inner city and demonstrated "energy and leadership" had different experiences and perspectives that could each uniquely contribute to the educational environment.[182] An admissions officer could constitutionally weigh these respective experiences in deciding whether to admit either (or both) applicants. The "critical criteria," Justice Powell noted, "are often individual qualities or experience not dependent upon race but sometimes associated with it."[183] His point was that higher education can constitutionally distinguish among individuals in ways that account for the relative salience of race to their lived experiences.

Justice Powell's *Bakke* opinion underscores an important point that has been lost in the debate over race-conscious admissions policies: white students in predominantly white institutions enjoy a *presumption* of intraracial diversity. This is in part a function of the relative size of the white population, but is also the product of a conscious effort by universities to embrace diversity across a broad spectrum. As a result, white students are freer to develop their individuality without the stereotype constraints of "racial roles." Indeed, the number *and* diversity of white students in predominantly white institutions is so extensive that we commonly fail to acknowledge whites in terms of their group status.[184] Both the vastness of their group—and the individual differentiation within it—diminish the salience of their race.[185] Accordingly, we have come to take diversity among white students for granted. Policies like those at issue in *Fisher* simply seek to extend the same benefits to students of color.

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181 *Id.* at 324.

182 *Id.*

183 *Id.*

184 *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L.REV. 953, 957 (1993) (describing whites' general lack of "white consciousness"); *cf.* Gasman, *supra* note 109 (discussing white student's unique experience attending a predominantly black college).

185 *Id.*

2. *Political Participation & K-12 Education*

In contexts outside higher education, the Court has embraced intraracial diversity as a constitutional norm by striking down race-conscious policies that obscure individual differences within minority populations.[186] In each of the cases discussed below, the Court starts with a presumption of intraracial differentiation and rejects those classifications that perpetuate false notions of "sameness" among individual persons of color. Because these classifications elevate racial *groups* above the individual members of those groups, the Court determines that they run afoul of equal protection's command that "[n]o state shall . . . deny to any person . . . the equal protection of the laws."[187]

Shaw v. Reno[188] offers an example of equal protection's differentiation norms. There the Court determined that plaintiffs could bring an equal protection claim against a state redistricting plan that appeared to effectuate a racial gerrymander by combining minority voters who resided in different parts of the state into "unusually shaped," majority-minority districts.[189] Expressing skepticism that voters who were "otherwise widely separated by geographical and political boundaries"[190] shared sufficient interests to justify being grouped in the same electoral district, the Court reasoned that the challenged redistricting plan could only be "rationally" understood as a state effort "to segregate races for purposes of voting."[191] The plan "reinforce[d] the perception that members of the same racial group" shared the same viewpoints, political interests, and would "prefer the

186 The anti-differentiation theory also operates, though somewhat differently, in the gender context. It acknowledges that some stereotypes may be descriptively accurate, but are nonetheless constitutionally problematic because they limit opportunities for non-conforming individuals within the group. Another theory of stereotypes rejects sex classifications that promote notions of "legal, social, and economic inferiority." United States v. Virginia, 518 U.S. 515, 534 (1996). The Court also acknowledges stereotyping concerns regarding state recognition of groups which it perceives as conveying assumptions of inferiority. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 464 (1985) (striking down a zoning ordinance that refused to grant a special use permit to group home for people with mental disabilities).

187 U.S. CONST. amend. XIV, § 1.

188 509 U.S. 630 (1993).

189 *See also id.* at 635–36 (observing that one district had been compared to a "Rorschach inkblot test" and that the second district stretched for 160 miles and wound "in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobble[d] in enough enclaves of black neighborhoods'" (quoting Shaw v. Barr, 808 F.Supp. 461, 476–77 (E.D.N.C. 1992))).

190 *Shaw*, 509 U.S. at 647.

191 *Id.* at 642.

same candidates at the polls," regardless of other distinguishing demographic criteria, such as "age, education, economic status," or their community of residence.[192]

In other words, the Court's premise in *Shaw* was that racial considerations in redistricting obscured differences among individual voters.[193] The Court regarded it as significant that the state legislature failed to track the state's political geography and instead created districts that brought together minority voters from different residential communities.[194] The presumption was that minorities had more in common with their own geographically-defined communities than with other members of the same racial group who lived elsewhere.[195] The redistricting plan threatened constitutional harm because it presumed that race predominated over geography, the assumption being that choice of residential community was a more accurate reflection of individual political interests than race.[196]

Similarly, in *Schuette v. Coalition to Defend Affirmative Action*, the Court rejected an equal protection challenge to a voter initiative that amended the State of Michigan's constitution to prohibit race-conscious affirmative action in higher education admissions.[197] Plaintiffs argued that the initiative singled out race-sensitive admissions policies for discriminatory treatment in the political process by selectively removing them, and not other kinds of admissions decisions, from the purview of the state universities' governing bodies.[198] The contention was that the initiative racially distorted the state's political process, effectively preventing racial minorities from securing policies that "inure[] primarily to [their] benefit" and that they "'consider' . . . to be . . . 'in their interest.'"[199] The Court rejected the proposed standard on the grounds that it would lead to a stereotyped assess-

192 *Id.* at 647; *see also* League of United Latin Am. Citizens v. Texas, 548 U.S. 399, 434 (2006) (noting the importance of intraracial differentiation in the redistricting context).

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

194 *Id.* at 647.

195 For a critique of *Shaw v. Reno*, see Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1366 (1997).

196 *See* Guinier, *supra* note 1, at 1603 (discussing the view that "geography approximates political interests").

197 Schuette v. Coal. to Defend Affirmative Action, 134 S.Ct. 1623 (2014).

198 Respondents' Brief on the Merits at 1–5, *Schuette*, 134 S. Ct. 1623 (2014) (No.12-682).

199 *Schuette*, 134 S. Ct. at 1634 (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982)). Justice Sotomayor echoed this point in her dissent. *See id.* at 1651, 134 S.Ct. at 1651 (Sotomayor, J., dissenting) ("Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.").

ment of the kinds of policies that "benefited" racial minorities.[200] This was untenable because it presumed that racial minority groups shared similar, readily discernible interests and, therefore, failed to acknowledge the individuality of racial minorities.[201]

Parents Involved in Community Schools v. Seattle School District No. 1[202] offers another example of equal protection's differentiation norms. There the Court struck down school district policies that used racial classifications to achieve racial balance and diversity among the enrolled students.[203] The Court rejected the policies on narrow tailoring grounds.[204] A crucial problem was the broad dimensions of the racial classifications themselves, which, in the case of one district, identified students as being "white" or "non-white" and, in the second, classified them as "black or 'other.'"[205] In a district that included widely diverse student populations, the Court determined that these rough categorizations failed to capture the full spectrum of students' racial identities[206] Its premise—that race had been too bluntly utilized to align with each district's diversity goals—suggests that more finely grained racial definitions could better satisfy their educational objectives.[207] The recognition of people of color as individuals, rather than as members of a racial group, depended on embracing the full spectrum of racial diversity, rather than relying on rough racial distinctions of "non-white" and "other."

As each of these cases indicates, the Court has struck down race-conscious policies that obscure differences among individual members of minority groups. These cases support the constitutional premise of intraracial diversity, which by definition emphasizes the individuality of persons of color.

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200 *Id.* at 1634 (Kennedy, J.) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.'" (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993))).

201 *Id.*

202 551 U.S. 701 (2007).

203 *Id.* at 709–11.

204 The Court did not reach the question of whether diversity itself is a compelling state interest in the context of K-12 education. *Id.* at 726.

205 *Id.* at 727.

206 *Id.*

207 *Id.* at 723–24 ("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." (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting)). *See also Metro Broadcasting, Inc.*, 497 U.S. at 610 ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals.").

C. Racial Recognition & Identity

The previous subparts discussed differentiation norms in equal protection. Drawing on these cases, I have suggested that public universities may constitutionally take differences among individual members of racial minority groups into account in their admissions policies. But these cases also raise a separate problem with the plaintiff's theory in *Fisher*. Prohibiting the consideration of race as a supplemental, individualized component of critical mass requires the state to *disregard* the role that race may have played in shaping the lives of applicants. In the name of protecting individuality, "colorblindness" paradoxically commands the state to overlook an important element of an applicant's identity and personhood.[208] Indeed, the University of Texas admissions policy was calibrated for this purpose. It allows race to be factored into the overall assessment of the candidate if it is demonstrably meaningful to her lived experience.[209]

Thus, barring racial considerations in higher education admissions—effectively erasing race—threatens to undermine individuality in a way that tramples core equal protection concerns.[210] Efforts to erase race—to pretend that it does not exist under the guise of "colorblindness"—can actually undermine the full expression of personhood.[211] Requiring the state to ignore race in a context in which it is individually meaningful denies persons of color the opportunity to explore in their application racially-associated experiences that comprise an important element of their identity.[212] Allowing the state to pursue diversity, but not diversity within underrepresented racial groups, sends the message that individuality matters for white students but not for racial minorities.[213]

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208 Schuette v. Coal. to Defend Affirmative Action, 134 S.Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (noting the "stark reality that race matters").

209 *See* Joint Appendix at 168a–70a, Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf (reproducing a segment of a deposition, in which the deponent explained contextualized consideration of race).

210 *See* Carbado & Harris, *supra* note 48, at 1147–48 (contending that "colorblind admissions regimes" are "likely to be particularly costly to applicants for whom race is a central part of their social experience and sense of identity").

211 *Id.*

212 *Id.*

213 *See supra* Part III.B.1 (identifying a hidden presumption of intraracial diversity for white students).

IV. LESSONS FOR EQUAL PROTECTION

Equal protection has long embraced a rubric of "colorblind" individualism,[214] which presumes that state recognition of racial groups leads to racial stereotyping, stigma and balkanization.[215] Social science reveals that these assumptions are not only mistaken but, paradoxically, can produce the very racial dynamics that equal protection condemns.[216] Contrary to the assumptions of "colorblindness," groups and individual identity are linked.[217] As discussed earlier, enhancing the size of a minority group in an institution can create positive racial synergies that improve the health of the institution itself.[218] Enlarging the size of the minority presence also fosters the individual development of persons of color by alleviating the salience of race in ways that free racial minorities to explore their individuality.[219] This in turn creates conditions that lessen racial stigma, stereotyping, and the social harms of tokenism.[220] Further, contrary to assumptions that racial classifications lead to group balkanization, critical mass increases the opportunity for healthy cross-racial interactions that build respect, mutuality, and reciprocity between persons from different racial backgrounds.[221]

The lesson here, therefore, is that for equal protection to be faithful to its professed goals of individualism, it should continue to permit racial classifications that foster diverse institutional settings through critical mass. By bolstering the depth and breadth of racial diversity, institutions enhance the opportunity for positive intergroup contact and for ameliorating racial stereotypes that retard individual opportunity and development.[222] Creating such an environment, however, necessarily requires explicit attention to building a healthy group presence of racial minorities and attending to the conditions

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214 *See supra* Part I.

215 *See, e.g.*, City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (observing that "classifications based on race carry a danger of stigmatic harm"); *id.* at 494 ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978))); *see also* Siegel, *supra* note 29, at 1278 (identifying an "antibalkanization perspective" on equal protection that condemns uses of race perceived to "threat[en] social cohesion").

216 *See supra* Part II.

217 *See supra* Part II.

218 *See supra* Part II.

219 *See supra* Part II.

220 *See supra* Part II.

221 *See supra* Part II.

222 *See supra* Part II.

of that setting, which in turn requires explicit attention to race itself.[223] This raises important questions about how to operationalize critical mass and—more particularly in light of *Fisher*—how to pursue critical mass through intraracial diversity. I turn to this last point now.

Devon Carbado[224] and Vinay Harpalani,[225] who both support the constitutional premise of intraracial diversity, have explored questions about its implementation, though they differ in some of the particulars in important respects. Harpalani, for example, proposes a "unique contribution to diversity" test, which would require universities to identify how their race-conscious selection policies improve the representation of certain minority groups and/or enhance diversity within those groups,[226] such as by increasing the "socioeconomic, cultural, or geographic diversity among Black and Latino students."[227] This is a sensible approach, though I would not require universities to demonstrate that they have in fact achieved "sufficient diversity of viewpoints . . . within each racial group," as Harpalani at times appears to suggest.[228] In my view, universities need only show that their policies seek to admit students of color with a range of different experiences and that these policies are narrowly tailored to their goals. For example, a university might conclude that an African-American student who attended an inner city high school brings a different experience than a student who graduated from a predominantly white high school in the suburbs. Depending on the profile of the students who have already been admitted, a university might properly con-

223 *See, e.g.*, Purdie-Vaughns et al., *supra* note 78, at 621–22 (discussing how "colorblind" policies increase the perception of social threat in corporate institutions with low minority representation).

224 *See* Carbado, *supra* note 18, at 1164.

225 *See* Harpalani, *supra* note 18, at 477 (observing that "within-group variation actualizes the educational benefits of diversity, as it serves to break down racial stereotypes . . . .").

226 *Id.* at 524–25.

227 *Id.* at 525.

228 *Id.* at 494; *see also id.* at 470 (urging universities "to demonstrate explicitly that [their] race-conscious policy is used to increase the variety of viewpoints and experiences among minority students—by admitting minority students in different majors, or from different cultural or socioeconomic backgrounds . . . ."); *id.* at 473 (defining critical mass to "refer[] to the diversity of viewpoints and experiences within racial groups"). One potential problem with requiring a showing of viewpoint diversity is that viewpoint testing runs perilously close to trenching on First Amendment concerns. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (describing the constitutional impermissibility of viewpoint testing under the First Amendment).

clude that one adds to intraracial diversity more than the other. In fact, Justice Powell endorsed such an approach in *Bakke*.[229]

Carbado properly cautions against adopting a framework that may incentivize admissions officers to judge applicants of color according to how well they conform (or don't conform) to stereotypical characteristics and behaviors most associated with their race.[230] This means that universities should avoid devising admissions systems that "trade on biases and stereotypes."[231] To return to my earlier example of the African-American students who attended two different kinds of schools, admissions officers under my formulation could constitutionally take their different experiences into account in evaluating their applications. But it would cross the line to make admissions decisions based, for example, on whether a particular student is more (or less) "authentically black." The constitutional problem here is that such a judgment rests on racial stereotypes about how blacks "are" or are "supposed" to be: it confines the universe of "blackness" to people who conform to a predetermined set of characteristics or behaviors and rejects (or accepts) those based on whether they deviate from the identified racial archetype. No such problem occurs, however, where an admissions officer decides to admit an African-American student based on the uniqueness of her experiences or background. This judgment, of course, involves some assessment of *why* she is different, which in turn depends on some understanding of commonalities among African Americans as a group. But it survives constitutional review because it does not depend on rigid, mechanistic assumptions about African Americans in general. Rather, it is based on an acknowledgement of individual differences among the racial group: it opens the universe of "blackness" by acknowledging that black people *can* be and are, in relevant respects, different—not only from those who are not black, but also from each other.

In his dissent from the Fifth Circuit Court of Appeals' recent majority opinion in *Fisher*, Judge Garza missed this point, contending that the University of Texas's policy to promote intraracial diversity

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229 Indeed, this is the approach that Justice Powell endorsed in *Bakke*. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 321–24 (1978).

230 *See* Carbado, *supra* note 18, at 1135, 1158 (asking whether decisionmaking processes that promote intraracial diversity are "normatively desirable" and contending that an "intragroup differentiation dynamic" in the admissions context can lead to judgments about whether African Americans are "stereotypically black"); *cf.* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA 1–2 (2013) (exploring how employees manage and "perform" racial identity to conform to and to disconfirm racial stereotypes).

231 *See* Carbado, *supra* note 18, at 1158.

itself depended on racial stereotypes.[232] Garza argued that minority students admitted under the Top Ten Percent Law were regarded by the University as "somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review."[233] This argument, however, tracks the misguided premise of colorblind individualism, which ignores once again the reality and relevance of the lived experiences of race. There are two responses to the *Fisher* dissent, both of which justify the University's approach. The first is that the educational environment of segregated schools *is* different than the environment of integrated schools, not invariably worse, but most certainly different in key respects. Indeed, it is so fundamentally different that we have erected an entire body of constitutional doctrine around the distinction.[234] The second response, which is consistent with the first, is that minority students who attend racially segregated schools may very well have experiences that are similar to minority students who attend integrated schools and vice versa. Indeed, as already discussed, learning about such shared experiences is an important part of the university experience. But of course these students will never have the opportunity to realize their commonality unless the university brings them together in the first place. And once it does, these students might well come to appreciate their shared individuality within the broader context of society's racial architecture.

This leaves us with the constitutional question of how to determine when critical mass has been achieved and race-conscious admissions are no longer needed.[235] Given the vagaries of human nature, it is impossible to engineer human relationships completely. This means that an institution likely would have a hard time determining the size of the minority population that is required to achieve critical mass without some trial and error.[236] Rather, it would have to evaluate and monitor the quantity and quality of diverse interactions on campus, in addition to creating social structures that facilitate such

232 758 F.3d 633, 669–70 (Garza, J., dissenting).

233 *Id.*

234 *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

235 See Carbado, *supra* note 18 (discussing constitutional questions associated with "critical mass"); Harpalani, *supra* note 18 (discussing the same).

236 *Cf.* Harpalani, *supra* note 18, at 484 (observing that the "educational benefits of diversity . . . may vary based on local history, demographics, and politics, or the institution's history and educational mission, all of which can also change over time").

interactions.[237] Through careful observation, a university might determine that a certain range of racial minority students is more likely to achieve a critical mass in its particular environment,[238] though that range may change over time with demographic shifts and changes in the profile of the institution's student population. Once the number of students falls within this range,[239] the university might cease to consider race in admissions for that cycle. Importantly, this does not mean that it would necessarily cease to admit minority students; it would only limit the number of students who could be admitted under a race-conscious process for purposes of achieving critical mass.[240]

Properly conceived and implemented, therefore, critical mass can take account of relevant differences within underrepresented minority groups, but not in a way that depends on racial typecasting. Once again, the goal is to permit institutions to acknowledge race as part of an individual's identity, if the applicant's life experiences and circumstances so indicate. The objective is to create an environment that both recognizes and cultivates the individuality of persons of color, just as it does for white students. Failure to do otherwise is inconsistent with equal protection's normative framework.

CONCLUSION

Equal protection advances principles of colorblind individualism, but social science points to race as a lived reality. Although the state may ignore race, it cannot make race go away; and doing so, in fact, is likely to make race relations worse. Given these outcomes, colorblind state action is never fully "race neutral" and colorblindness may in fact be color-consequential. Social science reliably indicates that increasing the size of the minority population in an institution can ameliorate the effects of tokenism, stereotypes, and stigma. Therefore, the use of racial classifications to build a healthy minority presence paradoxically diminishes the salience of race. It promotes the individuality of persons of color and, accordingly, is more consonant with the objectives of equal protection.

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237 *See* Bowen, *Brilliant Disguise*, *supra* note 57, at 1234–44 (noting the importance of carefully managing interactions among a diverse groups of students).

238 *See* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97, 133–34 (2007) (observing that the creation of "critical mass" depends on empirical observation of the student body and their interactions in a unique institutional context).

239 *See* Grutter v. Bollinger, 539 U.S. 306, 336 (2003) (observing that "a range is inconsistent with a quota").

240 *See id.* at 342 (observing that narrow tailoring requires periodic review to determine continued necessity of race-conscious selection process).