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EQUALITY AND IDENTITY HIERARCHY

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INTRODUCTION

There is little if any recent scholarship advancing a theory of equality that actually describes the Supreme Court's equal protection jurisprudence.[1] There are, of course, numerous normative theories.[2] Typically, they propound what constitutional equality

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[1] Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2424 (1994) ("It is not at all simple to come up with a sensible theory of equality that would map onto" the Court's current approach to equal protection cases).

[2] *See, e.g.*, *id.* at 2429 (Fourteenth Amendment intended to prohibit laws that "contribute to the maintenance of second-class citizenship, or lower-caste status. . . ."); R.A. Lenhardt, *Understanding The Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 888-89 (2004) (Fourteenth Amendment prohibits racial stigmatization); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996) (Fourteenth Amendment prohibits state from treating any "societal group as untouchable."); Charles R. Lawrence III, *The Id, The Ego, And Equal Protec-*

ought to entail and either highlight the Court's failure to interpret the Equal Protection Clause in a manner that is consistent with that normative vision and/or propose a new test that is consistent with it.[3] Unlike that scholarship, this paper advances a theory of equality that actually describes the Court's recent equal protection jurisprudence. Many scholars have lamented that the Court's Fourteenth Amendment jurisprudence is inscrutable and ad hoc.[4] At first glance, recent equal protection cases appear to confirm these criticisms. This article, however, contends that liberal theories of equality and identity help to explain these cases.

This article will focus on recent affirmative action and redistricting cases where the Court has rendered "doctrinally awkward" decisions that are difficult to square with precedent.[5] The Court sounded the death knell for affirmative action more than a decade ago when it decided that "colorblindness" required that

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tion: Reckoning With Unconscious Racism, 39 STAN. L. REV. 317, 355 (1989) (Fourteenth Amendment should shield people from "unconscious racism"); Kenneth L. Karst, *Foreword: Equal Citizenship Under The Fourteenth Amendment*, 91 HARV. L. REV. 1, 8 (1977) (Fourteenth Amendment supposed to ensure "equal citizenship" which means that individuals are treated as if they possess equal worth). The line between "normative" and "descriptive" is, of course, imprecise. Description is an interpretive act and all of these normative theories are based upon interpretations of cases and constitutional history. This paper, however, differs from all of these by arguing that the Court's recent equal protection jurisprudence reflects a theory of equality.

[3] *See*, *e.g.*, Lenhardt, *supra* note 1, at 890-95 (proposing a stigmatic harm test); Lawrence, *supra* note 2, at 356-61 (proposing "racial meaning" test); Sunstein, *supra* note 2, at 2413 (anticaste principle is largely outside judiciary's competence to implement); Karst, *supra* note 2, at 49-56 (describing equal protection cases that are inconsistent with "equal citizenship" theory).

[4] *See, e.g.*, Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1073-97 (1998) (describing ostensible "incoherence" of equal protection cases); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1150 (1989) (intent test obfuscates nature of judgments courts actually make in equal protection cases). Identifying neutral, coherent principles to adjudicate equal protection claims has been a longstanding concern for constitutional scholars. *See generally* Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[5] Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1718 (2005). *See also* Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 242 (2004) (noting similarity of analytic approaches in recent affirmative action and redistricting cases); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 526 (1993) (noting awkwardness of recent redistricting cases).

strict scrutiny apply to all such programs.[6] In 2003, however, the Court in *Grutter v. Bollinger* upheld the University of Michigan Law School's affirmative action program, concluding that it furthered the state's compelling interest in diversity and that it was narrowly tailored because it treated applicants as "individuals" and not just members of a racial group.[7] Many noted that the Court's application of strict scrutiny seemed considerably more relaxed than the word "strict" suggests.[8] At the very least, the Court's result is inconsistent with any straightforward understanding of "colorblindness," which prohibits the use of race in public decision-making. In *Gratz v. Bollinger*, a companion case to *Grutter*, the Court, struck down the University of Michigan's undergraduate affirmative action admissions policy for not being narrowly tailored.[9] The Court determined that, unlike the Law School's program, the undergraduate program failed to treat applicants as "individuals" because it awarded a fixed number of points to minority applicants.[10] In tandem, *Grutter* and *Gratz* evince the Court's commitment to vigilantly policing "benign" racial classifications[11] and its unwillingness to embrace a categorical colorblindness approach.[12]

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[6] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (2001) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

[7] Grutter v. Bollinger, 539 U.S. 306, 336, 341 (2003).

[8] *See, e.g., id.* at 353 (Thomas, J. dissenting); Balkin, *supra* note 5, at 1724; R. Richard Banks, *The Benign-Invidious Asymmetry In Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 584 (2003); Adam Winkler, *Fatal In Theory And Strict In Fact: An Empirical Analysis Of Strict Scrutiny In The Federal Court*, 59 VAND. L. REV. 793, 808 (2006).

[9] Gratz v. Bollinger, 539 U.S. 244 (2003).

[10] *Id*. at 272.

[11] The term "benign" is frequently used to describe programs such as affirmative action that confer a benefit upon members of a specific marginalized group. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005).

[12] The Court's most recent equal protection decision suggests that at least five justices remain opposed to a rigid colorblindness approach. In *Parents v. Seattle*, parents challenged the use of race by school districts in assigning students to public schools. Justice Kennedy, in a concurrence, along with the four dissenting justices, indicated that equal protection does not require strict colorblindness. *See* Parents v. Seattle School Dist. No. 1, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J. concurring) ("In the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle."); *id*. at 2815 (Breyer, J. dissenting) (stating that Constitution does not require colorblindness). It is unclear whether Justice Roberts and Alito endorse a strict

The Court has also been unwilling to categorically embrace colorblindness when scrutinizing so-called majority-minority districts. In a line of cases beginning with *Shaw v. Reno*, the Court applied strict scrutiny to such districts when drawn such that members of a non-white racial group constitute the majority of registered voters.[13] In the process, the Court conceived of an entirely new and controversial voting rights injury: being included in a voting district that is drawn based primarily on race.[14] The Court devised this new injury to protect the "individual."[15] It stated that voters are not treated as individuals when they are included in voting districts that are drawn with too much emphasis on race.[16] This commitment to the individual seems strained in the districting context given that voting is, by definition, a collective political act: groups of voters elect candidates.[17] Although individual voters have the right to cast a vote, no single voter has the right to pick the winning candidate.[18]

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colorblindness approach. Justice Roberts' plurality opinion does not explicitly suggest as much nor did either Justice join Justice Thomas' concurrence which does endorse a strict colorblindness approach. *See id.* at 2770 (Thomas, J. concurring). *See also infra* note 374 and accompanying text.

[13] Shaw v. Reno, 509 U.S. 630, 635, 652 (1993) (concluding that where district is so irrational on its face that no showing of intent is required) [hereinafter Shaw I].

[14] *See* Miller v. Johnson, 515 U.S. 900, 911 (1995) (a state "may not separate its citizens into different voting districts on the basis of race.").

[15] *Id.* (The state "must treat citizens as individuals, not simply as components of a racial, religious, sexual, or national class.") (internal quotation marks omitted).

[16] *Id.*

[17] *See, e.g.,* Heather K. Gerken, *Understanding The Right To An Undiluted Vote*, 114 HARV. L. REV. 1663, 1678 (2001) (quoting Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J. concurring and dissenting in part); Pamela S. Karlan & Daryl Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1204-08 (1996) (arguing that because districting is group-based, it is distinct from other kinds of government decision-making); Lani Guinier, Comment, *(E)racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 127 (1994) (discussing relation between geographic districting process and group-based representation).

[18] *See* Gerken, *supra* note 17, at 1678. There are, of course, more individual-based claims in the voting rights realm – e.g., exclusion from the ballot box – but such claims are not the subject of this paper.

Both the affirmative action and redistricting cases appear to turn on what is due to the "individual."[19] It is, however, impossible to know what is due without first knowing what it means to be an "individual." The answer to this question is at the core of the descriptive theory this article advances. This article argues that the reasoning in the affirmative action and districting cases depends upon an unspoken theory of identity and that the Court uses the term "individual" as shorthand for that theory. Put somewhat differently, this article seeks to identify the theoretical underpinnings of what the Court means when it claims that equal protection protects the individual.

Any theory of equality depends upon a theory of identity. In positing that two or more persons are the same, equality assumes some conception of what it means to be a person. "Identity" here simply refers to any social conception of what it means to be a person (or a particular kind of person). "Identity" is the label given to people who possess a specific set of attributes or traits. By this definition, any label used to describe someone, including the labels "person" or "individual," constitute an identity.[20] Section I advances two points: first, equality always depends upon a theory of identity and second, the "individual" is an identity.

Once it is established that equality requires a theory of identity and that the individual is an identity, Section II describes the specific contours of that theory – i.e., it describes the identity traits of the individual. Equality is central to the liberal tradition; Section II accordingly looks to liberal theory for a conception of identity. Virtually all liberal theories assume the existence of "identity hierarchy." Identity hierarchy posits that the individual is first

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[19] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[T]he Fourteenth Amendment 'protect[s] *persons*, not *groups*.'") (quoting *Adarand*, 515 U.S. at 227); Shaw I, 504 U.S. 630, 648 (noting that individual should be focus of redistricting cases).

[20] *See* JUDITH BUTLER, THE PSYCHIC LIFE OF POWER 10-11 (1997) (arguing that it is impossible to explain how persons are constituted without relying upon the notion of personhood). *Cf.* ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 57 (Chris Turner trans., Verso 1991) (implying that universalistic designation such as "human" is an identity to the extent that it assigns attributes and differentiates "between humanity and animality" where racism posits certain kinds of persons as animals). *See also* Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC*: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 534-35 (1990) (arguing that the Court's use of "individuality" masks identity-related assumptions).

and foremost a civic self – i.e., the individual experiences his citizenship or "civic identity" as primary to non-civic identities such as race, religion, occupation, etc. "Identity hierarchy," as that expression is used here, does not refer to the sociological fact of group domination, but rather to the theoretical ranking of identities. Moreover, it posits that subordinate identities are best cultivated by the State only when those identities operate in the service of civic identity and help to consolidate its primacy.

Section III demonstrates how identity hierarchy explains the Court's affirmative action and majority-minority districting cases. Like liberal theoreticians, the Court uses the term individual to describe a person who experiences civic and non-civic identities in a manner consistent with identity hierarchy. The Court permits the state to consider race when it bolsters identity hierarchy and forbids the state from considering race when it threatens identity hierarchy.[21] In the affirmative action context, race may be used in university admissions because doing so helps cultivate civic identity amongst students. The Court, however, does not permit universities to assume that race constitutes minority applicants' primary identity trait.[22] Doing so, the Court reasons, is inconsistent with treating applicants like individuals. In the redistricting context, the Court is not concerned with cultivating civic identity so much as it is with creating the optimal circumstances for its expression. The Court deems it acceptable to consider race in the districting process when doing so helps identify a community with a shared civic identity. The state, however, is not allowed to assume that civic identity is "predominantly racial."[23] As in the affirmative action context, the Court reasons that treating civic identity as if it were predominantly racial is an affront to the individual.

Section IV discusses some of the normative implications of identity hierarchy and concludes that the affirmative action and

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[21] This paper does not offer identity hierarchy in the way of a principle that unifies all equal protection cases or even all equal protection race cases. However, identity hierarchy represents an important explanatory strand and, unlike other descriptive theories of equal protection jurisprudence, is a theory of equality. Democratic process theory is an example of a descriptive theory of equal protection that is not a theory of equality. *See infra* notes 199-202 and accompanying discussion.

[22] *See Grutter*, 539 U.S. at 340; *Gratz* 539 U.S. at 272.

[23] Bush v. Vera, 517 U.S. 952, 980 (1996).

redistricting cases would have greater analytic integrity, and in some cases a different result, if the Court were to focus on promoting civic identity without reference to the individual.

I. EQUALITY REQUIRES IDENTITY

Equality is often viewed as identity's foil: a political vista where everyone is the same despite race, religion, and other particularities. Equality is thought of as universalistic and identity as particularistic. This section argues that equality's universalism is illusory because it assumes and depends upon identity. Equality posits that like individuals ought to be treated alike. It is, however, impossible to talk about which individuals are like without some concept of what it means to be an individual. Identity refers to the collection of traits and characteristics that make someone an individual. Individual is, in other words, an identity.

A. EQUALITY'S ILLUSORY UNIVERSALISM

Equality sits atop the high altar of American ideals.[24] At first glance, it is universalistic: it is all encompassing, positing that everyone, for most purposes, should be thought of as the same in the state's eyes. Equality is central to the liberal tradition and is grounded in reason, a capacity for which is thought to be a defining human trait as opposed to the unique provenance of a particular racial, ethnic, or other particularized group.[25] Equality requires the state to treat everyone the same regardless of their color, creed, or other traits.[26] One might expect these particularities' salience (and relevance) would be ever-diminishing in public life if the state aggressively promoted equality. Taken to its logical extreme, however, equality portends a dystopic regime of forced conformity that threatens to suppress widely embraced differences.[27] A society in which everyone is literally the same is horrifying.[28]

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[24] *See* KENNETH KARST, BELONGING TO AMERICA 28 (1989).

[25] *See infra* Section II.

[26] *See* ETIENNE BALIBAR, POLITICS AND THE OTHER SCENE 157 (2002) (arguing that equality's promise of liberation constitutes a "fictive universality" that purports to transcend particular identities).

[27] Some theorists view this dynamic in terms of an opposition between "liberty" and "equality." *See*, *e.g.*, Sunstein, *supra* note 1, at 2410. Liberty is thought to promise the

Identity limits equality's universalizing possibility and simultaneously ensures the particularism that is necessary to stave off dystopia.[29] In all liberal countries there are hierarchies of "belonging" that belie the universality of the equality credo.[30] At any given historical moment, there will be broad social consensus regarding the significance of various identity differences.[31] Equality's reach will be restricted to undoing no more than those differences that are socially perceived as illegitimate. Accordingly, there are a host of identities, and corresponding inequalities, that are tolerated if not celebrated in liberal societies. Wealth stands out as a prominent example of such.[32] Most western democracies have also had long histories of racial exclusion and domination – typically while simultaneously holding themselves out as beacons of universalistic virtue.[33] This contradiction was managed by imagining the dominated "other," whether slave or colonial subject, as sub-human and thus existing outside of the "family of man."[34] The United States is no exception: for the greater portion of its history, American political and legal discourse posited that the systematic exclusion of

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freedom to do as one pleases while equality limits that freedom in order to control political and/or economic stratification in society. *Id.* Whether equality and liberty are antithetical to one another is largely a function of how one conceptualizes them. For instance, the two tend to converge if one adopts the libertarian understanding of equality as ensuring the same opportunity to pursue one's own ends. *Id.* at 2411. Professor Dworkin goes so far as to argue that there is no opposition at all because "equality" is the original right from which all others flow. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-81, 277 (1978). This paper shall not concern itself with the "liberty-equality" debate.

[28] *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (1932). An example (that seems absurd now) of the strategic use of this anxiety in political debate is the argument made by opponents of the Equal Rights Amendment that passage of the Amendment would forbid gender segregated restroom facilities. *See* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense Of Originialism*, 101 NW. U. L. REV. 383, 393 (2007).

[29] *See* Balkin, *supra* note 5, at 1690-93 (discussing the extent to which juridical theories of equality have accommodated social hierarchies that serve powerful groups' "identities and interests.").

[30] *See* Balibar, *supra* note 26, at 69.

[31] *See* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896); Balkin, *supra* note 5, at 1690.

[32] *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (holding that differential treatment based on wealth not entitled to heightened scrutiny under the equal protection clause).

[33] *See* BALIBAR & WALLERSTEIN, *supra* note 20, at 62-63.

[34] *See id.* at 57.

African-Americans from the nation's political and social life was consistent with equality.[35]

This tension between equality and identity finds pointed and repeated expression in Fourteenth Amendment jurisprudence.[36] Fourteenth Amendment doctrine has always reflected and continues to reflect a complicated, and often contradictory, interaction between equality and identity. In the nineteenth and early twentieth centuries, for example, a "tripartite theory" of rights limited the Equal Protection Clause's role in dismantling Jim Crow as famously emblematized by *Plessy v. Ferguson's* "separate, but equal" holding.[37] As described in detail elsewhere, the tripartite theory was designed to forestall the frightening implications of millions of freed slaves becoming white persons' full equals.[38] The theory was expressly conceived for the purpose of limiting equality's full reach. The theory cleaved rights into three discreet categories: civil, political, and social.[39] Equality, it was thought, should only obtain with regard to "civil rights" (which included the right to contract and own property), but not with regard to the rights to participate in the political process or marry whites (the latter two belonging to the "political" and "social" realms).[40] Justice Harlan's *Plessy* dissent,

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[35] *See, e.g., Plessy*, 163 U.S. at 551-52; U.S. Const. art. I, § 2, cl. 3 (slave counts as 3/5 of a person for apportionment of representatives and taxes).

[36] *E.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (too expansive a reading of Equal Protection Clause "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black. . . ."); *Plessy*, 163 U.S. at 551-52 ("If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.").

[37] *Plessy*, 163 U.S. at 551.

[38] *E.g.*, Balkin, *supra* note 5, at 1696; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120-29 (1997) (arguing that status hierarchies adapt and change form in response to shifts in law, but do not disappear); Melissa L. Saunders, *Equal Protection, Class Legislation, And Colorblindness*, 96 MICH. L. REV. 245, 270 (1997) (arguing that majority-minority redistricting cases are inconsistent with Fourteenth Amendment founders' intent); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1417 (1992) (arguing that Privileges and Immunities Clause intended to provide "equality-based" protection under state laws).

[39] *E.g.*, Balkin, *supra* note 5, at 1696; Siegel, *supra* note 38, at 1120-29 (1997); Saunders, *supra* note 38, at 270; Harrison, *supra* note 38, at 1417.

[40] *E.g.*, Balkin, *supra* note 5, at 1696; Siegel, *supra* note 38, at 1120-29 (1997); Saunders, *supra* note 38, at 270; Harrison, *supra* note 38, at 1417.

oft heralded as premonitory of the Equal Protection Clause's role in dismantling Jim Crow,[41] betrays the tripartite theory's contradictions. Justice Harlan noted that the white race will remain "the dominant race" if it "remain[ed] true to its great heritage" and extended civil equality to blacks.[42] In both the majority opinion and Justice Harlan's dissent, equality is imagined as consistent with white supremacy – i.e., equality and identity underwrite each other rather than stand in opposition to one another other.[43] As discussed in the next subsection, the tripartite theory is not an aberration; equality always depends on identity.

B. EQUALITY AS IDENTITY

Equality, like all universals, must incorporate particularisms to remain viable.[44] Legal scholars have noted that equality's promise of like treatment for like individuals requires an outside reference point by which to measure likeness and difference.[45] Among the most aggressive formulations of this point is Peter Westen's argument that equality is entirely tautological. He posits equality to mean that likes should be treated alike where "likes" are those "who should be treated alike."[46] Equality, he contends, is purely formalistic, an "empty vessel."[47] It requires that people be given "their due," but depends entirely upon some underlying right to specify exactly what is due.[48] Westen contends that legal and

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[41] *See, e.g.*, Richard A. Epstein, *Of Same Sex Relations And Affirmative Action: The Covert Libertarianism Of The Supreme Court*, 12 SUP. CT. ECON. REV. 75, 100 (2004) (Harlan dissent "was the constitutional pole star during the heroic (pre-1954) era of the struggle for Civil Rights.").

[42] *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). *See also* Balkin, *supra* note 5, at 1700-01.

[43] *Cf.* BALIBAR & WALLERSTEIN, *supra* note 20, at 43 (discussing the contradiction inherent in positing "whiteness" and "universalistic virtue" as coterminous).

[44] BALIBAR, *supra* note 26, at 58 (stating that every universalism contains particularisms within it).

[45] *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE 51 (1990) ("A reference point for comparison purposes is central to a notion of equality. Equality asks, equal compared with whom?"); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 545 (1982).

[46] Westen, *supra* note 45, at 547-48.

[47] *Id.* at 547.

[48] *Id.* at 556-57.

political claims ought to be made directly in terms of those predicate rights rather than indirectly through equality.[49] Whether equality is devoid of independent normative content is a matter of debate amongst academics, and is beyond this article's scope.[50] This article accepts that any juridical theory of equality requires an outside reference point to function and argues that identity constitutes one example of such a reference point.

Equality purports to put an equal sign between persons or groups of persons.[51] Equality posits that persons are, at least in some capacity, the same. The terms in the equation, however, can never literally be the same – otherwise the equation, which is by definition comparative, collapses into unity. It is only within a system of differences, that equality registers: to say that two things are the same is not to say that they are literally one-in-the-same; the terms of the equation are ontologically discrete – i.e., they are different. The word "same" describes the co-occurrence of certain traits as opposed to the absence of particularity. It is the comparison of two discrete things that permits the conclusion that they are the same.[52] For example, when we say that two flowers are the same, we do not mean to say that they are literally one-in-the-same, but rather that they are both red, both roses, both fragrant, or otherwise have some shared characteristics. Which characteristics are relevant depends entirely upon the purpose for which the comparison is being carried out.

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[49] *Id.* at 592-93.

[50] *See, e.g.*, Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1212-13 (1997) (arguing that equality is empty, but not tautological as Westen argues); Kent Greenawalt, *How Empty Is The Idea Of Equality?*, 83 COLUM. L. REV. 1167, 1168 (1983) (arguing that Westen's argument is too formalistic and that equality has substantive content).

[51] *Cf.* Jean Copjec, *The Phenomenal Nonphenomenal: Private Space in Film Noir*, *in* SHADES OF NOIR: A READER 167, 174-75 (Jean Copjec, ed., 1993) (discussing process of numeration of equals confers identity of citizen); BALIBAR, *supra* note 26 at 27 ("[A]ll identity is fundamentally transindividual.").

[52] This notion, presented here as a logical proposition, is expressed in different terms (and in a different analytic context) by Etienne Balibar: "[D]ifferences among men are differences among sets of *similar individuals* (which, for this reason, can be 'identified.')". ETIENNE BALIBAR, MASSES, CLASSES, IDEAS: STUDIES ON POLITICS AND PHILOSOPHY BEFORE AND AFTER MARX 200 (1994) (discussing the structure and premises of racist ideologies).

When two individuals are said to be equal, in what capacity are they thought to be the same and in what capacity are they thought to be different? To ask this question is to assume some notion(s) of what it means to be an individual. Identity is any social conception about what it means to be an individual or a particular kind of individual.[53] Identity is a set of ideas about personhood that lends narrative unity to the co-occurrence or absence of certain traits. For example, you are an "L" if you have features 1 through 6, but not 7.[54] Identity is a group-phenomenon; to the extent that there is a social conception of "Ls," anyone who has internalized that identity and/or is socially perceived as an "L" would be an "L."[55] Individuals are thought of as the same whenever they share the identity that is the relevant reference point for a particular comparison. For example, one could conclude that California residents are the "same" with regard to the question "where do you live?" They, however, might be different with regard to the question "where were you born?"

Given these definitions of identity and the individual, the Supreme Court's pronouncements that the Equal Protection Clause protects individuals suggest that the individual is equality's reference point – i.e., it is with regard to the individual that likeness is measured. [56] The individual, like any designation that attributes traits to human beings, is an identity. It is the specific nature of that identity to which we next turn.

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[53] Every word that might be used to describe a human being (including "human being") is an identity concept. There is no way to talk about human existence without invoking the language of identity. This runs counter to the common-sense understanding that personhood exists prior to identities – i.e., that identity is something that gets layered onto one's personhood. This paper's position is that "personhood" itself is a kind of identity. *See*, *supra* note 20 & accompanying discussion.

[54] KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 66-69 (2005). In exploring the relationship between identification and identity, Appiah identifies three salient dynamics: 1) the existence of a social concept of the group 2) internalization of that group concept, and 3) patterns of behavior towards the group that are a function of its existence as a group.

[55] *Id*. at 67.

[56] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting *Adarand*, 515 U.S. at 227); Miller v. Johnson, 515 U.S. 900, 911 (1995); *Shaw I*, 509 U.S. at 648.

II. LIBERAL THEORY ASSUMES THAT THE INDIVIDUAL IS FIRST AND FOREMOST A CIVIC BEING

It may seem counterintuitive to look to liberal political theory for a conception of identity. Liberal theory tends to focus on the design of political institutions and the distribution of rights among individuals without explicitly acknowledging the individual as an identity.[57] Liberal theorists often seem disinterested in questions of identity;[58] some even give the appearance of being opposed to it.[59] They are, however centrally concerned with equality.[60] Some contemporary liberal thinkers even hold equality out as the foundational right from which all others flow.[61] Because equality requires a theory of identity, however, this section reads "between the lines" of liberal theory in order to tease out the identity features that constitute the individual. This section attempts to lay bare liberalism's assumptions about what makes an individual.

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[57] *See* APPIAH, *supra* note 54 at xiv-xv; JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY, AND NATIONALITY IN THE LIBERAL STATE 2 (1994).

[58] *See* SPINNER, *supra* note 57, at 2; *see also* JOHN RAWLS, POLITICAL LIBERALISM 27 (Expanded ed. 2005) (noting that the book is not intended to propound a metaphysical view of what it means to be an individual); MICHAEL KENNY, THE POLITICS OF IDENTITY 108, 129, 169 (2004) (describing liberal theorist's reluctance); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 207 (1990) (stating liberalism is not a theory of personhood).

[59] *See* KENNY, *supra* note 58, at 23-24 (arguing that this view is incorrect).

[60] *See, e.g.*, DWORKIN, *supra* note 27, at 180-81, 277 (arguing that equality is the foundational condition from which all liberal rights emerge); Michael Ignatief, *The Myth of Citizenship*, in THEORIZING CITIZENSHIP 53, 75 (Ronald Beiner ed., 1995) (equality is a longstanding central feature of the liberal tradition). Equality has been a central feature of liberal theory from John Locke forward. *See* APPIAH, *supra* note 54, at ix. "Liberal" is both an ungainly and commodious label, encompassing a range of theoretical works from utilitarianism to republicanism, most political parties in the United States, and Americans' popular intuitions about democracy. See APPIAH, *supra* note 54, at ix. Like other "isms," "liberalism" is a constellation of ongoing debates more than a fixed set of doctrines. See id. These debates, however, are preoccupied with several common themes including individual liberty guaranteed by rights, democratic governance, pluralism, and equality. See id. This paper uses the term "liberal" in the most generic sense to refer to these debates and looks specifically at those contemporary theories that have found greatest traction in the legal discourse.

[61] *See* DWORKIN, *supra* note 27, at 180-81, 277. Dworkin argues that liberty flows from equality, while other liberal theorists contend that liberty and equality are opposed to one another.

Like liberalism, equality describes a spectrum of debates more than it does a unitary concept. Different conceptions of equality and liberal justice are premised upon different notions of what it means to be an individual.[62] These liberal concepts run along a spectrum between strong deontology and strong communitarianism.[63] This Section does not reconcile these competing visions. Rather, it seeks to demonstrate that, across the spectrum, liberal theories rely upon "identity hierarchy": a structure of identity in which "private" identities such as race and religion are subordinated to "civic identity" where the latter refers to one's identity as the citizen of a particular state.[64] "Identity hierarchy" posits that an individual is, first and foremost, a civic being – somebody who experiences civic identity as superordinate and prior to private identities such as race. "Hierarchy" here does not describe the sociological fact of group domination, but rather the theoretical ranking of identity concepts.

The strong version of deontology posits private identities such as race as virtually irrelevant to civic identity. Weak deontology and communitarianism posit private identities as partially constituting and/or strengthening civic identity, but doing so from a subordinate position.[65] Although the traits that define civic identity

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[62] *See supra* Section I.

[63] This section proposes one spectrum (deontological-communitarian); however, liberalism could be organized along any number of spectra many of which would intersect. A few examples of such spectra might include: substantive-process; *see* Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 3 (1987-88), redistribution-recognition; *see* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? 9 (Joel Golb, James Ingram & Christine Wilke trans., 2003), egalitarian – libertarian; *compare* AMY GUTMANN, LIBERAL EQUALITY (1980) *with* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). The deontological-communitarian spectrum is appropriate here because it: 1) brings the competing theories of identity that undergird liberal equality into clear relief and 2) encompasses theories that have been at the center of legal discourse. *See generally* RAWLS, *supra* note 58; DWORKIN, *supra* note 27.

[64] This article used the expression "civic identity" as opposed to "citizenship" in order to avoid the confusion stemming from the multiple meanings associated with the latter – e.g., this article is concerned with citizenship as "identity" which, although related to, is not the same as "legal status." Leti Volpp, *Obnoxious To Their Very Nature: Asian Americans And Constitutional Citizenship*, 8 ASIAN L. J. 71, 71-72 (2001); *see also* APPIAH, *supra* note 54, at 101.

[65] *See* KENNY, *supra* note 58, at 90-91 (describing liberal understanding of private associations as subordinate to and/or servicing citizenship). The strongest version of

vary across the spectrum, the bedrock traits common to virtually all of the theories surveyed herein include: the capacity for reason and self-criticism, the capacity to engage in dialogue with fellow citizens, identification with the state, and tolerance of pluralism. In other words, the liberal theories surveyed in this section position these identity features as the defining traits of "the individual."

A. DEONTOLOGY

Deontology prioritizes "the right" over "the good."[66] It offers moral justification for a system of rules ("the right") that limits individuals' ability to pursue their substantive conceptions of a good life ("the good").[67] By prioritizing the right, deontology seeks to ensure that the state remains neutral towards the good and, thereby, enables the maximum possible conceptions of the good that can coexist within a society.[68] The right corresponds with the public life of liberal society while the good corresponds with its members' private lives. Public life encompasses all of the rights, rituals, and responsibilities that define membership in the political community and private life encompasses cultural, racial, religious, familial and other associational affinities.[69] This section examines prominent examples of strong and weak deontology and concludes that identity hierarchy is a defining feature of both, although the

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communitarianism inverts identity hierarchy by suggesting that, under specific circumstances, the state regards private identities as superordinate to civic identity. *See infra* Section II.B.3.

[66] Tim Stelzig, *Deontology, Governmental Action And The Distributive Exemption: How The Trolley Problem Shapes The Relationship Between Rights And Policy*, 146 U. Pa. L. Rev. 901, 907 (1998); JOHN RAWLS, A THEORY OF JUSTICE 26-28 (1999) [hereinafter "ATJ"]. Deontology, particularly as rendered by Rawls, traces its origins to Kant's formulation of "social contract" theory. Social contract theory posits that the rights, duties, and basic structure of liberal society emerge from a contract entered into by its members. *See id*.

[67] *See* ATJ, *supra* note 66, at 28.

[68] *See id*. at 28, 392-96 (discussing priority of "right" and contrasting "right" and "good").

[69] Contemporary deontologists tend to be preoccupied with rights. *See* Stelzig , *supra* note 66, at 908. "Civic identity" corresponds with the public life of the State and is, accordingly, sometimes referred to as "public identity" herein. *See* SPINNER, *supra* note 57, 40 (public-private dichotomy central to liberalism). Non-public identities, that is, those identities that are related to citizens individual conceptions of the good life, are referred to as "private identities." *See id*.

latter assumes that private identities can and should operate in the service of civic identity where the former does not.

1. Strong Deontology

a. Justice As Fairness

John Rawls' *A Theory of Justice* is iconic in the liberal cannon and exemplifies strong deontology.[70] *A Theory of Justice* does not explicitly engage the question of identity, let alone the question of how public and private identities should relate to one another. Nonetheless, it posits a notion of equality that assumes identity hierarchy.

A Theory of Justice centers on a theory of "justice as fairness." Moral cooperation generates principles for the proper distribution of rights and resources in a liberal society.[71] More specifically, Rawls seeks to "carr[y]" the Kantian notion of social contract "to a higher level of abstraction" through the device of an "original position."[72] The original position describes a hypothetical situation in which a group of rational and mutually disinterested individuals, operating under a "veil of ignorance," negotiate and agree to basic principles of justice for society.[73] The veil of ignorance blinds each participant to his own particularities such as religion, class, race, etc. Although each participant is aware that he has such identity

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[70] ATJ, *supra* note 66, at 10-11. Rawls' version of deontology is not the strongest version imaginable. *See* NOZICK, *supra* note 63. In Nozick's libertarian view, the only morally justified social arrangement is one which consists of a minimal state (i.e., one that offers narrow protection against theft, external threats, etc.) that refuses to endorse or advance any redistributive program. *See* NOZICK, *supra* note 63, at 149-150.

[71] ATJ, *supra* note 66, at 4, 185.

[72] Id. at 10; *see also* PATRICK NEAL, LIBERALISM AND ITS DISCONTENTS 28 (1997) (describing Kantian nature of Rawls' theory of individual autonomy). Per Kant, Rawls argues that persons ought to be treated as ends rather than means which, in Rawls view, means treating them in accordance with the principles of justice that emerge from the original position. ATJ, *supra* note 66, at 156. This approach is in contrast to utilitarianism which posits individuals as a means towards maximizing collective social welfare. *Id.* at 155. In utilitarianism, the interests and rights of any person may justifiably be sacrificed in the interests of achieving gains in overall utility. *Id.*

[73] ATJ, *supra* note 66, at 11, 17. The "society" in question is also hypothetical. Rawls assumes a closed society from which there is no exit and into which there is no entry, *id.*, an assumption for which he has been criticized. *See, e.g.*, YAEL TAMIR, LIBERAL NATIONALISM 119-20 (1993) (arguing that liberal theories such as Rawls' assume the existence of a nationalist community).

features, he is not aware of what significance those particularities will have once the veil is lifted.[74] The veil of ignorance thus ensures that individuals do not jockey for advantage based upon morally irrelevant characteristics.[75] Because participants to the original position are equal in every respect, the agreement that results is perfectly fair. [76] Rawls calls the agreement "justice as fairness."[77]

The principles of justice that constitute the agreement, although hypothetical, are intended to be benchmarks for appraising our own political system.[78] Two fundamental principles constitute "justice as fairness." They are: 1) "[A]n equal right to the most extensive scheme of [ ] basic liberties" that is possible and 2) "[s]ocial and economic inequalities" are to be distributed such that they operate to everyone's advantage and are attached to positions which are open to all.[79] The first principle guarantees basic liberties including freedom of speech, assembly, and conscience.[80] The second principle, which Rawls calls the "difference principle," requires that the distribution of wealth be to everyone's advantage and that there be "equal opportunity" to access all positions in society.[81] The difference principle permits inequality, but only to the extent that increases in the well-off's expectations serve to improve the worse-off's expectations as well.[82] The second principle permits

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[74] ATJ, *supra* note at, 16-17, 118-22.

[75] *Id*.

[76] *Id*. at 17. Dworkin interprets the original position to reflect the foundational condition of perfect equality. *See* DWORKIN, *supra* note 27, at 180-81, 277.

[77] ATJ , *supra* note 66, at xi.

[78] *Id*. at 84. The applicability of "justice as fairness" to our existing political institutions proceeds through a process of "reflective equilibrium." *Id*. at 18. Where there are discrepancies between justice as fairness and existing arrangements, that counsels in favor of revising either the former or latter with sensitivity to "our considered convictions of justice." *Id*. This process of adjustment and revision that flows from moving between justice as fairness and existing arrangements is "reflective equilibrium." *Id*.

[79] ATJ, *supra* note 66, at 53.

[80] *Id*. The only reason for circumscribing basic liberties would be because of conflicts between the exercise of those liberties and survival of the liberal state. *Id*. at 56.

[81] *See id*. at 73. Equality of opportunity is consonant with the notion of "procedural justice." *Id*. at 75. That is to say, equal opportunity does not guarantee any particular position for any particular person, only that the procedures for accessing the position are consistent and fair. *Id*. at 76.

[82] *See id*. at 65. From a distributive perspective, Rawls' theory can be thought of as egalitarian to the extent that it prohibits excessive income inequality, *Id*. at 198-99,

economic inequality, but ensures that all members of society have positive economic expectations. The first principle takes priority over the second whenever there is a conflict between the two. For example, the government could not impose restrictions upon speech in order to ensure economic gain, regardless of its magnitude or egalitarian effects. The two principles of justice constitute "the right." Individuals are free to pursue any scheme of the "good" (however idiosyncratic) without interference provided that doing so does not violate the two principles of justice.[83] The state enforces the right, but remains neutral with regard to conceptions of the good.[84]

Despite his elaborate defense of the original position, there is an implausibility to Rawls' account. Rawls tells us that we are "the progeny" of those in the original position.[85] It is unclear, however, why a hypothetical contract would bind anyone. In fact, the original position does not appear to be a contract at all.[86] According to Dworkin, the original position is not a contract as much as it is a device that highlights equality's foundational status.[87] Equality, as guaranteed by the veil of ignorance, does not flow from the original position. Rather, equality is the requirement for entry into the original position, ensuring that all participants have the same incentives. Accordingly, equality is foundational: it does not emerge from the

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and requires the State to ensure that everyone have sufficient resources to participate in the civic life of the State. *See* GUTMANN, *supra* note 63, at 137 (suggesting a revised first principle of justice that accommodates egalitarian distribution of wealth).

[83] ATJ, *supra* note 66, at 27-28. The "good" consists of society members views regarding "life choices" and execution of such choices. The examples of such are limitless but would include choices about faith, occupation, family configuration, consumables, etc.

[84] *Id*. at 28, 117, 392-96. This is to say that the liberal state is agnostic with regard to choices that individuals might make with regard to their substantive beliefs about the world and, to a large extent, with regard to their conduct. *See id.*

[85] *Id*. at 103-04.

[86] MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 105 (Cambridge Univ. Press 2d ed. 1998) (1982) (quoting Dworkin); DWORKIN, *supra* note 27, at 151 ("A hypothetical contract . . . is no contract at all.").

[87] DWORKIN, *supra* note 27, at 181.

original position, but rather creates the terms of its possibility.[88] This foundational equality assumes identity hierarchy**.**

b. Identity Hierarchy and the Original Position

The original position assumes the existence of pre-social selves – persons whose subjectivities are fully constituted prior to the existence of any community ties. [89] These persons are defined principally by their capacities for making reasonable choices. The veil of ignorance makes ostensible "identitylessness" manifest. As established in Section I above, however, the "individual" is in and of itself an identity. Despite appearances, the original position assumes a determinate notion of community and, thus, a determinate notion of identity.[90] Not only is the original position situated in a "closed community" implying the existence of a shared civic or national culture,[91] but Rawls periodically refers to the participants as "citizens," as if that term were synonymous with "individuals."[92] It is implausible that any person would agree to accept the redistributive implications of Rawls' difference principle without a preexisting sense of shared community.[93] By erasing identity contingencies, the veil of ignorance renders participants to the original position not just "similarly situated," but identically situated.[94] One typically thinks of bargaining as a process by which individuals negotiate their conflicting self-interests. In the original position, however, the veil of ignorance suspends the individuating features which would give rise to conflicting self interests. The principles of justice

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[88] *Id*.; *see also* NEAL, *supra* note 72, at 16-18 (discussing Dworkin's view of equality as foundational condition).

[89] SANDEL, *supra* note 86, at 8 ("The subject is something 'back there' antecedent to any particular experience, that unifies our diverse perceptions and holds then together in a single consciousness.").

[90] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 128, 181-83, 187 (Oxford University Press 1995) (arguing that Rawls assumes the existence of a shared civic culture); SANDEL, *supra* note 86, at 131-32; TAMIR, *supra* note 73, at 120, 129, 139, 141.

[91] *See* KYMLICKA, *supra* note 90, at 128; *see also* TAMIR, *supra* note 73, at 119-20, 128 (discussing extent to which Rawls and Ackerman's account assume the existence of a civic community with cultural bonds).

[92] *See* ATJ, *supra* note 66, at xii, 82, 175, 179, 185 (referring to citizenship and citizens).

[93] *See* TAMIR, *supra* note 73, at 119

[94] SANDEL, *supra* note 86, at 131-32.

are not yielded by bargaining, but rather by the operation of a single shared identity.[95] The two principles of justice, then, are not a contract as much as they are the product of an idealized, intersubjective convergence amongst the original position's participants. Put differently, the two principles of justice flow from a shared sensibility or community ethos, as to what is just. This ethos is civic because the two principles are concerned with the right or, in other words, the community's basic civic principles.[96] The veil of ignorance ensures that the only significant identity traits permitted to operate are those necessary for the conception of the community's basic civic tenets.

The defining features of this civic identity are minimalist, consisting of the capacities for: reason, selecting amongst conceptions of the good, and engaging in dialogue with co-members. The last capacity, in particular, assumes and requires identification between co-members – i.e., identification with the community whose civic understandings are being constituted from the original position.[97] These idealized individuals have other private identity features,

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[95] *Id*. at 129. In accord with Sandel's critique, Jurgen Habermas argues that Rawls' conception of "justice as fairness" represents an "intersubjective condition." JURGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 97 (Ciaran Cronin & Pablo de Grieff, eds., The MIT Press 1998). This intersubjective condition is one in which a social collective shares a set of political values and accords that set of values priority over other values. *Id.* at 87, 90, 92. Rawls' original position depends upon the preexistence of such value priority. *Id* at 92. In the lexicon of this article, Habermas implies that deontology assumes civic identity's priority over other identities. *See id.* at 93. Habermas implies this not only by arguing that Rawls assumes the priority of "political values," but by arguing that the deontological "right" has both "ethical" and "moral" dimensions. *See id.* at 26, 93. In philosophy, "ethics" pertains to what kinds of lives are good for a person to lead where "morality" pertains how persons ought to treat each other. *See* APPIAH, *supra* note 54, at xiii. Philosophers view questions of identity as a matter of "ethics." In contrast, Rawls is preoccupied with morals. *See* ATJ, *supra* note 66, at 442. Habermas argues that Rawls' "right" only functions if persons internalize the "right" as an ethical matter. *See* HABERMAS at 15-16. Thus, "right" is inherently wrapped up in identity.

[96] *See supra* notes 66-69 and discussion (discussing priority of the right).

[97] *See* ATJ, *supra* note 66, at 123-28 (discussing rationality as characteristic of original position). *See also* id. at 442 (defining "moral persons."). Where in Rawls the capacity for dialogue is implicit, the centrality of this capacity is made explicit in Bruce Ackerman's deontological theory. *See generally* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (Yale Univ. Press) (1980). Ackerman does not rely upon the pre-social individual as does *ATJ. Id.* at 33. However, he does construct an "original posi-

but those features are irrelevant to the community's public life. It follows that these idealized individuals should have a largely voluntary relationship with the good. They may choose whether to subscribe to a religious faith, identify (and be identified) with a cultural or racial group, and so on. These private identity choices may (but need not) be made, but are not determinants of one's identity as an "individual."[98] Put another way, they will *possess*, but not be *possessed by*, their private identities.[99] The parties to the original position are first and foremost civic selves.[100]

Rawls' theory of justice assumes a strong form of identity hierarchy: more than just insisting upon civic identity's primacy, it casts

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tion" analog that obviates the need for natural-law explanations of the social contract. *Id.* at 25, 67. Ackerman supposes that his original community consists of a group of individuals on a spaceship traveling towards a new planet upon which there is a finite supply of "manna." *Id.* at 31-32. The space travelers must devise a set of rules by which to divide the manna. Ackerman argues that "neutral dialogue" that begins with the premise of a right to equal shares will yield "nondominated equality" – i.e., liberal equality that neither settles for formal equality or imposes dystopic vision of society without difference. *Id.* at 18, 27-28, 58. Neutrality requires that good reason be offered for any movement away from equal distribution; the contention that one individual is intrinsically superior or that her conception of the good is intrinsically superior does not count as a good reason. *Id.* at 11.

[98] *See* SANDEL, *supra* note 86, at 55 (critiquing notion that private identities are merely voluntary associations); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 44 (1990).

[99] *See* SANDEL, *supra* note 86, at 55-56.

[100] One might object that Rawls' original position is intended to be hypothetical not sociological or that Rawls' concept of the individual is purely instrumental – i.e., conceived singularly for the purpose of developing idealized standards for liberal governance. *See* ATJ, *supra* note 66, at 18-19; *see also* Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1820 (1994) (likening Rawls' concept of the individual to the scaffolding used to construct a building). Rawls, however, suggests that the citizens of the liberal state are the original position's progeny. *See* ATJ, *supra* note 66, at 19. Even if hypothetical and instrumental, however the original position seeks to identify those characteristics of individual that are morally relevant and should be reflected in a liberal society's civic structure. *See* id. at 129; SANDEL, *supra* note 86, at 39; Will Kymlicka & Wayne Norman, *Return Of The Citizen*, in THEORIZING CITIZENSHIP, *supra* note 60, at 283, 308-09 (suggesting that Rawls' self is civic). *See also* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 23 (2nd ed. 1984) (arguing that moral theory always assumes sociological context, even when it purports not to). Such characteristics, however, are the identity attributes that ballast Rawls' theory. For the purposes of this paper, it makes no difference that Rawls did not intend to advance a complete theory of the individual.

private identities as virtually irrelevant in defining civic identity. As a consequence, his theory has been subject to considerable criticism.[101]

2. Weak Deontology

Deontologists have responded to communitarian criticism[102] by, among other things, revising their accounts of the pre-social self and the right-good opposition. Weak versions of deontology hold that the liberal state can never be agnostic with regard to the good and, thus, can never be neutral in any absolute sense.[103] Weak deontologists concede that liberalism endorses a specific vision of the good, but they argue that because this good is civic in nature and permits both pluralism and stable constitutionalism, it is superior to the goods advanced by other theories.[104] Weak deontology does not depend upon an intrinsically autonomous pre-social self. Rather, autonomy is cultivated.[105] Weak deontology acknowledges that private identities may inculcate values and habits that strengthen civic identity and, thus, the liberal good. Accordingly, some of these theories contend that the liberal state should afford rights not just to individuals, but also to groups.[106] Others argue that the liberal state should "recognize" certain private (non-civic) identities with a view towards preserving such groups so as to

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[101] *See infra* Section II.B.

[102] *See id*.

[103] William Galston, *Equality Of Opportunity And Liberal Theory*, *in* JUSTICE AND EQUALITY, HERE AND NOW 89, 90 (Frank S. Lucash, ed., 1986) (arguing Rawls', Dworkin's, and Ackerman's theories all rest on some notion of the good despite arguments to the contrary); NEAL, *supra* note 72, 6-8, 35 (arguing deontology's "good" is individual autonomy); SPINNER, *supra* note 57 at 46-47 (same); MACEDO, *supra* note 58, at 67 (arguing neutrality thesis is liberal "false consciousness."); KENNY, *supra* note 58, at 45 (arguing virtue and liberalism are consistent).

[104] *See, e.g*, NEAL, *supra* note 72, at 28 (liberalism is superior not because it is "natural," but because the good it posits is superior); MACEDO, *supra* note 58, at 5.

[105] KYMLICKA, *supra* note 90 at 84-93 (arguing that liberalism is consistent with the extension of group rights to specific cultural groups).

[106] *See id*.. Kymlicka argues that the extension of group rights is consistent with deontological liberalism because the right to social culture is an important *individual* right and because social cultures often inculcate values that bolster liberal individualism. Kymlicka, however, argues that it would be illiberal to permit social groups to restrict individual member's decisions whether to exit the group. *See id*. at 37.

ensure the dignity of their members.[107] Even Rawls adopted a weak version of deontology in his later work.[108] A revised formulation of identity hierarchy features in this account. Although it posits individuals as primarily civic selves, private identities are no longer rigidly bracketed as in *A Theory of Justice*. Rather private identities constitute civic identity and consolidate its primacy.

Weak deontology asserts that, contrary to communitarian critiques, the liberal state assumes a specific notion of community, even if a limited one.[109] "[F]ormal political acts. . .exhaust the communal life" of the liberal state.[110] In *Political Liberalism*, Rawls revises his account of "justice as fairness" and squarely presents it as a "political conception of justice" in which "the person is seen [ ] as a. . .citizen. . .standing in a political relation with other citizens."[111] *Political Liberalism* seeks to demonstrate that equality is best served when political and social institutions are organized in a manner consistent with Rawls' revised concept of personhood – a concept that privileges civic identity.[112] This civic identity is the product of what Rawls calls an "overlapping consensus," which is the process by which a community of equal citizens achieves political cohesion notwithstanding the existence of various competing world views.[113] The civic culture of liberal society consists of those ideas that are shared by reasonable philosophic, religious, and moral communi-

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[107] *See* FRASER & HONNETH, *supra* note 63 at 26-48. Fraser argues that deontology has been concerned too exclusively with redistribution. *See id.* at 9. Liberal justice is incomplete without providing for both redistribution and recognition. Accordingly, she argues for a "two-dimensional" approach that addresses both the distribution of resources and the social status. *See id.* at 29-31, 35-36; *see also infra* Section II.C.

[108] *See generally* RAWLS, *supra* note 58; *see also* NEAL, *supra* note 72, at 162-63, 169-70 (noting that both Rawls and Dworkin propounded weaker version of deontology in later works).

[109] *See, e.g.*, Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 479 (1989); MACEDO, *supra* note 59, at 10, 254.

[110] *See* Dworkin, *supra* note 109 at 500.

[111] RAWLS. *supra* note 58, at xvii, xliii; *see also id.* at 18 ("[A] person is someone who can be a citizen. . . .").

[112] *Id*. at 5. Rawls revises the "original position" in light of his new definition of personhood. *Id*. at 24-27. The parties to the original position are now imagined as ideal, representative citizens. *Id.* Rawls is explicit that it is intended to model idealized equality. *Id*. at 26.

[113] *Id*. at xxxviii. Habermas argues that "overlapping consensus," much like "justice as fairness" describes an "intersubjective condition." *See supra* note 96.

ties.[114] Unlike *A Theory of Justice,* which posits civic identity as operating above the fray of private conceptions of the good, *Political Liberalism* posits civic identity as existing at the convergence of such notions. Thus, political community is not a *modus vivendi*, but rather a full-fledged civic culture that is constituted and supported by private identities.[115]

Members of the liberal state share a public culture within which their civic identity is defined. [116] Rawls' overlapping consensus gives rise to a community defined by "civic friendship" and relations of "reciprocity."[117] These features of civic culture signify not just tolerance of pluralism, but affirmative investment in a shared (even if limited) political good. Spirited political dialogue is at the heart of this civic culture.[118] Here, Rawls' theory of liberal justice resonates with Bruce Ackerman's in that both position political dialogue as a key rite of civic culture.[119] In Rawls' theory,

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[114] RAWLS, *supra* note 58, at 10. Rawls calls these "comprehensive doctrines" or "comprehensive beliefs." The distinction between comprehensive doctrines and political doctrines *in Political Liberalism* tracks the distinction between "right" and "good" in ATJ. A belief system is "comprehensive" when it encompasses "ideals of personal character, as well as ideals of friendship and familial and associational relationships,. . .and in the limit to our life as a whole." *Id*. at 13.

[115] *Id*. at 148, 218. Strong deontological theories are often criticized for holding political society out as little more than a *modus vivendi* or equilibrium of competing forces. *Id*.; *see also* MACEDO, *supra* note 58, at 234. Writing in the 1920s, Horace Kallen observed that the United States was a *modus vivendi*, but should, as a society, work towards a thicker civic identity entailing the "cooperation of spirits." HORACE KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES 308 (1924). Habermas criticizes Rawls' conception of "overlapping consensus" for its failure to adequately account for a shared civic culture. Overlapping consensus suggests that, although a community may share a set of conclusions about the principles of justice, the community will not share reasons for coming to those conclusions. *See* HABERMAS, *supra* note 95, at 87.

[116] RAWLS, *supra* note 58, at 163 (discussing virtues engendered by public reason)

[117] *Id*. at xlix.

[118] *Id*.

[119] *Id*. at liv; ACKERMAN, *supra* note 97 at 6, 70, 73, 88. Ackerman's deontological arguments in *Social Justice in the Liberal State*, although "stronger" than those in *Political Liberalism*, are "weaker" than those in ATJ. Ackerman does not rely upon the pre-social individual as does *ATJ*, and acknowledges that one's civic identity is, at least partially constituted within private space. *See id.* at 33, 141, 147 (capacity for liberal dialogue is acquired in familial space). Ackerman implies that some sort of cultural bonds must exist in order for a civic identity to cohere. *See* TAMIR, *supra* note 73, at 128 (discussing Ackerman).

however, dialogue actually deepens civic culture by amplifying civic bonds.[120] "Public reason" is the language in which this dialogue plays out. Public reason is a shared set of principles that may be used to measure whether any particular position that is taken in civic dialogue is a just one.[121] Civic friendship requires that citizens offer each other plausible justifications when defending their political beliefs – a justification is plausible if it draws upon public reason.[122] This does not mean that everyone need agree, only that there be a shared vocabulary for political discussion.

Whenever conflict arises between civic principles and private conceptions of the good, the civic must trump.[123] Presumably, this does not create excessive social tumult because the overlapping consensus ensures that citizens experience their civic identity as superordinate to their private conceptions of the good. Indeed, civic identity's primacy is what allows individuals to embrace their comprehensive beliefs. Civic culture's primacy serves as a bulwark against the intolerance and balkanization that private concepts of the good precipitate if allowed to operate unchecked.[124] Overlapping consensus ensures civic primacy by requiring that private conceptions of the good bolster civic ideals whenever possible.[125]

Although *Political Liberalism* shifts away from rigidly dichotomizing the right and good, the notion of an overlapping consensus is not a break from this dichotomy. Rawls concedes that his

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[120] RAWLS, *supra* note 58, at 217-18 (dialogue affirms "public reason," it is not just a balance of competing forces). *See also* KENNY, *supra* note 58, at 46-52. Ackerman posits a static dialogic bond that is thinner that this. ACKERMAN, *supra* note 97 at 75.

[121] RAWLS, *supra* note 58, at 226; *see also* Kymlicka & Norman, *supra* note 100, at 298 (noting centrality of reasoned dialogue to liberal theory).

[122] This does not, of course, assure that there will always be agreement. To the contrary, the "burdens of judgment" assure that there will often be disagreement. RAWLS, *supra* note 58, at 55-56. There will often be disagreements for various legitimate reasons, but public reason ensures that there is shared conceptual language for debate. *Id*. This ensures that disagreements are intelligible and that, assuming the existence of suitable political institution, there will be a basis for resolving such disputes. *Id*. at 231 (the courts are exemplars of public reason).

[123] *See id.* at 195-97. An example of such is where a religious philosophy states that any just state will impose that particular religion upon its citizens. In the liberal view, proponents of such a philosophy could not seek to enact this specific belief. *See id*. at 196-97.

[124] *See id.* at 195-97.

[125] *See id*. at 139-40, 251 n.41.

theory of liberal justice advances a notion of the good, but he qualifies that this good is of a limited and strictly political nature.[126] It is not "comprehensive." By comprehensive, Rawls means a theory of the good that encompasses a broad range of values including ideals of personal character, associational relationships, and friendship.[127] *Political Liberalism* contends that the State should remain agnostic with regard to individuals' comprehensive beliefs provided that those beliefs do not conflict with the civic understandings that the overlapping consensus ensures.[128] Overlapping consensus ensures that comprehensive values bolster civic identity wherever possible.[129] Non-civic identities are to act in the service of civic identity. The subsection that follows shows that weak formulations of communitarianism posit a similar service relationship.

B. COMMUNITARIANISM

Communitarians criticize deontology for its vacuity,[130] contending that the deontological portrait of deracinated individuality uncritically mirrors western societies' fragmentation and anomie rather than proffering a moral vision to remedy these qualities.[131]

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[126] *See id*. at 11-15, 174-76. Rawls is specifically preoccupied with the political conception of society's basic structure. *Id*. at 11-13. Thus, Rawls continues to embrace the notion of state neutrality. *See* NEAL, *supra* note 72, at 170.

[127] RAWLS, *supra* note 58, at 13.

[128] *See id*. at 9-11.

[129] Some weak deontologists like Stephen Macedo go farther than Rawls, arguing that liberalism requires a consensus that overrides (not just imbricates) competing values. MACEDO, *supra* note 58, at 58. *But see* SPINNER, *supra* note 57, at 56 (liberalism is not incompatible with the maintenance of ethnic identities). Achieving an overlapping consensus is not only unrealistic according to Macedo, it does not produce a sufficiently vibrant and deep civic culture. *See id.* at 70-71. Macedo, like Rawls, believes that reasonableness is civic culture's touchstone and that comprehensive beliefs may serve to bolster its primacy. MACEDO, *supra* note 58, at 53, 55, 63. However, Macedo views liberalism as requiring a more intensive brand of identity hierarchy than Rawls. Macedo's individual must be willing to forsake personal interests for a "public morality" of self-critical reason and discard any commitments that are inconsistent with that morality. *Id*. at 244, 251, 256, 265, 272.

[130] RONALD J. TERCHEK, REPUBLICAN PARADOXES AND LIBERAL ANXIETIES 15 (1997) (summarizing communitarian thought). *But see id.* at 125-27, 137-39 (arguing that "traditional" liberals like Locke, unlike Rawls and Dworkin, advance a vision with moral content).

[131] MICHAEL WALZER, POLITICS AND PASSION 160-61 (2004).

Communitarians also charge that deontological neutrality is chimerical; without a well-developed notion of "the good" or "virtue" there is no basis for the affective bonds that any community, public or private, demands.[132] Individuals do not come into this world as autonomous beings, but rather become autonomous through a web of involuntary associations beginning with family. Communitarians argue that such private identities should be acknowledged by liberal theory because, among other things, they are critical to sustaining civic identity's vibrancy and primacy. Private identities, in other words, are thought to constitute civic identity, but from a position of subordination.

1. Rejection of the Pre-Social Self

Communitarians look skeptically upon deontology's reliance upon abstract and implausible assumptions about humans.[133] They charge that deontology's deracinated subject is sociologically implausible, and internally self-contradictory so that, as a consequence, deontology is without solid conceptual foundation.[134] Communitarians think it fanciful that all of an individual's private identifications could be a matter of volition – i.e., the notion that a human agent exists prior to and independent of any cultural, racial, religious, or other associations.[135] It is a sociological fact that human beings take shape as individuals through "involuntary associations."[136] Human beings are not born into the world and capable of rational thought/action; rather they are born into pre-existing networks of religious, cultural, familial, and other associations.[137] It is within such associations that human beings develop the capacity to make choices and engage the world. For example, most human beings are born into a family and many have a religious identity assigned to them upon birth. Such associations, through nurturance, education, and other social training, constitute one's personality,

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[132] *See* MACINTYRE, *supra* note 100, at 256-57. Weak deontology, of course, attempts to respond to these and other communitarian claims. See Section II.B *supra*.
[133] MACINTYRE, *supra* note 100, at 61, 221 (the "self" is always a construct); SANDEL, *supra* note 86, at 6-7.
[134] *See* SANDEL, *supra* note 86, at 6.
[135] WALZER, *supra* note 131, at 75, 161.
[136] *See* SANDEL, *supra* note 86, at 50-52; WALZER, *supra* note 131, at 19.
[137] *See* SANDEL, *supra* note 86, at 50-52.

ideology, tastes, etc. For this reason, communitarians argue that involuntary associations should play a central role in how individual agency and liberal justice are theorized.

Most communitarian theorists accept identity hierarchy, although their vision of such is more fluid than that of strong deontologists. Communitarians posit that any theory of liberal justice should account for involuntary association because it is frequently within the context of such that the virtues and character necessary for good citizenship are inculcated.[138] This conceptualization assumes civic identity's primacy over other identities. Private identities are cast as instrumental in relation to civic identity, which, in turn, constitutes the fiber of liberal society. It is within family, church, and other associations that one (ideally, at least) develops the capacities for self-reflection, dialogue, and concern for co-members that are the core traits of civic identity. By cultivating these traits, private identities lay the groundwork for a vibrant civic identity and, thereby underwrite the success of the liberal state and society. Although communitarians recognize the non-civic functions that private identities play in the constitution of personhood, communitarians are centrally preoccupied with private identities' instrumental role in constituting civic identity. At the heart of the communitarian critique of deontology is the charge that it ignores the dynamic relation between private identities and civic identity by using deracinated, pre-social individuals as the building blocks of liberal justice.

Communitarian theory suggests that liberal society ought to support certain private identities, while remaining vigilant regarding any parochial, self-promotional tendencies within those identities that threaten to unsettle civic identity's primacy.[139] This is in contrast to deontology's (particularly strong deontology's) agnosticism regarding private identities.

One the surface, communitarian and deontological notions of civic identity appear to have similar traits: the capacity for reason

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[138] *See* SANDEL, *supra* note 86, at xii (describing religious identity's relation to civic identity); MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 18 (1996) [hereinafter WALZER, AMERICAN] (parochial identities can operate in the service of civic identity). There is room for illiberal groups within liberal society to be sure, but it is unclear precisely how much. WALZER, *supra* note 131, at 55.

[139] See WALZER, *supra* note 131 at, 51-58.

and self-criticism, willingness to engage in dialogue with fellow citizens, identification with the state, and tolerance of pluralism. Communitarians, however, tend to imagine these traits as having greater depth and generating stronger civic bonds than do deontolgists. For example, communitarians such as Michael Walzer contend that civic identity requires active participation in public life, not just a capacity for engaging in dialogue with co-citizens. Similarly, communitarians view tolerance as entailing more than just a passive acceptance of social pluralism. In the communitarian view, tolerance means a celebration of pluralism from higher ground. Walzer describes this as a kind of civic solidarity or fellowship that is born of difference.[140] Civic identity requires not just accepting that one's co-citizens have private identities that are different from one's own, but embracing and actively engaging one's co-citizens precisely because of those differences. The groundwork for this civic fellowship is first cultivated within the involuntary associations that are the training ground for citizenship.[141] Walzer argues for deepening of the public sphere and invigorating civic identity.[142] This invigorated civic identity is not intended to compete with or eliminate private identities, but rather to create a more commodious space for those identities and the civic solidarities they engender.[143]

2. Republicanism And Civic Culture

Republicanism, like communitarianism generally, has sought to recover civic identity from deontology's deracinated individualism.[144] Republicans unabashedly posit civic identity's primacy.[145] The civic self is heroic: highly identified with the state and

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[140] *See* WALZER, AMERICAN, *supra* note 138, at 118-21.

[141] See WALZER, *supra* note 131, at 68; SANDEL, *supra* note 86, at 50-52; Kymlicka & Norman, *supra* note 100, at 295 (discussing Walzer's account of involuntary association); KENNY, *supra* note 58, at 62 (discussing Walzer); *see also* Charles Taylor, *Nationalism And Modernity*, in THEORIZING NATIONALISM 219, 228 (Ronald Beiner, ed. 1999) (arguing that modern state requires a high degree of identification with the polity).

[142] *See* WALZER, *supra* note 131, at 56. He, however, contends that civic identity should not become a "totalizing" identity. *Id*.

[143] WALZER, *supra* note 131, at 82-101.

[144] *See* GARY J. JACOBSOHN & SUSAN DUNN, DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD 9, 11 (1996) (discussing deontology's privileging of hyper-egoism).

[145] *See*, *e.g.*, *id*. at xi.

readily willing to make sacrifices for that political community.[146] A sinewy and enduring solidarity binds citizens to one another, yielding a vigorous and engaged civic culture. These republican ideals hail from a wide range of thinkers, including Aristotle and Jean Jacques Rousseau.[147] Both philosophers developed their theories within the context of small, city-state republics that placed stringent restrictions upon entering public life.[148] Although equality was central to their republican ethos, the civic realm consisted homogenously of male landowners.[149] Classical republicanism was entirely consistent with slavery and militarism.[150] Nevertheless, historians have sought to identify the extent to which republican ideals animated the Founders' conception of the American political system.[151]

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[146] *See id*. at 1. *But see* TERCHEK, *supra* note 130, at 54 (arguing that rebublicanism does not entail self-sacrifice).

[147] Suzanne Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 549 (1986) (invoking Aristotle); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1713 (1988) (invoking Rousseau). Some argue that communitarianism is just the most recent incarnation of republican theory, *see, e.g.*, TERCHEK, *supra* note 130, at 1, while others argue that the two are distinct philosophies. *See, e.g.*, Ronald Beiner, *Introduction*, in THEORIZING CITIZENSHIP, *supra* note 60, at 1, 19. *See also* Nomi Maya Stolzenberg, *A Book Of Laughter And Forgetting: Kalman's "Strange Career" And The Marketing Of Civic Republicanism*, 111 HARV. L. REV. 1025, 1070 n.152 (1998) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) (describing the "complex" relationship between contemporary communitarians and classical republicanism). There is obvious resonance between communitarianism and republicanism to the extent that both categorically posit strong civic bonds and reject deontology's prioritization of "the right." Accordingly, for the identity hierarchy thesis, it is appropriate to treat the communitarianism and republicanism under the same rubric. *See* TERCHEK, *supra* note 130, at 3.

[148] Ancient Greece in Aristotle's case and 18th century Geneva in Rousseau's. Both thought homogeneity was critical to republican citizenship. Beiner, *supra* note 60, at 10; *see also* JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 12 (1991) (there was no Roman equivalent to contemporary notions of individual identity).

[149] *See* Jurgen Habermas, *Citizenship And National Identity*, in THEORIZING CITIZENSHIP, *supra* note 60, at 255, 269 (noting restricted membership of civic realms); J.G.A. Pocock, *The Ideal Of Citizenship Since Classical Times*, in THEORIZING CITIZENSHIP, *supra* note 60, at 29, 31.

[150] *See* Linda R. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1668-69 (1988).

[151] *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); Ignatief, *supra* note 60, at 63 (contending that Constitution is a reconciliation of liberal and

Beginning in the late 1980s, constitutional scholars seized upon republicanism as an alternative to deontological theories, whose explanatory power seemed weak given the Court's willingness to limit minority rights based upon majoritarian values.[152] Legal scholars sought to construct a theory of justice that explicitly presupposed a normative civic good (as opposed to neutrality) but nonetheless maximized the social and political space for pluralism. This vision of republicanism posited the existence of a vigorous civic culture based upon liberal concepts such as tolerance and autonomy.[153] Numerous scholars questioned the plausibility of this revised republicanism - its salience in legal discourse has ebbed accordingly.[154] The notion, however, that the liberal state possesses and requires a "deep" civic culture persists in different guises within the legal academy.[155] This vision of civic culture is in contrast to deontology's notion of social contract.[156] Civic culture, much like in Wal-

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republican ideas); TERCHEK, *supra* note 130, at 225-26; Stolzenberg, *supra* note 147, at 1026-29.

[152] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (holding statute prohibiting sodomy constitutional); Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1499 (1989) (arguing that his vision of republicanism would counter-intuitively produce the opposite result in Bowers); *id.* at 1513-15 (republican vision stands in contrast to pluralist vision); Stolzenberg, *supra* note 147, at 1030 (scholars struggled to create models that were "composed of equal parts republicanism and liberalism.")

[153] Cass Sunstein, *Beyond The Republican Revival*, 97 YALE L.J. 1539, 1569 (1988) (arguing that republicanism is part of liberal tradition). *See also* TERCHEK, *supra* note 130, at 11 (arguing that republican language in U.S. is liberal).

[154] *See, e.g.*, Hope M. Babcock, *Democracy's Discontent In A Complex World: Can Avalanches, Sandpiles, and Finches Optimize Michael Sandel's Civic Republican Community?*, 85 GEO. L. J. 2085, 2103 (1997) (arguing that civic republicanism is too simplistic and static to be useful); Richard H. Fallon, Jr., *What is Republicanism and Is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1703-05 (1989) (arguing that republicanism is a critique of liberalism, but not useful as a recipe for reform); Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1609-12 (1988) (explaining why race scholars should view republican revival skeptically).

[155] *See, e.g.*, Jane S. Schacter, Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 734-36 (2004) (arguing that "democratic culture" is deeper than just majoritarian electoral politics); Pildes & Niemi, *supra* note 5, at 507 (arguing that Fourteenth Amendment protects against structural harms that undermine political culture).

[156] *See supra* note 66.

zer's communitarian view, is constituted and supported by diverse private identities that operate in a plural society.[157]

It is beyond this paper's scope to trace the complex relationship between communitarianism, republicanism and theories of democratic culture.[158] What bears noting is the extent to which republicanism and subsequent theories have relied upon similar versions of identity hierarchy. In its classical form, republicanism assumed a rigid subordination of the private to the public sphere.[159] Vestiges of that hierarchy carry over into its contemporary incarnation. Professor Michelman, for instance, has argued for a dialogue-based, pluralistic republicanism, where citizens who are capable of critical self-reflection constantly remake civic identity through "transformative dialogue" with the other -- someone whose private identities are different from her interlocutor's.[160] In this vision, civic identity is a unity created by dialogue amongst those who possess different private identities.[161] Recent legal scholarship espousing the existence of a shared civic culture makes similar assumptions about identity hierarchy. Such scholarship, for example, contends that the state (and courts in particular) must ensure a role for minority voices in civic the realm, not merely as an exercise of checking majoritarian tyranny, but to ensure the health and vibrancy of the civic culture.[162] In both accounts, civic identity's primacy cannot be sustained through mere tolerance for pluralism, but rather, requires the active expression and engagement of diverse worldviews

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[157] *See* Schacter, *supra* note 155, at 754-60 (explaining that "social enfranchisement" of minority groups is essential cultural precondition for democracy).

[158] Habermas outlines a compromise of two major models which he calls "deliberative politics." HABERMAS, *supra* note 95, at 239-52.

[159] Sherry, *supra* note 147, at 553-54. The private sphere was that of slaves and women. Stolenzenberg, *supra* note 147, at 1078-79. In Aristotle's vision, true freedom was to be found in the public sphere and that is where "personality" was constituted. J.G.A. Pocock, Citizenship, *supra* note 149, at 32-33.

[160] *See* Michelman, supra note 152, at 1529-31.

[161] *See* Kathryn Abrams, Comment, *Law's Republicanism*, 97 YALE L.J. 1591, 1595-96 (1988).

[162] See Schacter, *supra* note 155, at 754-60.

associated with private identities.[163] A vibrant civic identity exists because of private identities, not in spite of them.

3. Recognition Theory

Recognition theory lies on the strong communitarian end of the liberal spectrum. By abjuring identity hierarchy, recognition theory is the proverbial exception that proves the rule. Recognition theorists argue that the liberal state must afford "recognition" to marginal groups to help ensure their continued survival as distinctive cultural forms.[164] Recognition theorists do not necessarily view equality as exclusively requiring distributive justice predicated upon identity hierarchy.[165] Rather, they contend that liberal justice requires "equal recognition" of cultural groups within society.[166]

Recognition theory assumes that every individual has an "authentic," dialogically-realized self as opposed to an essential self – i.e., a pre-given and unchanging self.[167] Authenticity, or "self-realization," is achieved through interactions with other human beings and, through the state's and other human being's "recognition" of one's selfhood.[168] The refusal to afford such recognition may threaten to render certain cultural forms extinct.[169] Recognition theorists contend that the liberal state must therefore recognize the

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[163] The deontological response, of course, is that communitarian theory does not adequately account for intergroup rivalry or intolerance. *See*, *e.g.*, MACEDO, *supra* note 58, at 207. Although active engagement and expression of private identities sounds ideal, deontolgoist worry that the State's promotion of such places too much emphasis on private identities and increases the likelihood of identity-based conflicts that the State has no principled way of resolving (having promoted the active expression of such identities).

[164] *See, e.g.*, Charles Taylor, *The Politics Of Recognition*, in *Multiculturalism: Examining the Politics of Recognition* 25, 38, 61 (Amy Gutmann ed., 1994).

[165] *See* Young, *supra* note 98, at 18-21, 43 (arguing that deontological theories focus myopically on distributive justice alone).

[166] *See* Taylor, *supra* note 164, at 37; *see also* Young, *supra* note 98, at 174 (arguing that difference-conscious notions of equality will permit affirmation of group identities).

[167] *See* Taylor, *supra* note 164, at 28-35.

[168] *See id.* at 33-35. Put somewhat differently, this dynamic may be thought of as a need for recognition of one's most salient particularities. Cf. APPIAH, *supra* note 54, at 109 ("It [is] not. . .enough to require that one be treated with equal dignity despite being black. . . .And so one will end up asking to be respected *as a black*.") (emphasis in original).

[169] *See, e.g.*, Young, *supra* note 98, at 108-09;Taylor, *supra* note 164, at 60-61.

"equal value" of different cultures and take affirmative steps to ensure their survival.[170] This might involve social group representation in democratic bodies and differentiated educational curricula depending upon community membership.[171]

By arguing that the state should promote specific cultural forms for their own sake, recognition theorists challenge liberal notions of equality, individual autonomy, and state neutrality. Recognition theory situates the locus of control over identity at the group-level, not the individual-level.[172] Critics note that because it is impossible to measure "equal recognition," there is danger of the state promoting intolerance by affording "too much recognition" to some groups at the expense of others and/or artificially freezing group differences.[173] As discussed above, identity hierarchy has been central to liberal notions of equality. Recognition theory turns identity hierarchy on its head by asserting that, under certain circumstances, the state must treat individuals as if their primary identity was racial. This inversion of identity hierarchy puts recognition theory on the liberal identity spectrum's margin.[174]

C. CONCLUSION

This section has surveyed the spectrum of identity theories that underlie liberal equality. Virtually all liberal theories assume that cohering a political community of equals requires that civic

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[170] *See* Taylor, supra note 164, at 64-65; Taylor, *supra* note 164, at 64.

[171] *See* Young, *supra* note 98, at 184-90 (describing idea of a "heterogeneous public."). *But see* KYMLICKA, *supra* note 90, at 62, 102 (arguing that "heterogeneous public" leads to intolerance and prevents proper development of a civic identity).

[172] *See* Kwame Anthony Appiah, *Identity Authenticity, And Survival,* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149, 163 (Amy Gutmann ed., 1994) ("The politics of recognition requires that one's skin color, one's sexual body, should be acknowledged politically in ways that make it hard for those who want to treat their skin and their sexual body as personal dimensions of the self. And personal means not secret, but too tightly scripted.").

[173] *See* Terchek, *supra* note 130, at 15 (noting liberal concern about communitarianism leading to intolerance); APPIAH, *supra* note 54, at 110 (noting that there's no bright line between imposing and recognizing group differences).

[174] *See, e.g.*, Stephen Rockefeller, *Comment,* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 88 (Amy Gutmann ed., 1994) ("a person's ethnic identity is not his or her primary identity[ ] and. . .is not the foundation of recognition of equal value and the related idea of equal rights.").

identity maintain superordinate status over private identities. Identity hierarchy is equality's condition of possibility. Across the spectrum there are several bedrock features of civic identity that are common to most theories even if the specific significance of those features varies. Those features include: the capacity for reason and self-criticism, willingness to engage in dialogue with fellow citizens, identification with the state and civic community that constitutes it, and tolerance of pluralism.[175] Weak versions of deontology and communitarianism posit that certain private identities constitute and operate in the service of civic identity. In Rawls' work, this relation takes the form of "overlapping consensus."[176] In communitarianism, it takes the form of private identity as "training ground" and impetus for the expansion and deepening of civic culture. Section III reveals how recent equal protection cases regarding race reflect identity hierarchy.

III. THE SUPREME COURT'S AFFIRMATIVE ACTION AND MAJORITY-MINORITY DISTRICTING CASES RELY UPON IDENTITY HIERARCHY

The Supreme Court has emphasized that the Fourteenth Amendment requires that persons be treated as individuals and not just members of a racial group.[177] Because the Constitution is colorblind, it does not permit race's use in public decision making.[178] The

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[175] *See, e.g.*, APPIAH, *supra* note 54, at 101; WALZER, AMERICAN, *supra* note 138, at 82-101; Terchek, *supra* note 130, at 231; MACEDO, *supra* note 58, at 244, 251; ACKERMAN, *supra* note 97, at 27-29. *Cf.* RAWLS, *supra* note 67, at 24-27 (specifying conditions for dialogue in a condition of idealized equality – i.e., the original position.).

[176] *See supra* note 113-117 and accompanying text.

[177] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[T]he Fourteenth Amendment 'protect[s] *persons*, not *groups*.'") (quoting Adarand Constructors Inc. v. Pena, 515 U.S. 200, 227 (1995)); Miller v. Johnson, 515 U.S. 900, 911 (1995) ("[T]he Government must treat citizens 'as individuals,' not 'as simply components of a racial, religious, sexual, or national class.'") (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting)); Shaw v. Reno, 509 U.S. 630, 648 ("[T]he individual is important, not his race, his creed, or his color. . . .") (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964)).

[178] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (2001).. ("[E]qual protection cannot mean one thing when applied to one individual and something else when applied to another.") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1977)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (quoting the same); *but see id.* at 520-521 (Scalia, J., concurring) (criticizing majority for not creating a strict colorblindness rule). The expression that the "Constitution is

Court's suspicion of all racial classifications, even so-called "benign" ones, compels it to scrutinize such classifications stringently.[179] In recent affirmative action and redistricting cases, however, the Court took doctrinal turns that are difficult to square with precedent or colorblindness. After sounding the death knell for affirmative action nearly a decade ago,[180] the Court recently concluded that the University of Michigan Law School's affirmative action program satisfied strict scrutiny.[181] In the voting rights context, the Court subjected majority-minority redistricting schemes to strict scrutiny even though they were facially neutral.[182] But here again, the Court did not take the strong deontological approach suggested by colorblindness; rather it permitted legislators to consider race under certain circumstances.[183]

The doctrinal awkwardness of the affirmative action and redistricting cases generated considerable debate. Professor Balkin argued that *Grutter* may reflect the Court's interest in moving away from a tiered review scheme that grew too complicated to be use-

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color-blind" appears to have had its genesis in Justice Harlan's famous *Plessy* dissent. Plessy v. Ferguson, 163 U.S. 537, 559 (1896). Of course, those words import is different when leveled against 19th Century Jim Crow as opposed to 20th Century affirmative action.

[179] The term "benign" is frequently used to describe programs such as affirmative action that confer a benefit upon members of a specific marginalized group. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005). The Court has concluded, somewhat implausibly, that there is no way to identify whether a program is actually benign without applying strict scrutiny. Strict scrutiny is supposed to "smoke out" the difference between benign and malignant programs. *Croson*, 488 U.S. at 493.

[180] *See* Adarand v. Pena, 515 U.S. 200, 227; City of Richmond v. Croson, 488 U.S. 469, 505-06.

[181] Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

[182] Facially neutral rules – i.e., rules that do not draw an express racial classification – only offend the Equal Protection Clause if motivated by discriminatory intent. *E.g.*, Washington v. Davis, 426 U.S. 229, 241-42 (1976). Plaintiffs must show, for instance, that a legislature passed a law "because of" its adverse effect upon a protected group, not "in spite of it." Pers. Adm'r. of Mass. v. Feeney, 442 U.S. 256, 279 (1976) (stating that awareness that rule may have disparate effect on a protected group, by itself, insufficient to show discriminatory intent). *But see*, *infra* notes 352-355 and accompanying discussion (discussing inconsistent application of "intent" standard).

[183] *See, e.g.*, *Miller*, 515 U.S. at 916; Shaw v. Hunt 517 U.S. 899, 905 (1996) [hereinafter *Shaw II*]. *See also* Bush v. Vera, 517 U.S. 952, 1072 (1996) ("[T]he Court has repeatedly made it plain that Shaw was in no way intended to effect a revolution by eliminating traditional districting practice for the sake of colorblindness.") (Souter, J., dissenting) (citations omitted).

ful.[184] Alternatively, it may be that the Court simply chose to render decisions that track popular political and social sentiments regarding race at this historical juncture.[185] What is clear, however, is that the "judicial impulses" at work in these cases are in tension with established doctrine regarding strict scrutiny review.[186] This section argues that identity hierarchy sheds light on the judicial impulses at work in these cases and, in particular, what the Court means when it asserts that the Fourteenth Amendment protects the individual.[187] It is in the name of the individual that the Court permits or forbids consideration of race. The Court insists that it is an affront to the individual when race is considered "for its own sake."[188] This section contends that the Court uses the term individual to describe persons whose identities are organized in the manner suggested by identity hierarchy. Protecting the individual requires maintaining identity hierarchy in a manner that echoes the weak versions of deontology and communitarianism described in Section II above.[189]

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[184] *See* Balkin, *supra* note 5, at 1718. "Tiered review" here refers to the Court's system of differentiating equal protection cases into three categories: those, in ascending order of stringency, that warrant "rational basis review," "intermediate scrutiny," or "strict scrutiny." *See infra* notes 193-196 and accompanying discussion. *See also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 493-94 (2004) (arguing three-tier system has outlived its usefulness).

[185] *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassifiation Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1537 (2004) (arguing that "anticlassification" rationale of Court's recent equal protection cases has limited the more radical "antisubordination" rationale that girds *Brown*); Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 362-71 (2003) (arguing that *Grutter* mirrors elite sentiments regarding race and affirmative action).

[186] *See* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1594 (2002) (noting redistricting cases created a "more forbearant version of strict scrutiny" and anticipated an application of a "softer form of scrutiny" in affirmative action cases); Pildes & Niemi, *supra* note 5, at 484 (discussing voting rights cases).

[187] This paper should not be taken to argue that identity hierarchy is the only plausible explanation for these cases. There are any number of, sometimes competing, rationales for the Court's equal protection jurisprudence, of which the identity hierarchy is but one strand.

[188] *Miller*, 515 U.S. at 913.

[189] Civic identity here refers to those bedrock features discussed in Section II above – namely: the capacity for reason and self-criticism, willingness to engage in dialogue with fellow citizens, identification with the state and civic community that constitutes it, and tolerance of pluralism. *See supra* note 175.

The obfuscation generated by the Court's over-reliance upon the individual is taken up in Section IV.

A. AFFIRMATIVE ACTION

In *Croson v. Richmond* and *Adarand v. Pena*, the Court announced that strict scrutiny applies to all publicly sponsored affirmative action programs. In doing so, the Court embraced colorblindness –the formalist notion that all racial classifications, whether benign or malignant, are presumptively unconstitutional. By so doing, the Court cast doubt on whether any form of affirmative action would be permissible in public decision making. In *Grutter v. Bollinger*, however, the Court concluded that the University of Michigan Law School's affirmative action program satisfied strict scrutiny.[190] Although it is questionable whether the Court actually applied strict scrutiny as it claimed, the Court relied upon identity hierarchy.

1. Strict Scrutiny and Colorblindness

a. Background

"Strict scrutiny" is such an entrenched feature of equal protection jurisprudence that it is tempting to think of its genesis as coterminous with the "equal protection revolution" whose origin is commonly marked by *Brown v. Board of Education*. *Brown*, however, was not a "strict scrutiny" case.[191] In fact, the Court did not use strict scrutiny to strike down government statutes until the 1960s – well after the Court had issued most of its landmark decisions dismantling Jim Crow legislation.[192] The Court first used strict scrutiny to strike down state statutes prohibiting miscegenation.[193] Because

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[190] 539 U.S. at 343.

[191] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[192] *See* Michael J. Klarman, *An Interpretive History Of Modern Equal Protection*, 90 MICH. L. REV. 213, 239 (1991) (arguing that *Brown* was grounded in notion of "fundamental rights" not "suspect classification").

[193] *Id*. at 255 (citing McLaughlin v. Florida, 379 U.S. 184 (1964) and Loving v. Virginia, 388 U.S. 1 (1966)). The notion of "suspect classifications," however, had been hinted at well before these cases were decided. In the famous *Carolene Products* footnote four, the Court first indicated that legislation "directed at. . .racial minorities" might warrant more rigorous scrutiny than legislation regulating commerce. United States

strict scrutiny's requirements have been discussed in detail elsewhere, only a brief summary is provided here.[194]

Courts apply strict scrutiny to any government scheme that expressly classifies people based upon race or certain other "suspect" criteria.[195] In order to survive strict scrutiny, the challenged classification must be: 1) justified by compelling state ends and 2) use narrowly tailored means to accomplish those ends. This not only ensures that there is an exceedingly good reason for relying upon a suspect classification, but that the legislation is no broader in scope than that reason justifies.[196] In practice, virtually no racial classification actually survived strict scrutiny.[197] Thus, the adage:

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v. Carolene Prod. Co. 304 U.S. 144, 152 n.4 (1939) (legislation regulating commerce generally constitutional unless plaintiffs show that it does not "rest[ ] upon some rational basis." *Id.* at 152.); *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject them to the most rigid scrutiny."). Professor Siegel has argued that the Court's formalization of strict scrutiny analysis in *McLaughlin* and *Loving* was a move away from anitsubordination towards anticlassification – i.e., away from the notion that equal protection should remedy harms that flow from racial subordination as opposed to remedying harms that flow from racial classifications. Siegel, *supra* note 185, at 1505-07.

[194] *See generally* 16b AM. JUR. 2D *Constitutional Law* § 816 (2007).

[195] Race is the paradigmatic example of a "suspect classification." The Court has indicated that classifications based upon nationality, illegitimacy, gender, and, under certain circumstances, "alienage" warrant heightened scrutiny, but it has been generally unwilling to expand the list beyond that. *See generally* Kenji Yoshino, *Assimilationist Bias In Equal Protection: The Visibility Presumption And The Case Of "Don't Ask Don't Tell,"* 108 YALE L.J. 485, 489-90 (1998); Mark Strasser, *Suspect Classes And Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 944-45 (1991).

[196] This is frequently referred to as "means-ends" testing: i.e., the means used to accomplish a justified end must be no broader than required by that end. *See* Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. Ill. L. Rev. 691, 698-99 (2004). Strict scrutiny requires a particularly tight "fit" between means and ends. JOHN HART ELY, DEMOCRACY AND DISTRUST 146 (Harvard University Press) (1980).

[197] *But see* United States v. Paradise, 480 U.S. 149, 185-86 (1987) (plurality opinion) (rejecting equal protection challenge of racial quota remedy awarded for discrimination in public employment); *Korematsu*, 323 U.S. at 219-20 (deeming internment of Japanese-Americans during World War II constitutional); Winkler, *supra* note 8, at 814-830 (arguing based upon empirical study that strict scrutiny is readily survivable in lower federal courts under specific circumstances).

"strict in theory and fatal in fact."[198] Ostensibly, the Court conceived of strict scrutiny to guard against "majoritarian tyranny" – that is, the majority's hijacking of the democratic process in order to disadvantage protected minority groups.[199] According to this view, it is the courts' responsibility to correct so-called failures of the "democratic process."[200] The Court should strictly scrutinize only that legislation that uses express classifications to disadvantage minority groups, not legislation that uses classifications to remedy social discrimination or otherwise benefit minority groups.[201] There is no political process failure where a majority group, through its elected representatives, imposes a hardship upon itself for the benefit of a minority group.[202] Although for years it remained conflicted over how to address affirmative action,[203] the Court ultimately rejected the democratic process approach in favor of colorblindness

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[198] Gerald Gunther, *In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971) (internal quotations omitted). *But see* Winkler, *supra* note 8, at 797-98.

[199] ELY, *supra* note 196, at 157. This "process theory" holds that substantive value-judgments should be left to the legislature, *see id.* at 74, and that courts should only concern themselves with ensuring that procedures by which the legislature makes such judgments are fair. *Id.* at 101. Where, for example, the political process is so tainted by prejudice as to preclude meaningful consideration of a racial minority's interests or views, there should be a judicial corrective. *Id.* at 157-59. Process theorists such as Ely argued that courts should pay careful attention to legislative motivation in evaluating whether process failure has occurred. As a practical matter, it is impossible to divorce consideration of a value determination from the political process that yielded that determination. *See* Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1699-1704 (1998). This likely plays some substantial role in explaining why process theory has not had the explanatory or predictive power that it promised. *See, e.g.*, Brian Boynton, Note, Democracy and Distrust *After Twenty Years: Ely's Process Theory And Constitutional Law Reform From 1990 to 2000,* 53 STAN. L. REV. 397, 445-46 (2000) (concluding that Court was not process-oriented from 1990 to 2000); Klarman, *supra* note 192, at 309-15.

[200] *See* AM. JUR. 2D *Constitutional Law*, *supra* note 194.

[201] Ely argued this view specifically. ELY, *supra* note 196, at 170-72.

[202] *Id.*

[203] For several years, the Court failed to produce a majority opinion justifying the result in affirmative action cases. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-85 (1986) (plurality) (considering retention policy that favored minority school teachers over more senior white school teachers); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978) (plurality) (considering medical college set-aside program that conferred preference upon minority applicants).

which requires that all express racial classifications including affirmative action programs be reviewed with strict scrutiny.

In *Richmond v. Croson*, the Court first concluded that strict scrutiny should apply to affirmative action.[204] Plaintiff J.A. Croson, a white-owned contractor, challenged the City of Richmond's minority set-aside program, which required all contractors receiving city contracts to subcontract 30% or more of the contract's dollar amount to minority-owned subcontractors.[205] J.A. Croson obtained a city contract, but was only able to comply with the set-aside provision by incurring substantially greater expense than it otherwise would have.[206] Applying strict scrutiny, the Court determined that Richmond's set-aside program was neither motivated by a compelling state interest nor narrowly tailored.[207] Richmond justified its program by pointing to the history of pervasive discrimination in the construction industry, arguing that absent such discrimination the number of minority contractors and sub-contractors would have been much higher in Richmond.[208] The 30% set-aside was intended to correct for that dearth.[209] The Court rejected this argument, stating that municipalities only have a compelling interest in remedying discrimination that they are directly responsible for.[210] Soon after striking down Richmond's program, the Court extended *Croson* to federal affirmative action programs. [211]

The Court noted that there is no limit to broad remedies that seek to ameliorate society-wide discrimination; it is thus inevi-

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[204] City of Richmond v. J.A. Croson, 488 U.S.469, 493-94 (1989).
[205] *Id.* at 477-78.
[206] *See id.* at 482-83.
[207] *See id.* at 505-06.
[208] *See id.* at 498-99.
[209] *See id.*
[210] *See id.* at 492, 498-504.
[211] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (2001) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). The challenge in *Adarand* was, of course, brought under the Fifth Amendment and not the Fourteenth Amendment, as the latter only applies to the states. The Court determined that because the Fifth and Fourteenth Amendments require congruent equal protection analysis, Congress was entitled to no greater latitude to craft race-conscious legislation than state or local governments. *Id.* at 224 (quoting Buckley v. Valeo, 424 U.S. 1, 93). *But see* Winkler, *supra* note 8, at 841-42 (arguing that in lower federal courts, federal laws tend to survive strict scrutiny more readily than state and local laws).

table that such remedies will confer economic benefit upon at least some non-whites who never experienced the specific kind of discrimination at issue and that at least some "innocent" whites who never discriminated will be penalized.[212] In the Court's view, the open-ended redistribution of economic benefits based upon race undermines the guarantee of equality for individuals qua "individuals." [213] In her *Adarand* opinion, Justice O'Connor emphasized that "any individual suffers an injury when he or she is disadvantaged . . . because of his or her race, whatever that race might be."[214] This echoes her earlier words, articulated in the *Metro Broadcasting* dissent, excoriating race-based remedial programs for dividing the "[n]ation . . . into racial blocs" and treating "individuals as the product of their race" as opposed to treating them as individuals.[215]

Croson and *Adarand* boded poorly for all government affirmative action programs. The Court had ostensibly committed itself to a rigid colorblindness approach in the name of ensuring equal treatment for individuals qua individuals. Commentators severely criticized the Court for taking what appeared to be a strong deontological tact by insisting upon race's irrelevance to public life.[216] *Grutter v. Bollinger* complicated the picture by holding that race consciousness can survive strict scrutiny.

b. Grutter and Gratz

Grutter and its companion case *Gratz v. Bollinger* came before the Court nearly 10 years after *Adarand*. *Grutter* and *Gratz* involved challenges to the University of Michigan's Law School and undergraduate affirmative action programs, respectively. The Court upheld the Law School program, but struck down the undergraduate program. Both *Grutter* and *Gratz* draw heavily upon

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[212] See *Croson*, 488 U.S. at 493, 499, 506 (noting that Aleut individual would receive benefit of set-aside program despite never having lived in Richmond or been discriminated against there).

[213] *See id.* at 493.

[214] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (2001).

[215] Metro Broad. Inc. v. FCC, 497 U.S. 547, 603-04 (1990) (O'Connor, J., dissenting).

[216] *See generally* Cassandra D. Hart, *Unresolved Tensions: The Croson Decision*, 7 HARV. BLACKLETTER J. 71 (1990); Douglass D. Scherer, *Affirmative Action Doctrine and the Conflicting Messages of Croson*, 38 U. KAN. L. REV. 281 (1990); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

Justice Powell's opinion in *Bakke*.[217] In *Bakke*, the Court struck down U.C. Davis Medical School's affirmative action admissions program, but failed to produce a majority opinion justifying that result. U.C. Davis set aside a fixed number of seats for minority students and considered applicants for those positions in a separate pool from candidates for the non-minority seats.[218] Justice Powell, writing for himself, but arguably upon the narrowest grounds of all the Justices,[219] concluded that strict scrutiny ought to apply to Bakke's claim and that Davis' rigid quota system did not pass muster.[220] In his view, producing "a diverse student body" was a compelling state interest because of its contribution to a "robust exchange of ideas."[221] Notwithstanding, he found that Davis' quota system was not narrowly tailored because it overemphasized race to the exclusion of all other diversity traits.[222] Had Davis treated race as one among so many diversity "plus" factors, Justice Powell would have deemed it narrowly tailored.[223] As such, Justice Powell's opinion left open the possibility that a university affirmative action program could survive strict scrutiny.[224]

The *Grutter* Court adopted Justice Powell's conclusion that "diversity" is a compelling state interest in the context of higher education.[225] The Court based this conclusion on the premise that

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[217] Grutter v. Bollinger, 539 U.S. 306, 323-24 (2003) (noting that the opinion "has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

[218] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 274 (1978).

[219] The Grutter Court declined to answer the question of whether Justice's Powell's opinion was for the Court and thus binding precedent. *Grutter*, 539 U.S. at 325 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977), which held that the narrowest opinion is binding precedent upon lower courts).

[220] *Bakke*, 438 U.S. at 305-09.

[221] *Id.* at 313.

[222] *See id.* at 315-16. Justice Powell concluded that, in order to rise to the level of a compelling state interest, diversity must encompass a "broad[ ] array of qualifications and characteristics" possibly including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor. . . ." *Id.* at 315, 318.

[223] *See id.*

[224] Akhil Reed Amar & Neil Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1771-79 (1996) (arguing that Justice Powell's opinion in *Bakke* should determine affirmative action, not *Croson* and *Adarand*).

[225] *Grutter*, 539 U.S. at 329.

campus diversity fosters the creation of a more tolerant and dexterous citizenry by: 1) facilitating the exchange of ideas which help develop "cross-racial understandings" necessary for dismantling racial stereotypes,[226] 2) preparing students to effectively function in an increasingly diverse society,[227] and 3) creating a future leadership that, by virtue of being inclusive, has popular legitimacy.[228] The Court in *Grutter* also found that the University of Michigan Law School's affirmative action program was narrowly tailored to achieve diversity.[229]

In *Gratz*, the University simply assigned a fixed number of points – 1/5 of the points necessary for admission - to all undergraduate applicants who were members of underrepresented minority groups.[230] By contrast, in *Grutter*, the Law School admission committee did not assign fixed points to minority candidates or otherwise reserve seats for minorities.[231] Instead, the Law School considered race, along with other diversity traits and conventional qualifications, in a "holistic" manner.[232] Although race could be an important factor in any given admission decision, it was not necessarily so.[233] As such, race was not "the predominant factor" in the admission process, but rather one of many factors that could weigh differently depending upon a particular applicants' circumstances.[234] Although both the Law School and undergraduate programs ensured predictable results regarding minority representation in each entering class,[235] the Court concluded that the Law School's approach was acceptable because it was "highly individualized" and used race in a "flexible and nonmechanical way."[236]

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[226] *Id*. at 330-32.
[227] *Id*. at 330.
[228] *See Id*. at 332.
[229] *Id*. at 334.
[230] Gratz v. Bollinger, 539 U.S. 244, 255, 270 (2003).
[231] *Grutter*, 539 U.S. at 337.
[232] *Id*.
[233] *Id*. at 319.
[234] *Id*. at 320.
[235] *Id*. at 385 (Rehnquist, J. dissenting); *Gratz*, 539 U.S. at 256.
[236] *Grutter*, 539 U.S. at 309, 334. The Court accepted the Law School's argument that it had to pay attention to minority enrollment statistics because it was necessary to have a "critical mass" of minority students in order for the benefits of diversity to be realized. *Id*. at 335-56.

Commentators have questioned whether *Gratz* and *Grutter* are doctrinally reconcilable – it is not readily apparent why treating race as a quantitatively determinate plus factor undermines "individualized treatment" any more than treating race as a quantitatively indeterminate plus factor.[237] Identity hierarchy sheds light on why the Court viewed the programs in *Grutter* and *Gratz* differently.

2. Identity Hierarchy

Grutter put to rest the notion that strict scrutiny is necessarily "strict in theory, but fatal in fact."[238] The historical significance of this was not lost upon the *Grutter* dissenters. Justice Thomas, in particular, highlighted the extent to which the majority diluted the strict scrutiny test.[239] He questioned whether maintaining a public law school constituted a compelling government interest, let alone maintaining diversity at such an institution.[240] Prior to *Grutter*, the Court had almost never concluded that a government interest satisfied strict scrutiny.[241] Several commentators have noted that the test applied in *Grutter* is "strict" in name only.[242] Regardless of whether one agrees with that proposition, it is clear that the Court made a move away from colorblindness in *Grutter*.[243] Professor Balkin has speculated that *Grutter* may represent the first steps in the reworking of the tiered system of scrutiny while others have suggested that *Grutter* represents a doctrinal aberration that is attributable to popu-

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[237] *See, e.g.*, Patrick S. Shin, *Compelling Interest, Forbidden Aim: The Antinomy of Grutter And Gratz*, 82 U. DET. MERCY L. REV. 431, 441 (2005); Robert Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 71-72 (2003); Robert George, *Gratz and Grutter: Some Hard Questions,* 103 COLUM. L. REV. 1634, 1634 (2003); Spann, *supra* note 5, at 243-44. If anything, the program at issue in *Grutter*, quantitatively speaking, entailed a smaller racial privilege than that in *Gratz*. *See* Ian Ayres & Sydney Foster, *Don't Tell Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 Tex. L. REV. 517, 518 (2007).

[238] *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

[239] *Id.* at 351-53 (Thomas, J., dissenting).

[240] *Id.* at 357-58 (Thomas, J., dissenting).

[241] *Id.* at 352-53.

[242] *See* sources cited *supra* note 8.

[243] *Grutter* does not repudiate colorblindness. Rather, it casts it as an achievable aspiration that, for the time being only, requires a modicum of race consciousness. Accordingly, the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343.

lar support for affirmative action amongst certain elites.[244] This paper does not call these views into question so much as offer an alternative account for the Court's awkwardly hewn reasoning.

The *Grutter* majority viewed the creation of a diverse student body at institutions of higher learning as significantly different from a range of other government purposes that are not compelling state interests such as providing role models to minority children and remedying discrimination in society at-large. The Court faulted affirmative action programs that sought to confer economic benefit upon members of minority groups at the expense of whites who are not directly culpable for the historic discrimination being ameliorated. [245] In these cases, there was no suggestion that race-consciousness had any relation to, let alone operated in the service of, civic identity.[246] Rather, the Court treated the programs as if they were purely redistributive in nature; [247] the state's race-consciousness was wholly for the sake of benefiting racial minorities – i.e., race was considered for its own sake. The Court concluded that the state had treated people as if they were "the product of their race" rather than as individuals who happen to have a racial attribute.[248] By contrast, in *Grutter*, the Court concluded that race-consciousness operated in the service of civic identity.

The *Grutter* majority found "diversity" to be compelling, not because it made up for past harms endured by minority communities, but rather because race-conscious admissions are neces-

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[244] *See* Balkin, *supra* note 5, at 1718. *See also* Devins, *supra* note 185, at 362-73.

[245] *See Croson*, 488 U.S. at 493, 499, 506.

[246] One could, as some liberal thinkers have, argue that there must be an egalitarian distribution of resources in order to ensure that citizens have the ability to meaningfully uphold their responsibilities to the civic communities and exercise the privileges that flow from membership. *See, e.g.*, GUTMANN, *supra* note 63, at 226. Outside the academic world, however, in the United States at large, there is a strong predilection towards decoupling civic identity from income/wealth. The Court's understanding of equal protection reflects this decoupling. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (concluding that wealth is not a suspect classification).

[247] It is not even clear that the programs positively contributed to the government's ability to execute construction projects. Amar & Katyal, *supra* note 224, at 1776.

[248] *See Metro Broadcasting*, 497 U.S. at 603-04 (O'Connor, J., dissenting) (characterizing the Court's holding in *Croson*).

sary for cultivating good citizens.[249] In *Grutter* race-consciousness did not operate for its own sake, but rather in order to cultivate civic identity amongst the country's future leaders.[250] The majority emphasized that a racially diverse student body benefits all students by facilitating vibrant dialogue and the attendant "cross-racial understandings" that challenge stereotypes.[251] The capacity for political dialogue and tolerance is, of course, a bedrock feature of civic identity in the liberal tradition.[252] Higher education is a training ground for citizenship.[253] It is where civic identity is honed.[254] It is particularly important that these traits be assiduously cultivated amongst students at elite law schools because these students are very likely to be tomorrow's leaders and thus model and emblematize the ideals of civic identity for the public at large.[255] Civic identity, like the nation's leadership, would hardly seem legitimate if its avatars are all white.

The Court's narrow tailoring discussion even more pointedly casts race within identity hierarchy's rubric. Although it accepts that race plays an important role in cultivating civic identity's primacy, the Court was only willing to approve of the Law School's plan because it treated applicants as individuals by virtue of using race as a flexible "plus" factor without allowing it to become the predominant factor in the admissions calculus.[256] In *Grutter*, race functioned as just one of a constellation of traits such as language fluency, family history, and travel experience among others.[257] As the Court saw it, in the Law School's calculus, the individual was not reducible to any combination of diversity traits let alone a single one. The individual was principally defined by her ability to suc-

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[249] *Grutter*, 539 U.S. at 331-33. *But see Metro Broadcasting*, 479 U.S. at 612-14 (stating that diversity is not measurable and too "amorphous" to constitute a compelling state interest).
[250] *Grutter*, 539 U.S. at 330-33.
[251] *Id.* at 330.
[252] *See supra* note 175 and accompanying text.
[253] *See Grutter*, 539 U.S. at 330-31.
[254] *See id.*; Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity,* 72 FORDHAM L. REV. 2301, 2305-06 (2004) (discussing how different kinds of diversity contribute to advancement of a university's mission).
[255] *See Grutter*, 539 U.S. at 332.
[256] *Id.* at 334-38.
[257] *Id.* at 338.

ceed in the Law School – i.e., by her capacity for becoming the successful citizen the Law School sought to cultivate.[258] The admissions process treated applicants as if they *possessed* race, not as if they were *possessed by* race.[259] The Court's implicit understanding of the individual echoes that of liberal theorists – an individual is, first and foremost, a civic self (or proto-civic self, as it were). The opinion, however, also recognizes (even if not explicitly) the extent to which civic identity, like any identity, is a group phenomenon.[260] For instance, the Court accepted the notion of "critical mass" that a certain quantum of minority students is necessary to facilitate the kind of dialogue that fosters tolerance and civic friendship.[261] The Court also accepted that a certain quantum of minority representation is necessary to consolidate civic institutions' and civic identity's legitimacy.[262] There is tension here because civic identity's need for a specific quantum of minority representation is not necessarily consistent with evaluating each applicant as an individual who is, first and foremost, a civic self.[263]

In contrast to *Grutter*, the admissions process in *Gratz* assigned a fixed and substantial number of points to each applicant from underrepresented minority groups.[264] By so doing, the university treated race as not only the most important diversity trait, but as defining of applicants' identities.[265] It also appeared to tie the university's hands with regard to assessing what any particular individual might contribute to discourse on campus.[266] The Court seems to have concluded that the undergraduate admissions program was, in effect, a quota given that the point system was designed to ensure a specific quantum of minority representation

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[258] *See id.*at 338 ("[A]ll underrepresented minority students admitted by the Law School have been deemed qualified.").
[259] See *supra* note 99 and accompanying discussion.
[260] See *supra* notes 53-55 and accompanying discussion.
[261] *See Grutter*, 539 U.S. at 329-30.
[262] *See id.* at 331-32.
[263] *See* Post, *supra* note 237, at 72-73.
[264] Gratz v. Bollinger, 539 U.S. 244, 255 (2003).
[265] *See id.* at 271-72 (stating that policy has "effect of making 'the factor of race. . . decisive.'")
[266] *Id*. at 273 (artistic talent only garnered 5 points while race garnered 20 points).

in each entering class.[267] By this logic, when decisive weight is accorded to race regardless of a particular applicant's circumstances,[268] race ceases operating in the service of civic identity, and becomes a gratuitous benefit for minority students. By this view, the admissions process becomes purely redistributive: seats are awarded to minority students because they are minorities rather than because of what they will be able to contribute to civic discourse. Racial identity, in other words, is considered and rewarded for its own sake, not for its instrumental role in cultivating civic identity. Together *Grutter* and *Gratz* suggest that the Court sees the importance of cultivating and strengthening civic identity (as the group phenomenon that it is) provided that applicants are considered as individuals. The normative implications of this contradiction are explored in Section IV.

B. MAJORITY-MINORITY DISTRICTING

Voting is civic identity's most salient rite.[269] It is not only an expression of civic agency, but marks one's status as a member of the civic community.[270] Since the passage of the Voting Rights Act of 1965 (VRA), the creation of so-called majority-minority districts has accounted for dramatic increases of minority representatives in Congress. Beginning with *Shaw v. Reno*, the Court questioned the constitutionality of some such districts for over-reliance upon race. As in the affirmative action context, the Court struck

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[267] It is not at all clear from the *Gratz* opinion whether the Court was worried about the fixed nature of the award, the magnitude of the award, or both. *See* Post, *supra* note 237, at 70-71. As a practical matter, the Court's lack of clarity probably does not matter since no school would award a fixed number of points for race diversity so low that it had no bearing on the demographic profile of its entering class – doing so would be pointless. In this vein, both of the University of Michigan's programs sought to achieve specific quantitative targets for minority representation in each entering class. *See Grutter*, 539 U.S. at 385-86 (Rehnquist, C.J., dissenting). The Court's differentiation of the *Gratz* and *Grutter* programs based upon the notion that the latter was "individualized" is ironic at best, given that it weights races more heavily than the program in *Gratz*. *See* Ayres & Foster, *supra* note 237, at 518.

[268] *Gratz*, 539 U.S. at 272 (quoting *Bakke*).

[269] *See* SHKLAR, *supra* note 148, at 2-3. *But see* Balkin, *supra* note 5, at 1694 (noting that Fourteenth Amendment's drafters did not imagine that it would encompass the right to vote).

[270] *See* SHKLAR, *supra* note 148, at 2-3.

down majority-minority districting schemes in the name of protecting the individual, but did not insist upon a rigid colorblindness approach.[271] Commentators note that the Court's focus on the individual seems particularly misplaced in the voting context for various reasons, but two in chief. First, it is communities of voters who, through collective action, select representatives, not voters acting alone.[272] The VRA is explicitly premised upon this reality and compels states to create minority-majority voting districts.[273] Second, there is the danger of "democratic harms" in voting rights cases that cannot easily be reduced to harms befalling specific voters – i.e., equal protection enforces values regarding the structure of our democratic system, not just rights that inhere to specific voters.[274]

Although numerous commentators have criticized the Court's emphasis on the individual in the voting rights context, little has been said as to how the Court conceptualizes the individual therein. This subsection argues that identity hierarchy offers critical insight. As in the affirmative action context, the Court uses the terms individual to describe someone who is first and foremost a civic self. In this vein, the Court has ruled that race may only be used in the districting process provided that doing so helps identify a community of individuals who possess a shared civic identity. Using race for "its own sake" by assuming that civic identity is primarily racial is impermissible.[275] In the voting rights context, unlike in the affirmative action context, however, the Court is less concerned with cultivating civic identity's essential attributes than with creating the optimal circumstances for those attributes' expression.

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[271] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594, 2620 (2006) (hereinafter "LULAC") ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'") (quoting Shaw II, 517 U.S. 899, 917 (1995)); Miller v. Johnson, 515 U.S. 900, 911 (1995) (the state "must treat citizens 'as individuals, not simply as components of a racial, religious, sexual, or national class.'").

[272] *See, e.g.*, Gerken, *supra* note 17, at 1721-1741.

[273] Guinier, *supra* note 17, at 110.

[274] *See*, *e.g.*, Pildes & Niemi, *supra* note 5, at 508-09.

[275] *E.g.*, *Miller*, 515 U.S. at 913.

1. From Dilution to Representative Harms

a. Background

In *Baker v. Carr* and *Reynolds v. Sims*,[276] the Court held that states must minimize the population variance between voting districts lest some votes have more quantitative weight than others.[277] The Court noted that "dilution of the weight of a citizen's vote" denies the right to vote "just as effectively as by wholly prohibiting the free exercise of the franchise."[278] The so-called "one person one vote" rule ensures that every citizen's vote has the same quantitative weight as every other citizen's.[279] This quantitative stringency, however, does not exhaust the equality dilemmas created by the United States' geography-based districting process.[280] Thus, the term "dilution" is used expansively to refer to any districting arrangement that reduces the voting power of an interest-defined group, typically a racial minority.[281] For instance, both "at-large" and "multi-member" districts have been successfully challenged for

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[276] *See* Baker v. Carr, 369 U.S. 186 (1962); *see also* Reynolds v. Sims, 377 U.S. 533 (1964).
[277] *Reynolds*, 377 U.S. at 569 (apportionment must occur on a "population basis").
[278] *Id.* at 555.
[279] The "one person one vote" principle tracks Rousseau's notion that, in a republic of "n" number of citizens, each citizen holds a 1/n share of state sovereignty. *See* WALZER, *supra* note 131, at 26-28.
[280] There are different ways in which voters may be aggregated for the purposes of selecting representatives. For example, proportional representation systems are "partisan-based" to the extent that parties take power in proportion to the number of votes received by the party in question. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 109 (2004). Although there are numerous varieties of proportional representation systems, such systems typically yield legislature that reflect the distribution of party affiliation across society. *See, e.g.*, Katharine Ingless Butler, *Racial Fairness And Traditional Districting Standards*, 57 S.C. L. REV. 749, 783 (2006); Pildes & Niemi, *supra* note 5, at 489. This is in contrast to the United States' winner-take-all, geography-based system. *See id*. In the United States, elected representatives speak for geographically specific constituencies regardless of party affiliation – e.g., a Democratic representative is presumed to speak for the both the Democrats and Republicans in her district regardless of the fact that many, if not most, of the Republicans voted against her. Guinier, *supra* note 17, at 127.
[281] Shaw I, 509 U.S. 603, 640-41 (1993) (describing dilution claims). The community, however, need not always be racial. *E.g.*, LULAC, 126 S.Ct. 2594, 2607 (2006) (noting that a partisan gerrymandering case is justiciable) (citing Davis v. Bandemer, 478 U.S. 109, 118-27 (1986)).

diluting minority voting power.[282] By allowing a racial majority to, in effect, select all of the representatives for a particular jurisdiction, at-large and multi-member districts can, quite literally, submerge minority voting strength. Plaintiffs may challenge such districting schemes under both the Equal Protection Clause and/or section 2 of the VRA, although the former requires a showing of "discriminatory intent" while the latter does not – in effect, making section 2 the preferred means for asserting a dilution claim.[283]

In *Thornburg v. Gingles*, the Supreme Court articulated the required showing for a section 2 violation. The minority group must be: 1) large enough to constitute a majority in a single-member district, 2) politically cohesive, and 3) prevented from electing its chosen representative by the white majority's bloc voting.[284] The possibility of drawing a so-called "Gingles district," characterized by the three *Gingles* factors – gives rise to a section 2 claim. *Gingles* applies not only to at-large and multi-member districting, but also to a single-member districting scheme that fragments or packs minority voters. "Fragmenting" minority voters reduces their voting strength by dividing them across districts and thereby preventing them from constituting a majority in any one of those districts.[285] "Packing" minority voters into a single district such that they constitute a supermajority reduces their voting strength by "wasting" the votes in excess of those needed to elect their chosen representa-

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[282] *See* Rogers v. Lodge, 458 U.S. 613, 616 (1982) (at-large districting); Whitcomb v. Chavis, 403 U.S. 124, 158-59 (1973) (multi-member district); *but see* White v. Regester, 412 U.S. 755, 765 (1973) (stating that a multi-member district is not *per se* unconstitutional).

[283] Congress amended section 2 in 1980 to permit challenges based upon discriminatory effect alone. *See* Thornburg v. Gingles, 478 U.S. 30, 35-36 (1986). Congress made this change largely in response to the Court's prior determination that section 2, like the Equal Protection Clause, required a showing of "discriminatory intent" when challenging a facially neutral districting scheme. *See id.* (*citing* Mobile v. Bolden, 446 U.S. 55 (1980)).

[284] *See Gingles*, 478 U.S. at 50-51. The test requires evaluation of the "totality of the circumstances," however, the Court indicated that plaintiffs would typically be unable to prevail on a section 2 claim unless the three *Gingles* factors are present. *See id.* at 50; *but see* De Grandy v. Johnson, 512 U.S. 997, 1013 (1994) (stating necessity of looking to factors beyond three *Gingles* factors in cases that are a "closer call[ ]").

[285] *See De Grandy*, 512 U.S. at 1007.

tive.[286] A jurisdiction is not required to draw any more majority-minority districts than are necessary for a particular minority group to have the potential to choose representatives in proportion to their population in the state.[287] Proportionality is a benchmark for ascertaining the number of majority-minority districts a jurisdiction has to draw in order to stave off liability under the VRA. Proportionality in particular, and section 2 in general, relies upon the assumption that minority groups have shared interests and that the realization of those interests turn upon the group's collective ability to elect representatives.[288]

The *Gingles* Court did not indicate how or where states should draw majority-minority districts in order to remedy a section 2 violation – the Court only held that the absence of a majority-minority district where the *Gingles* factors were present created section 2 liability.[289] *Gingles*, permits states to draw remedial majority-minority districts in places other than where the *Gingles* factors are present.[290] This is particularly significant because VRA compliance is only one of many variables in the redistricting calculus many of which may weigh against drawing a majority-minority district where the *Gingles* factors are present.[291] One particularly salient

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[286] *See id.* and thereby preventing votes from being used to effect election results in other districts. Of course, packing is only objectionable where the minority voters in question are "politically cohesive" – i.e., that they tend to vote for the same candidate. *See also Gingles*, 478 U.S. at 50-51.

[287] *See De Grandy*, 512 U.S. at 1014-17; *see also* Gerken, *supra* note 17, at 1676, 1686 (arguing that the harm in a dilution case is aggregate in nature); Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 33 (1995) (section 2 together with Equal Protection Clause create a rule of "constrained proportionality"). The Court, however, has made clear that proportionality does not create a "safe harbor" from section 2 liability for those states that make up for discrimination in one part of a state by creating a majority-minority district in a different part of the state. *See DeGrandy*, 512 U.S. at 1019. Nor does the Constitution guarantee proportional representation in the legislative body in question. *See Davis*, 478 U.S. at 132 (plurality).

[288] *See* Gerken, *supra* note 17, at 1676, 1686; Briffault, *supra* note 287, at 33.

[289] *See* Gerken, *supra* note 17, at 1697-98.

[290] *Id.*; Shaw I, 509 U.S. 630, 677 (1993) (Stevens, J., dissenting) (noting that there is no constitutional requirement to satisfy *Gingles* factors); Shaw II, 517 U.S. 899, 934 (1996) (Stevens, J., dissenting) (same).

[291] *See, e.g.*, *Shaw II*, 517 U.S. at 937 (Stevens, J. dissenting) (noting that districting plan reflected both legislature's interest in aggregating rural voters with one another and urban voters with one another and also its interest in retaining incumbents); Miller v.

variable, for example, is incumbent retention; whatever political party is in power will seek to draw district lines to preserve its incumbents' seats.[292] Incumbent retention frequently makes it suboptimal for legislators to create majority-minority districts where a *Gingles* district could be drawn and/or to draw "compact and contiguous" majority-minority districts.[293] State legislatures have considerable discretion to create districts that are suited to the political needs of the state.[294] States have frequently used this discretion to draw awkwardly shaped majority-minority districts that appear anything but "compact and contiguous" and/or are not drawn where the *Gingles* factors are present.[295] It is the constitutionality of such majority-minority districts that the Court took up in *Shaw v. Reno* and subsequent cases.

b. Shaw and Progeny

In a series of cases involving challenges to various states' 1990 decennial redistricting, the Supreme Court substantially expanded the scope of a voting rights injury under the Equal Protection Clause. In *Shaw v. Reno*, white voters challenged North Carolina's creation of two majority-minority districts. The plaintiffs did not allege vote dilution or that they had been excluded from the voting process.[296] Rather, they made the novel claim that the State had "created an unconstitutional racial gerrymander" and thereby "violated their constitutional right to participate in a 'color-blind'

Johnson, 515 U.S. 900, 941-42 (1995) (Ginsburg, J., dissenting) (noting that Georgia legislature considered traditional districting criteria in addition to incumbent retention); Karlan & Levinson, *supra* note 17, at 1215 ("In any racially diverse jurisdiction where race is even loosely correlated with voting behavior, race will simply be one motivating factor in the placement of voters.").

[292] *See Miller*, 515 U.S. at 941-42 (1995).

[293] *See id*.

[294] *See* Chapman v. Meier, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body. . . .").

[295] *See* Pildes & Niemi, *supra* note 5, at 541-49 (showing numerous non-majority-minority districts more oddly shaped than majority-minority districts in *Shaw I*); *see also*, *Miller*, 515 U.S. at 940-41 (Ginsburg, J. dissenting) (describing shapes of majority-majority districts).

[296] *Shaw I*, 509 U.S. at 641 ("They did not even claim to be white.").

electoral process."[297] The district court dismissed for failure to state a claim and the Supreme Court reversed.[298] Emphasizing the "highly irregular" and "bizarre" shapes of the contested districts,[299] the Court stated that racial gerrymanders create a special brand of harms. "Racial gerrymanders" reinforce not only the stereotype that people of a particular race all think alike, but also the idea that representatives need only represent a specific racial group as opposed to everyone in their districts.[300] The Court considered this an affront to all voters, including members of the minority group.[301] The Court held that strict scrutiny should apply to the plaintiffs' claim and, for that matter, any claim involving a redistricting scheme "so irrational on its face" that it must be seen as an effort to segregate voters by race.[302] The Court remanded for a determination as to whether North Carolina's reapportionment scheme was narrowly tailored to serve a compelling government interest.

Standing alone, *Shaw* might have been understood to only require strict scrutiny's application to outlandishly shaped voting districts.[303] In *Miller v. Johnson*, however, the Court expanded *Shaw* such that any reapportionment scheme in which race was the "predominant factor" would trigger strict scrutiny.[304] The Court made clear that a district's facial irregularity, although probative, is not

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[297] *Id.* at 636, 641-42. *But see id.* at 659 (White, J. dissenting) (stating that plaintiffs have presented no recognized injury).
[298] *Id.* at 658.
[299] *Id.* at 640, 644, 651 (likening case to that presented in Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the city limits of Tuskegee were redrawn to exclude nearly all black persons from municipal elections).
[300] *Shaw I*, 509 U.S. at 650. Professors Pildes and Niemi call these "expressive harms," Pildes & Niemi, *supra* note 5, at 483, which accrue when the government endorses the view that race is the most important among the values informing a political process. *Id.* at 527. This seems related to a "stigmatic harm," which accrues when people are degraded by virtue of their inclusion or exclusion from a particular status group. *See* Shaw II, 517 U.S. 899, 928, 931 (1996) (Stevens, J. dissenting). Stigmatic harm, standing alone, is typically insufficient to create standing to bring an equal protection claim. *See* Allen v. Wright, 468 U.S. 737, 755 (1984) ("Our cases make clear that [stigmatic harm] accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.").
[301] *Shaw I*, 509 U.S. at 647-48 (stating that the oddly shaped district may fuel stereotypes harmful to minorities).
[302] *Id.* at 658.
[303] *See* Miller v. Johnson, 515 U.S. 900, 934 (1995) (Ginsburg, J., dissenting).
[304] 515 U.S. at 916.

necessary for demonstrating that race was the predominant factor motivating the district's creation.[305] By this standard, even compact and contiguous majority-minority districts could be subjected to strict scrutiny.[306] The Court, however, was careful not to say that race could play *no* role in reapportionment – to have gone that far would have been to declare section 2 unconstitutional because it compels states to consider race when creating voting districts.[307] Moreover, as the Court itself recognized, legislators will almost always be aware of race.[308] Not only is race readily visible, it often correlates strongly with other important features including political and social interests.[309] Thus, consideration of race in redistricting is not *per se* unconstitutional. However, when race is considered "for its own sake, and not other districting principles" there is a constitutional violation.[310] The Court further elaborated that race was the "predominant factor" in a reapportionment scheme if the legislature subordinates "traditional race-neutral districting principles, including … compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests. . . ." to race.[311] *Miller*, in other words, placed the *Gingles* factors at the center of equal protection analysis – before *Miller* the *Gingles* factors only defined a section 2 violation; after *Miller* they also defined the outer limit for how and where states can create remedial majority-minority districts.[312] The *Miller* Court assumed without deciding that VRA compliance constituted a compelling government interest and then concluded that Georgia's reapportionment scheme was

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[305] *Id*. at 913-14.
[306] *But see* Pildes, *supra* note 280, at 64-65 (suggesting that there have not been and will likely not be challenges to compact and contiguous majority-minority districts).
[307] *See* Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 207 (2005).
[308] *See* Shaw I, 509 U.S. 630, 646 (1993).
[309] *See Miller*, 515 U.S. at 944 (Ginsburg, J., dissenting) (citing urban ethnicity studies).
[310] *Id*. at 913.
[311] *Id*. at 916.
[312] Shaw II, 517 U.S. 899, 916-17 (1996) (explaining that legislatures cannot draw majority-minority districts anywhere it wants, provided that *Gingles* factors are satisfied); *see also supra* note 290 and accompanying discussion.

not narrowly tailored because the VRA did not compel creation of the majority-minority districts at issue.[313]

Although *Shaw* and its progeny leave a number of important questions unanswered,[314] it is clear that the Court is unwilling to police race in the reapportionment context using a categorically colorblind approach.[315] Legislators will inevitably be aware of race and are free to use that information, albeit in a proscribed manner. It is difficult to say exactly when "awareness" becomes "predominance" and the Court has offered little precise guidance.[316] "Legislative intent" is elusive in most contexts, but particularly in the reapportionment context where multiple co-dependent variables animate the decisional calculus.[317] Compounding the confusion is the continuing uncertainty as to the nature of the harm at play in these cases. The Court has emphasized that the right to vote, like all rights, is individual and not group in nature.[318] Scholars, however, have criticized this assertion as implausible given that only groups

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[313] 515 U.S. at 923-24. *Miller*, like *Shaw I*, not only implicated section 2, but also section 5 of the VRA. Section 5 embodies the so-called nonretrogression principle. *Id*. at 926. Certain jurisdictions that have histories of voting discrimination are required to submit redistricting plans to the Attorney General for clearance. The process was designed to ensure that there was no diminution of minority voting strength secured during the Civil Rights Movement. *See id*. at 925-26. In *Miller* and *Shaw I*, the state legislatures created the contested majority-minority districts in part to obtain clearance from the Attorney General in compliance with section 5. *See id*. at 924-26. In both cases, the Court concluded that the states had not satisfied narrow tailoring, in part, because they had gone farther that section 5 required. *See Miller*, 515 U.S. at 926-27; *Shaw II*, 517 U.S. at 902, 903.

[314] Among these questions is the continued vitality of the VRA. *See* Gerken, *supra* note 17, at 1665-66. *But see* Pildes, *supra* note 280, at 67-68 (noting that state legislatures appear to have internalized *Shaw* and its progeny, and that there has been little litigation around majority-minority districts subsequently).

[315] *See* Hunt v. Cromartie, 526 U.S. 541, 551-52 (1999) (indicating that state's demonstration of strong correlation between race and partisan affiliation defeated summary judgment); Bush v. Vera, 517 U.S. 952, 1071-72 (1996) (Souter, J., dissenting) (noting impracticability of colorblindness in voting context).

[316] *See Vera*, 517 U.S. at 1062 (1996) (Souter, J., dissenting). *But see* Easley v. Cromartie, 532 U.S. 234 (2001) (determining, after careful review, that evidence did not support a finding of predominance).

[317] *See supra* note 291 and accompanying discussion. *See also* Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

[318] *See Miller*, 515 U.S. at 911 (citing Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1083 (1983)).

of voters have the power to elect a representative.[319] Claims of vote-dilution are premised upon a minority group's inability to elect the representative of its choice. Section 2 of the VRA compels states to consider race in redistricting precisely so that minority communities can elect representatives of their collective choosing. Moreover, the harms that the Court actually speaks of – i.e., the "representative harms" that accrue whenever the state assumes that "political identity is or should be, predominantly racial" [320] – hardly seem individual in any conventional sense of that term. Rather, as Professor Pildes observes, these harms are irreducibly group-based in "that they are enforcing structural values concerning the democratic order as a whole."[321] It is the use of race itself as opposed to its effect on any specific individual that constitutes the harm.[322] For instance, relying too heavily on race might communicate its importance over other significant values that are germane to districting in a fashion that is inconsistent with our shared understandings as to how our political system is supposed to operate.[323]

To the extent that these commentators are correct, the Court appears to have potentially laid the groundwork for a clash between the Fourteenth Amendment and the VRA. [324] Professor Gerken proposed a framework for considering voting as an "aggregate right."[325] By her approach, the right to vote should be thought

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[319] *See* Gerken, *supra* note 17, at 1721-1742. By this she means that voting is an individual right to aggregate one's vote with other like-minded voters in the interests of selecting a candidate. This theory avoids the difficulties of positing voting as categorically individual-based or group-based.

[320] *Vera*, 517 U.S. at 980 (plurality).

[321] Pildes, *supra* note 280, at 46; *see also* Karlan & Levinson, *supra* note 17, at 1204 (noting that voting is a group-driven activity).

[322] *See* Karlan & Levinson, *supra* note 17, at 1214; *accord* Pildes & Niemi, *supra* note 5, at 509.

[323] *See* Pildes & Niemi, *supra* note 5, at 508-09. Another example of a structural harm, although not one specific to minority-majority districting, is partisan self-entrenchment which militates against the shifting interest-based alliances that are the hallmarks of pluralist politics. *See* Pildes, *supra* note 280, at 45.

[324] *See Vera*, 517 U.S. at 990 (O'Connor, J., concurring). There may, however, be reason to think that such a clash will not materialize. *Shaw* and its progeny have had little or no effect on the number of minority representatives in Congress and there has not been a flood of cases challenging majority-minority districts. *See* Pildes, *supra* note 280, at 67-68.

[325] *See* Gerken, *supra* note 17, at 1711-17.

of as a voter's right to make choices about with whom to aggregate that vote.[326] This may represent the beginning of a doctrinal reconciliation, if one is needed.[327] It does not, however, purport to capture the Court's actual assumptions as to what it means when it uses the term individual. Identity hierarchy fills this gap.

2. Identity Hierarchy

The Court has gone to pains to emphasize that the Equal Protection Clause protects individuals, not groups.[328] *Shaw* and its progeny make clear that there is no exception to this ostensibly individual-focused approach in the voting rights context.[329] The scholarly criticism discussed in the subsection above along with the discussion in Section I counsels against taking the Court's "individual" versus "group" opposition too literally. As stated in Section I, "individual" is an identity designation and identity is always a group phenomenon. To be an "L" requires some concept of what it means to be an "L" and that concept will be a group-defining concept.[330] As discussed above, in the voting context, the individual-group binary is especially precarious because individuals do not elect representatives, groups do.[331] No single voter has the power or right to elect the candidate of her choice – rather, it is only when acting collectively that voters may elect someone.[332] The VRA is premised upon the group nature of voting: section 2 is explicitly designed to protect the ability of minority groups (qua groups) to select representatives of their choosing in rough proportionality to

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[326] *Id.*

[327] *See* Pildes, *supra* note 280, at 67-68 (stating that such a clash has not materialized).

[328] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[T]he Fourteenth Amendment 'protect[s] *persons*, not *groups*.'") (second alteration in original) (quoting Adarand Constructors Inc. v. Pena, 515 U.S. 200, 227 (1995)).

[329] *E.g.*, LULAC, 126 S.Ct. 2594, 2620 (2006) ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'") (quoting Shaw II, 517 U.S 899, 917 (1996)); Miller v. Johnson,, 515 U.S. 900, 911 (1995) (stating the state "must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual, or national class."'") (citing Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1083 (1983)).

[330] *See supra* notes 53-55 and accompanying discussion.

[331] *See supra* note 17.

[332] *See id.*

their share of the population.[333] The central question in redistricting (and dilution) cases is how votes ought to be aggregated for the purposes of selecting a representative.[334] An aggregation scheme is based upon those shared features of a group of voters that compel thinking of them as a community that ought to speak with collective voice in the electoral process.[335] Put differently, an aggregation scheme is based upon specific features of a community's identity. The default aggregation scheme in the United States tends to be geographic – the presumptively correct way to think about communities of voters is by where they reside as opposed to their partisan affiliations.[336] Consistent with this default principle, the *Shaw* line of cases suggest that geography is the aggregation scheme that affords the individual equal protection.

In *Miller* and *Shaw II*, the Court placed "traditional districting principles" at the center of its equal protection jurisprudence by holding that the individual is denied equal protection when a jurisdiction subordinates traditional districting principles in favor of race.[337] It follows that "traditional districting principles" describe an aggregation principle that the Court finds consistent with treating voters as individuals – that is to say, there is no equal protection problem when a state relies upon traditional districting principles. A voter's status as an individual is honored when one is aggregated with other voters in a traditionally drawn district. The aggregation principle embodied in "traditional districting principles" assumes that geography and interests track each other.

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[333] *See* Johnson v. De Grandy, 512 U.S. 997, 1014-17 (1994); Gerken, *supra* note 17, at 1689; Briffault, *supra* note 287, at 34.

[334] *See, e.g.*, Gerken, *supra* note 17, at 1677; Karlan & Levinson, *supra* note 17, at 1204; Pildes & Niemi, *supra* note 5, at 484.

[335] Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 101 ("Districting picks one, two, or perhaps three salient characteristics (residence always, political party affiliation usually, and race occasionally) and tells voters that those are the only groups that really matter to the political process.").

[336] *See supra* note 280 and accompanying discussion. *But see* Karlan, *supra* note 335, at 104 (contending that geography is a constraint on the districting process, but not determinative thereof).

[337] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995); Shaw II, 517 U.S. 899, 916-17 (1996).

Geography here tracks the bedrock attributes of civic identity.[338] To assume that geography tracks interests is to assume that civic identity is best expressed through real communities such as block, neighborhood, and town.[339] This vision of civic identity is one that prizes the political culture of localism: town hall meetings and face-to-face political dialogue amongst neighbors. "Interests" here are not partisan, but rather dialogic; this vision of localism, like liberalism more generally, assumes that there will be disagreement. Identity does not turn on agreement, but rather upon the existence of a shared civic vocabulary and points of political reference about which neighbors have impassioned, but reasoned discussion.[340] This echoes Rawls and Ackerman whose theories are built around the notion of reasoned dialogue between those who share a civic identity and, ideally, engage in dialogue with one another.[341] By the Court's reasoning in the districting context, the individual is not a deracinated being, but rather a member of a geographically-defined civic community. One's status as an individual is realized through membership in and identification with that civic community. This remains true even for those individuals who hold minority views within the community. Traditional districting principles assume that politicians represent all members of their constituency – even those who did not vote for them.[342] This, in the Court's view, is only true if race is not permitted to subvert civic identity's primacy.[343]

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[338] *See supra* note 175 & accompanying discussion.

[339] *See* Briffault, *supra* note 287, at 31 (noting that traditional districting norms place geography at the center of American civic identity as opposed to parties or ideology); Pildes & Niemi, *supra* note 5, at 484 (noting the centrality of geography to notions of legitimate political representation).

[340] *See supra* notes 97, 119 & accompanying discussion.

[341] *See id.*

[342] Davis v. Bandemer, 478 U.S. 109, 132 (1986) ("An individual or a group of individuals who votes from a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district."); *see also* Guinier, *supra* note 17, at 127.

[343] *See* Shaw I, 509 U.S. 630, 648 (1993) (stating that when district is created to benefit a racial group, "elected officials are more likely to believe that their primary obligation is to represent only member of that group, rather than their constituency as a whole"). The Court does not explain why the representative of a majority-minority district is less likely to represent her entire constituency than the representative of

Understood this way, the Court's individual-centered voting jurisprudence is less about privileging individuals over groups than it is about privileging particular identity concepts over others.[344] The Court's redistricting jurisprudence posits civic identity, as defined by geography, to be superordinate to racial identity. In the Court's language, equal protection is frustrated whenever the state subverts identity hierarchy by positing "political identity" as "predominantly racial."[345] Over-reliance on race disrupts the foundational assumption that real communities of interest are geographic.[346] Communities, like the individuals who constitute them, are thought to *possess* race, but not be *possessed by* it.[347] The individual in these cases virtually becomes a metaphor for civic identity such that promoting the latter is made to seem tantamount to protecting the former.

This, however, is not to wholly exclude race from the reapportionment calculus by embracing colorblindness. It is acceptable for the state to consider race in the reapportionment process,[348] but only to the extent that race tracks "traditional districting criteria."[349] Where race "correlates closely with political behavior"[350] by tracking residential patterns, it is a proxy for geographic contiguity/compactness. Here, relying on race does not subvert identity hierarchy, but rather consolidates it. Under such circumstances, information about race helps the state identify the appropriate geographic unit for aggregating votes or, putting it somewhat differently, to identify the geographic unit that best tracks a geographi-

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any other district. *See* Miller v. Johnson, 515 U.S. 900, 930 (1995) (Stevens, J., dissenting).

[344] *Cf.* Guinier, *supra* note 17, at 127 (noting that geography defines a notion of political group identity).

[345] Bush v. Vera, 517 U.S. 952, 980 (1996).

[346] *See Miller*, 515 U.S. at 916 (emphasizing the virtues of compact and contiguous districts).

[347] *See supra* note 99 & accompanying discussion.

[348] *But see* Briffault, *supra* note 287, at 68-78 (arguing the redistricting cases are consistent with colorblindness approach because race simply tracks other demographic features).

[349] *See Shaw I*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

[350] Easley v. Cromartie, 532 U.S. 234, 257 (2001). *See also* Hunt v. Cromartie, 526 U.S. 541, 550 (1999).

cally-specific, civic community. Race is thought to track civic identity. When this is true, the state may consider race. The state, however, may not do the reverse: i.e., assume that civic identity tracks race.[351]

C. CONCLUSION

The Court's reliance on identity hierarchy is revealed through its oft repeated rhetoric that the Fourteenth Amendment protects the individual. The individual, however, is an identity that, as used by the Court in its recent affirmative action and redistricting cases, depends upon identity hierarchy. Affirmative action and redistricting cases implicate civic identity in different ways. The former is concerned with its cultivation amongst the country's future elite while the latter is concerned with its expression as a geographically specific phenomenon. In both *Grutter* and the *Shaw* line of cases, the Court demonstrates its intention to vigorously police race's use in public decision making, but also its reluctance to embrace rigid colorblindness. Consistent with weak versions of deontology and communitarianism, the Court allows public actors to use race when doing so consolidates identity hierarchy. The Court's concern for the individual, however, is fraught with contradictions. In both contexts, the Court shoe-horns its concern for civic identity into a framework of protecting the individual. Section IV suggests some of the normative implications of this contradiction.

This section has explored identity hierarchy in a limited subset of equal protection cases. Identity hierarchy likely has application to other equal protection cases as well. For instance, when challenging a facially neutral classification that has a disproportionate effect on a protected group, equal protection plaintiffs must demonstrate that the government acted with discriminatory intent.[352] The quantum and quality of evidence required to prove intent varies across

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[351] *See Vera*, 517 U.S. at 980 (stating that there is "constitutional harm" when "political identity" is understood to be "predominantly racial").

[352] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 241-42 (1976); Plaintiffs must show, for instance, that a legislature passed a law "because of" its adverse effect upon a protected group, not "in spite of it." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1976) (awareness that rule may have disparate effect on a protected group, by itself, insufficient to show discriminatory intent).

cases: i.e., what "intent" requires changes from one context to another.[353] Identity hierarchy helps make sense of this inconsistency. The Court typically requires less of plaintiffs to prove intent when the challenged practice implicates features of civic identity – e.g., voting and jury selection cases[354] – than when the challenged practice implicates civic identity – e.g., criminal sentencing or employment.[355] Exploring identity hierarchy's role in these and other cases should be the subject of further research. Such research would not only be helpful in reconciling the cases, but in developing the full normative implications of the identity hierarchy thesis.

IV. CONCLUSION: PROMOTING CIVIC IDENTITY

This section criticizes the Court's conceptualization of the individual and the understanding of identity hierarchy upon which it depends. The Court assumes that the individual is first and foremost a civic self. This assumption is reductive for at least two reasons. First, it is inaccurate as an empirical matter: many, if not most persons, do not experience civic identity as discrete from and/or primary to their other identities. Second, as a theoretical matter,

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[353] *See, e.g.*, Foster, *supra* note 4, at 1072-73 (arguing that "process norms" explain different levels of intent); Siegel, *supra* note 38, at 1138 (noting that courts have discretion to require varying degrees of stringency upon plaintiffs); Ortiz, *supra* note 4, at 1107 (noting that standard for showing intent varies in voting, jury selection, and education cases).

[354] In these cases, the Court does not require specific intent. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93-94 (1986) (stating criminal defendant can make out prima facie case of purposeful exclusion of jurors from venire "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose"); Rogers v. Lodge, 458 U.S. 613, 623-27 (1982) (holding that disparate impact in addition to proof "that blacks have less opportunity to participate in the political process and to elect candidates" sufficient to show "purposeful discrimination" in challenge to at-large districting scheme).

[355] In these cases, the Court requires specific intent. *See, e.g.,* McKlesky v. Kemp, 481 U.S. 279, 280 (1987) ("[E]xceptionally clear proof" is needed to show that the prosecutor purposefully discriminated in seeking the death penalty or that state legislature adopted capital punishment statute "*because of* an anticipated racially discriminatory effect.") (emphasis in original); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1976) (finding legislature's awareness that veteran preference in state employment disadvantaged women insufficient to show discriminatory intent because unclear that legislature authorized preference "because of, not merely despite" the adverse effect upon women).

civic identity in the United States, like all identities, is a group phenomenon and depends upon non-civic identities in such a manner that it cannot be thought of as primary in any absolute way. To the extent that the Court uses the notion of "protecting the individual" as a metaphor for promoting civic identity, doing so is rhetorically and analytically awkward. The Court can and should seek to promote civic identity; however, doing so in the name of the individual is counter-productive. This section sketches a brief schematic of how the Court's affirmative action and majority-minority cases might look different if the Court focused squarely upon promoting civic identity without reference to the individual." [356] Although equality requires identity, it does not require the specific vision of the individual that the Court has embraced.

A. THE SUPREME COURT'S CONCEPTION OF THE INDIVIDUAL IS REDUCTIVE

This section suggests two related criticisms of the Court's notion of the individual. The first is empirical. Individuals do not actually experience identity in a manner consistent with identity hierarchy: people do not experience their identities as discrete and ranked; more specifically, they do not experience their civic identity in isolation from their non-civic identities.[357] The proliferation of hyphenated identities such as "African-American" and "Asian-American" in the United States demonstrates the extent to which this is true. Hyphenated identities suggest the extent to which people are viewed and/or view themselves not just as citizens, but as

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[356] As noted earlier, the relation between equality and identity is but one strand in the Court's equal protection jurisprudence. This paper has not sought to advance the identity hierarchy thesis as a totalizing explanation for the Court's jurisprudence. There are numerous policy concerns that inform the Court's reasoning in any equal protection case. *See, e.g.*, ELY, *supra* note 196, at 74 (legitimacy of judicial review); Gerken, *supra* note 17, at 1695 (imposition of costs upon "innocent" whites). It is beyond the scope of this paper to track the interaction between these policy considerations and the identity theories that have been this paper's subject. As such, any conclusions regarding how equal protection jurisprudence might look different without reliance upon the individual can be schematic at best.

[357] *See, e.g.*, APPIAH, *supra* note 54, at 108-10.

particular kinds of citizens.[358] Claims for inclusion often demand that the State accord respect or recognition to citizens for the unique perspective and historical experience that is the hallmark of a specific non-civic identity – e.g., the "black perspective." Claims for increased diversity, in particular, usually argue that historically marginalized groups have a perspective whose inclusion will benefit everyone.[359] In this formulation, an individual's (or group of individuals') experience of, for example, black identity is not severable from the individual's experience of civic identity. It is the extent to which the two are inescapably tied that justifies the demand for increased "diversity" or minority representation. It is precisely because members of minority communities do not experience their civic and racial/ethnic identities as discrete from their civic identities that their inclusion in civic life is thought important.

This empirical objection hints at a deeper, theoretical problem with the Court's conception of the individual. Strong deontology posits that race and other non-civic identities should be virtually irrelevant to civic identity while weak formulations of deontology and communitarianism posit that such identities help constitute and/or operate in the service of civic identity, but from a subordinate position.[360] The only assurance that individuals will be treated as equals is if those identities that differentiate them are kept subordinate to that identity shared by all members of the civic community. Section I.B, however, demonstrated that equality is only possible within a system of differences.[361] Equality's imperative that individuals be considered "the same" assumes that those very individuals must in some respects be different.[362] It is the visibility of such differences that permits the conclusion that the condition of equality actually exists. The absence of visible racial diversity within an institution is often sufficient basis for calling its commitment to equality into question. In this vein, "diversity" is often taken to mean that civic institutions ought to "look like" the society in which they

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[358] The relationship between self-identification and social identification is complex and beyond this paper's scope. *See generally* MARY C. WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA (1990).

[359] *See, e.g.*, Grutter v. U.S., 539 U.S. 306, 330-31 (2003).

[360] *See supra* Part II.B.

[361] *See supra* Section I.B.1 & 2.

[362] *See id.*

operate. It is the presence of different faces that reveals the extent to which there is shared civic identity predicated upon equality. Accordingly, to insist upon the absolute priority of civic identity over non-civic identities such as race is tenuous. The two are mutually defining at both the theoretical and empirical levels.

The Court has tacitly acknowledged this dynamic of mutual dependence. Writing for the majority in *Grutter*, Justice O'Connor noted that an all-white student body, like an all-white political leadership, would not enjoy popular legitimacy.[363] Without some visible representation of people of color, public institutions do not come off as the exemplars of equality that they are supposed to be. The same holds true in the voting rights context. Section 2 of the VRA was explicitly conceived to increase minority representation in political office.[364] The legitimacy of our representative government, in part, turns on the presence of minority representatives. Civic identity and race identity are mutually defining such that legislators could never really identify the former without being aware of the latter.[365] Civic identity and race identity can never really exist in a categorically hierarchical relationship, either at the individual or group levels. Civic identity requires the visible inclusion of non-white people to remain legitimate. Race thereby underwrites civic identity's integrity. By relying on race in this way, however, civic identity is constantly underwriting race's continued visibility and salience as a source of difference in society. The two identities are in constant flux.

This dynamic goes far in explaining why colorblindness cannot be the basis for a viable equal protection jurisprudence. Colorblindness can never be anything more than aspirational.[366] For equality to mean anything at all requires the continued salience and visibility of race and other sources of difference. The equal protection cases discussed in this paper reflect this tension, but engage it in a manner that is elliptical at best. In both the affirmative action and voting rights contexts, the Court has recognized the suboptimal equality results yielded by an unflinching adherence to colorblind-

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[363] *Grutter*, 539 U.S. at 332-33.
[364] *See* Guinier, *supra* note 17, at 110.
[365] *See* Hunt v. Cromartie, 526 U.S. 541, 550 (1999).
[366] *Cf. Grutter*, 539 U.S. at 342-43 (race preferences will be unnecessary in 25 years).

ness.[367] In both sets of cases, the Court has permitted race to be used, provided that it is not "for its own sake."[368] In both contexts, this can be understood to mean that the state must never behave as if the individual is, first and foremost, a racial self.[369] As explained below, however, the Court can promote a vibrant civic identity without relying upon identity hierarchy.

B. PROMOTING CIVIC IDENTITY DOES NOT REQUIRE IDENTITY HIERARCHY

This paper, and Section III in particular, have sought to demonstrate that the Court uses the term individual to describe a being that is, first and foremost, a civic self. It is in the interest of protecting this hypothetical individual that the Court has limited the State's power to consider race in making college admission and redistricting decisions. The Court, however, often seems to posit this individual as a metaphor for civic identity more generally. The Court's concern is understandable given that the integrity and dynamism of our civic culture and institutions is directly related to civic identity's strength. Civic identity, however, like any identity, is a group phenomenon.[370] By over-relying upon the metaphor of the individual, the Court artificially and implausibly posits civic identity and race as mutually exclusive when the two are mutually defining. The Court's reliance upon the notion of the individual yields contradictions and inconsistencies in its opinions that cannot be reconciled with any literal reading of the word individual. This subsection offers a tentative view as to how the result and reasoning in the cases discussed in Section III might look different if the Court focused explicitly and directly upon promoting civic identity rather than implicitly and indirectly through its concept of the individual.

In both *Grutter* and *Gratz*, the Court noted that affirmative action is necessary to cultivate the core attributes of civic identity and ensure that identity's legitimacy.[371] The Court accepted that a

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[367] *See supra* notes 181, 183, 243, 348 & accompanying discussion. *But see supra* note 243 & accompanying discussion.
[368] Miller v. Johnson, 515 U.S. 900, 913 (1995).
[369] *See supra* Sections III.A.2 & III.B.2.
[370] *See supra* notes 53-55 & accompanying discussion.
[371] *See supra* notes 226-228 & accompanying discussion.

certain quantum of non-white students were necessary to achieve the state's interest, but refused to permit the affirmative action program in *Gratz* on account of its failure to treat applicants as individuals.[372] Where *Grutter* did not assign a fixed number of points to applicants for their race, *Gratz* did.[373] This difference should not have made any difference in the Court's equal protection analysis given that both programs sought to ensure that specific proportions of their classes consisted of minority students. The Court's insistence upon individualized consideration is a formalistic requirement that does little other than reinforce the centrality of identity hierarchy to the Court's equal protection race jurisprudence. As a practical matter, this commitment to identity hierarchy and applicants' status as individuals makes it more administratively difficult for large academic institutions to achieve the civic benefits that accrue from a diverse student body. Given the volume of applicants such institutions receive, they must rely upon fairly mechanized, "non-individual" selection processes. This would, of course, be even more true for primary and secondary schools than for universities.[374]

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[372] Gratz v. Bollinger, 539 U.S. 244, 270-72 (2003).

[373] *Id*.

[374] Strictly speaking, public primary and secondary schools do not engage in "admissions" at all. Students are guaranteed a spot in a public school, although some school districts have used race in determining what specific school a student should be assigned to within the district. *See* Parents v. Seattle School Dist. No. 1, 127 S.Ct. 2738, 2746 (2007). In *Parents*, the Supreme Court struck down both Seattle's and Louisville's protocols for assigning students to public schools. Both school districts considered race in deciding where to assign students. *Id*. at 2746. In particular, both districts used race to ensure that "oversubscribed" schools – i.e., schools with more interested students that spots – had student populations that mirrored the demographics of the student population in the district. *Id*. at 2747. A majority of the justices voted to strike the assignment protocols down for failing to be narrowly tailored, although the Court failed to produce a single majority opinion. A plurality of the justices concluded that because both assignment protocols were explicitly designed to yield "racial balance" (i.e., mirror district-wide student demographics) as opposed to the educational benefits of diversity, the protocols were not narrowly tailored. *Id*. at 2757 ("'[R]acial balance is not to be achieved for its own sake.'" (quoting Freeman v. Pitts, 503 U.S. 467, 494 (1992))). A majority of the Justices hinted that school districts must use an "individualized" assignment protocol akin to that in *Grutter* in order to satisfy strict scrutiny. *Id*. at 2753. The scope of "diversity" as a compelling interest, however, remains an open question. *Id*. at 2789 (Kennedy, J. concurring) (stating that "avoiding racial isolation" is a compelling interest for school districts). Although cast as a nar-

In these contexts, treating applicants as if they were individuals in the *Grutter* sense is inconsistent with promoting civic identity. To the extent that tolerance and the capacity for engaging those who are "different" is essential to cultivating civic identity, schools must be diverse. The Court seems prepared to compromise this project in the interests of protecting an individual whose identity can never be thought of as primarily racial. For the reasons discussed above, organizing equal protection doctrine around such a fictional individual is misguided. Excising this concept of the individual from the analysis would permit the Court to singularly focus on whether the quantum of minority representation an institution claims to require is actually necessary to consolidate civic identity in the manner the institution alleges. The Court might take issue with the specific weight accorded to race in an admission process, but it ought to permit institutions to consider race in a non-individualized manner.[375]

Focusing on civic identity's requirements in this way would not necessarily compel a different result in cases like *Adarand* and *Croson*. By the Court's description there was no attribute of civic identity at play in those cases.[376] As such, disallowing the affirmative action program would be unnecessary to promote civic identity. *Metro Broadcasting Inc. v. FCC* presents a more difficult case.[377] In that case, white-owned radio stations challenged the FCC's affirmative action policies that provided minority-owned radio stations a preference in obtaining broadcast licenses under certain circumstances.[378] The plurality opinion affirmed the program, but the

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row tailoring analysis, the plurality's impugning of "racial balancing" suggests a narrow reading of what "diversity" entails.

[375] *Cf.* Ayres & Foster, *supra* note 237, at 575 (arguing that the Court should re-adopt a "minimum necessary preference" inquiry to determine whether a racial preference is Constitutionally valid rather than employ individualized inquiry).

[376] *But see supra* note 246 & accompanying discussion. Of course, much turns on how broadly or narrowly one conceives of civic identity. Here, I am referring only to civic identity in terms of the bedrock features identified in Section II, *see supra* note 175 & accompanying discussion, and not in terms of income or wealth. *See supra* note 82 & accompanying discussion.

[377] 497 U.S. 547 (1990) (plurality).

[378] *See id.* at 557-58. There were two FCC programs at issue in the case. Under the first, when the FCC compared mutually exclusive applications for new licenses, it conferred a "plus factor" for minority ownership. *Id*. at 557. Under the second program, a license-holder in danger of losing its license could avoid the normal FCC hearing procedure (to evaluate the propriety of a transfer) if it transferred its license

case was decided prior to *Adarand* which held that federal affirmative action programs, not just state programs, are subject to strict scrutiny.[379] Under the approach suggested here, the Court would look to whether and how such a licensing program promoted civic identity. One might imagine that minority-owned radio stations are more likely to contribute to civic discourse and tolerance in society much like minority students do in a university setting.[380] If this were not true, however, the licensing preference might begin to seem much more like the set-aside programs struck down in *Adarand* and *Croson*. The question of whether the program treats prospective license-holders as individuals, however, is irrelevant to this analysis.[381]

In the voting context, the Court has implausibly struck down majority-minority districts in the name of the individual.[382] The State cannot assume that voters' primary identity is racial.[383] As in the affirmative action context, however, the Court's reliance on the individual is beset with inconsistencies and contradictions. Voting is fundamentally about collective action and group identity. It is for that reason that section 2 of the VRA compels state's to consider the racial composition of electoral districts. In the majority-minority redistricting cases, the Court asks what aggregation principle for collecting and tabulating votes recognizes the shared civic identity of a community, but does so indirectly by asking which such principle best protects the individual.[384] The Court implies that civic expression is thwarted when the state allows race to become the "predominant factor" in the districting process and political identity is accordingly treated as if it were predominantly racial in nature.[385] That notwithstanding, the Court acknowledges that

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to a minority-owned radio station for no more than 75% of the fair market value. *Id.* 557-58.

[379] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30, 233-34 (2001) (explaining that *Metro Broadcasting* is no longer good law).

[380] *See Metro Broadcasting*, 497 U.S. at 580-81 (discussing how viewpoint diversity in broadcast contributes positively to citizenship).

[381] *But see id*. at 610 (O'Connor, J., dissenting) (stating that "individuals" should be at the center of equal protection jurisprudence).

[382] *See supra* notes 318-322 & accompanying discussion. *See generally* Section III.B.2.

[383] *See* Bush v. Vera, 517 U.S. 952, 980 (1996).

[384] *See generally* Section III.B.2.

[385] *See generally* Miller v. Johnson, 515 U.S. 900, 900 (1995).

race sometimes tracks interests.[386] Empirical research, however, indicates that race does not just track interests, but typically predicts them with remarkable accuracy.[387]

Other than the convergence of interests with race, there are additional reasons to think that majority-minority districts promote civic identity. The prospect of selecting the winning candidate increases minority participation in the electoral process.[388] Diversity in elected bodies promotes civic discourse within such bodies and their responsiveness to the needs and interests of the electorate. Both of these dynamics would likely tend to enhance the legitimacy of representative government.[389] This is not to argue that these factors should be the only concerns when assessing majority-minority districting, only that they are germane to civic identity's vibrancy.[390] In practice, promoting civic identity would likely mean deferring to state legislatures' creation of majority-minority districts in most instances. Although *Shaw* and *Miller* seem to foreclose such, more recent cases seem to acknowledge, even if implicitly, the complicated dynamic between race and civic identity. It may be that the Court will not police majority-minority rigorously provided that they are not outlandishly shaped.[391] It is, however, unclear why a district's shape would be of such paramount significance if promoting civic identity was the Court's focus.

Gauging the full normative consequences of the identity hierarchy thesis will require a broader case analysis than has been possible here.[392] This article has sought to lay the groundwork for such future research by advancing a descriptive theory of equality that has application to equal protection case law. The version of identity hier-

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[386] *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 257 (2001).

[387] The Court itself acknowledges this. *See* Hunt v. Cromartie, 526 U.S. 541, 550 (1999).

[388] *See, e.g.*, Peter J. Rubin, *Reconnecting Doctrine & Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand & Croson*, 149 U. PA. L. REV. 1, 60 (2000).

[389] *Cf.* Grutter v. Bollinger, 539 U.S. 306, 331-33 (2003) (discussing extent to which diversity promotes institutional legitimacy).

[390] This is also not to suggest that geography should have no role in making districting decisions. An approach that did not rely on identity hierarchy, however, would likely not emphasize geography to the extent that the Court's current approach does.

[391] *See* Pildes, *supra* note 280, at 68-69 (arguing that this had been the meaning of *Shaw I* all along).

[392] *See supra* notes 352-355 & accompanying discussion.

archy embraced by the Court in the name of the individual is broadly consistent with that embraced by liberal political theory. Recognizing that any theory of equality necessarily depends upon a theory of identity is the first step towards freeing equal protection from the obfuscatory rhetoric of the individual. This would help in cultivating a vibrant civic culture – one premised upon the dynamic interaction between identities, not one's subordination to another.