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## The Dangerous Law of Biological Race

Khiara M. Bridges  
*Boston University*

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# THE DANGEROUS LAW OF BIOLOGICAL RACE

*Khiara M. Bridges\**

*The idea of biological race—a conception of race that postulates that racial groups are distinct, genetically homogenous units—has experienced a dramatic resurgence in popularity in recent years. It is commonly understood, however, that the U.S. Supreme Court has rejected the idea that races are genetically uniform groupings of individuals. Almost a century ago, the Court famously appeared to recognize the socially constructed nature of race. Moreover, the jurisprudence since then appears to reaffirm this disbelief: within law, race is understood to be a social construction, having no biological truth to it at all. Yet upon closer examination, the Court’s apparent disbelief of racial biology is revealed to be as mythical as racial biology itself. This Article argues that the Court treats “race” as a legal term of art, using the term in a “technical,” legal way to reference populations of people who are not presumed to be biologically or genetically homogenous. In treating race as a legal term of art, however, the Court essentially hedges its bets by leaving open the possibility that race, in its “scientific” usage, describes persons who are united by biology or genotype. In other words, while the Court has rejected racial biology in law, it has never rejected the possibility that, outside of law, race is actually a biological entity. By not shutting the door completely to biological race, the Court, and the law more generally, is complicit in the resuscitation of one of the most dangerous inventions of the modern era.*

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\* Associate Professor of Law and Associate Professor of Anthropology, Boston University. I am grateful to Donald Braman, Michael C. Harper, Gary Lawson, David Lyons, Tracey Maclin, Osagie Obasogie, David Walker, and Ruqaiijah Yearby for offering their insights on drafts of this Article. Thanks as well to Jennifer Ekblaw in the BU Law Library, who has made my life much easier and my scholarship much better. Thanks are also owed to the participants in faculty workshops at Boston University School of Law and Boston College School of Law, where drafts of this Article were presented. Thanks also to Kyra Berasi, Aaron Horth, Jack Khavinson, and Monica Narang for superb research assistance. All errors remain my own.

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#### INTRODUCTION

“Race, like Freddy Krueger, keeps coming back after we believe we kill it.”<sup>1</sup>

In April 2012, Boston University’s daily newspaper, *BU Today*, ran a story with the eye-catching headline, *BU Takes on Cancer: Racial Disparities*.<sup>2</sup> It is the headline beneath the headline, however, that is truly provocative: *Genetics Can Trump Income, Access to Care*.<sup>3</sup> The article tells a tale that has become almost hackneyed in recent years: black people are dying at disproportionately high rates from an illness, and genetic difference is offered as the explanation for the racial disparity in health.<sup>4</sup> This particular article explains that a team of researchers at Boston University has been probing “the role of genetics” in black women’s experiences with cancer.<sup>5</sup> They concluded that “cancers can behave differently in different populations, so the medical establishment needs to stop treating them as if they were the same.”<sup>6</sup> The story educates the reader:

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1. Eduardo Bonilla-Silva, *Praise for DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011) (inside flap of dust jacket).

2. Susan Seligson, *BU Takes on Cancer: Racial Disparities*, BU TODAY (Apr. 9, 2012), <http://www.bu.edu/today/2012/bu-takes-on-cancer-racial-disparities/>.

3. *Id.*

4. *See id.*

5. *Id.*

6. *Id.*

The phrase cancer disparities refers to more than racial or socioeconomic gaps in access to cancer diagnosis and treatment. As it turns out, all other things being equal, race and ethnicity account for significant differences in the incidence and survivability of certain cancers and in how well people respond to standard treatments. . . . [C]umulative findings from several studies indicate that, regardless of their incomes and how early they are diagnosed, African American women are more likely to die from breast cancer than their white counterparts. “At all ages mortality from breast cancer is higher for black women, and it’s clear now that it’s not due to differences in access, care, or treatments,” [one researcher] says.<sup>7</sup>

According to these researchers, there is a genetic truth to race. Different racial groups possess different genes. Biological race—an idea of race within which racial groups are distinct, genetically homogenous or genetically similar units<sup>8</sup>—is not a myth; instead, it is a truth that may be “counterintuitive” to the medical community who, up until this point, had not studied the role of genetics in producing different cancer behaviors in different racial groups.<sup>9</sup>

Yet, it is commonly understood that the U.S. Supreme Court has rejected the idea that races are genetically uniform groupings of individuals. Almost a century ago, in *United States v. Thind*,<sup>10</sup> the Court famously appeared to recognize the socially constructed nature of race.<sup>11</sup> In deciding that the term “white person” within the naturalization law at issue did not refer to persons who would be considered white according to “science”<sup>12</sup> (i.e., Caucasians), the Court appeared to disbelieve racial “science.”<sup>13</sup> Moreover, the jurisprudence since then appears to reaffirm this skepticism: within law, race is understood to be a social construction, having no biological truth to it at all.<sup>14</sup> Upon closer examination, however, the Court’s apparent

7. *Id.* (emphasis added).

8. See Deborah A. Bolnick, *Individual Ancestry Inference and the Reification of Race As a Biological Phenomenon*, in REVISITING RACE IN A GENOMIC AGE 70, 73 (Barbara A. Koenig, Sandra Soo-Jin Lee & Sarah S. Richardson eds., 2008) (observing that while “traditional notions of race” are variable, “most describe racial groups as equivalent, biologically distinct units”).

9. See Seligson, *supra* note 2.

10. 261 U.S. 204 (1923).

11. Professor Haney López’s work on *Thind* is probably the most definitive account of the case. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1997).

12. Because the belief that human races exist as biologically coherent groups has been, for the most part, widely rejected within modern science, this Article uses quotation marks around “scientific” and “science” when the reference is to archaic notions of biological race that were once championed by scientific disciplines like biological anthropology.

13. *Thind*, 261 U.S. at 208 (“[T]he words ‘white persons’ . . . are words of common speech and not of scientific origin.”).

14. See, e.g., *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (calling the program at issue racially discriminatory “whether or not it would be classified as racial in terms of modern scientific theory”); *Id.* at 610 n.4 (challenging the common understanding of biological race based on some scientists’ “conclu[sion] that racial classifications are for the most part sociopolitical, rather than biological, in nature”); *Morrison v. California*, 291 U.S. 82, 85 (1934) (“White persons, within the meaning of the statute, are members of the

disbelief of racial biology is revealed to be as mythical as racial biology itself.

This Article argues that, while the Court uses the term “race” to refer to sociocultural and sociopolitical groupings of individuals who are not thought to share the same biology or genes, the Court allows for the possibility that race may actually be a biological entity. Thus the Court treats race as a legal term of art, using the term in a “technical” way to reference populations of people who are not presumed to be biologically or genetically homogenous. In treating race as a legal term of art, however, the Court hedges its bets by preserving the possibility that race, in its “scientific” usage, describes persons who are united by biology or genotype. Thus, the Court has demonstrated a commitment to racial biology, albeit an implicit one.

Differently stated, while the Court has rejected racial biology *in law*, it has never rejected the possibility that, outside of law, race is actually a biological entity. By not shutting the door completely to biological race, the Court, and the law more generally, is complicit in the resuscitation of one of the most dangerous inventions of the modern era. Biological race is a dangerous invention because it has dangerous consequences. The extermination of racialized<sup>15</sup> groups of people thought to be biologically inferior is one such consequence.<sup>16</sup> Biological race is also dangerous because it argues that racial minorities—namely, black people—remain subordinated because of genetic inferiority, and not because of structural and institutional processes.<sup>17</sup> When the explanation for enduring social subordination is genetic, the state and society are absolved of the responsibility for fixing the problem.<sup>18</sup>

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Caucasian race, as Caucasian is defined in the understanding of the mass of men.” (internal quotation marks omitted)).

15. Because races are not biological entities, but rather socially constructed entities, a group must be constructed as a race in order to become a race. The term “racialize” refers to the processes by which groups come to be constructed as races. Accordingly, “racialized groups” are those groups that are thought of in racial terms.

16. See Osagie K. Obasogie, *The Return of Biological Race? Regulating Innovations in Race and Genetics Through Administrative Agency Race Impact Assessments*, 22 S. CAL. INTERDISC. L.J. 1, 6 (2012) (describing biological race as the foundation of eugenic policies and noting the devastation that such policies had on vulnerable, racialized populations); *Statement on “Race,”* AM. ANTHROPOLOGICAL ASS’N (May 17, 1998), <http://www.aaanet.org/stmts/racepp.htm> (describing the Holocaust as a demonstration of biological race at its “logical” conclusion).

17. See Obasogie, *supra* note 16, at 2 (observing that when biological race is offered to explain black people’s overall poorer health and shorter life spans, poor health and short life spans become understood as products of “fundamental differences between Whites and minorities” instead of consequences of social determinants).

18. See Dorothy E. Roberts, *Is Race-Based Medicine Good for Us?: African American Approaches to Race, Biomedicine, and Equality*, 36 J.L. MED. & ETHICS 537, 542–43 (2008) (noting that “a renewed belief in inherent racial differences provides an alternative explanation for persistent gross inequities in blacks’ health and welfare despite the end of de jure discrimination” and observing that “[p]lacing the responsibility for ending health disparities on individual health decisions or on taking race-based medications will weaken the sense of societal obligation to fix systemic inequities”).

In acknowledging and critiquing the idea of racial biology that courses through the Court's jurisprudence, this Article finds company in an abundance of scholarship.<sup>19</sup> It importantly diverges from the predominating literature, however, in at least one critical way: most scholars argue that, at some point, the Court abandoned biological race and accepted race as a social construction.<sup>20</sup> This Article adds an essential gloss on this point, which has become a truism in the scholarship on the issue: while the Court abandoned the idea, *in the law*, that the term "race" encompasses biological race, it has nevertheless remained committed to the possibility that race "really is" a biological fact outside of the law.

The Court's implicit commitment to biological race is evidenced most clearly by two areas of its jurisprudence: (1) case law concerning American Indians, in which the Court explicitly uses race to mean biological race,<sup>21</sup> and (2) Title VII cases, in which discrimination on the basis of biological characteristics (i.e., skin color, hair) is identified as discrimination on the basis of race, and discrimination on the basis of nonbiological

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19. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Luis Angel Toro, "A People Distinct from Others": *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995).

20. E.g., Natasha L. Minsker, "I Have A Dream—Never Forget": *When Rhetoric Becomes Law, a Comparison of the Jurisprudence of Race in Germany and the United States*, 14 HARV. BLACKLETTER L.J. 113, 126 (1998) (arguing that, at present, the Court's opinions "reflect[] the notion that race is socially constructed and in no way based in biology"); Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History and the Law*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 231, 256 (2008) (claiming that federal courts have rejected biological definitions of race and instead look for "racial markers" like self-identification, language, experiences, and physical traits).

In an important article, Donald Braman, an anthropologist and legal scholar, departs from the literature by arguing that the Court has *never* accepted the idea that biological race exists. See generally Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999). He contends that

the scientific and legislative classificatory disarray, presented in briefs and oral arguments as early as *Plessy v. Ferguson*, has repeatedly moved the Supreme Court to understand and treat racial status as the product of social and political institutions. . . . [T]he Court has not embraced a biological conception of race.

*Id.* at 1380–81 (emphasis added). Braman's rereading of the Court's jurisprudence is correct insofar as the Court may have never defined race within law as "biological race," instead using race as a legal term of art denoting a socially constructed grouping of people. It is important to note, however, that Braman's argument is limited to the legal definition of race, a point that he acknowledges. See, e.g., *id.* at 1399–1400 (arguing that the Court believed that race, "at least as a legal matter, was a decidedly arbitrary statutory distinction, and that despite the powerful pull to consider racial status to be grounded in nature, the Court pragmatically held it to be political in practice" (emphasis added)); see also *id.* at 1446 ("Repeatedly presented with evidence describing the diversity of popular classificatory schemes and the scientific community's demonstration of the nonbiological nature of race, the Court has responded pragmatically. It has treated and described racial status as the product of social and political institutions."). This Article notes, however, that in using race as a technical term, the Court simultaneously allows that there is a nonlegal use of race that references a biologically/genetically homogenous grouping of people. Thus, this Article does not contradict nor disagree with Braman's insightful history.

21. See *infra* Part III.A.

characteristics (i.e., language, accent) is identified as discrimination on the basis of national origin.<sup>22</sup>

The Article proceeds in three Parts. Part I gives a history of racial biology—describing the invention of the idea, its decline, and its recent resuscitation in medical science. It continues by offering an accurate definition of race, defining a race as a group of individuals that has been differentiated from other groups of individuals, often in ways that homogenize the group and reduce them to a few defining characteristics. In this way, race is “essentializing.” Part II then considers the Supreme Court’s use of race, demonstrating, via a tour through some of the Court’s racial jurisprudence, that the Court clearly considers race to be a social construction representing a biologically heterogeneous grouping of persons who, because of historical, social, and political forces, have come to be thought of as a single race. This Part also demonstrates, however, that the Court understands race within law to be distinct from race within the biological sciences. Thus, the Court has created two conceptual entities: a *legal* race that denotes socially constructed groups, and a *scientific* race that denotes biologically similar groups. This Part contends that this rhetorical move functions to make the Court complicit in the resuscitation of racial biology, as it implicitly reaffirms the idea that there exist races that are not products of social construction, but rather are products of genetic homogeneity.

Part III discusses two areas of jurisprudence where the Court’s implicit commitment to biological race is made explicit. First, this Part observes that American Indian jurisprudence is not shy about defining race as biological race, and that doing so has resulted in bad law (that is, law that is antithetical to the interests of the American Indians—the subjects of the law). Second, this Part explores cases in which plaintiffs have sued employers under Title VII for discriminating against them because they spoke a language other than English while at work or because they spoke English with an accent. In these cases, the discrimination at issue is understood to be a question of national origin, not race. This Part suggests that the reason why language and accent fail to be appreciated as racial characteristics and, instead, are appreciated as characteristics of national origin, is because courts are proceeding from the assumption that biological race exists. Because differences in language and accent were never fault lines along which races were divided in so-called scientific schemas (unlike differences in skin color, hair texture, nose width, lip size, and eye shape), language and accent are not considered racial characteristics in Title VII case law.

This Part concludes by observing that if the Court and lower courts actually wholly rejected biological race and accepted the accurate definition of race offered in Part I of this Article, then they would likely have to reconsider their Title VII jurisprudence. Rejecting biological race would

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22. See *infra* Part III.B.

likely result in more successful Title VII challenges for plaintiffs than under the current Title VII regime.

Before beginning the exploration, it might be beneficial to underscore just why the Court's implicit acceptance of bad science in the form of biological race matters. First, it is relevant because, in this particular instance, bad science produces bad law—as both the analysis of American Indian law and Title VII case law in Part III reveals. Second, it matters because of the discursive effects of the Court's acceptance of biological race. It is damaging and dangerous for the Court to communicate, albeit implicitly, that biological race is real—even if it proceeds as though racial biology does not exist. An analogy or two might be illustrative.

We should be particularly disturbed if the Court in *Lawrence v. Texas*<sup>23</sup> communicated that, while it believed that homosexuality was profoundly immoral for the purposes of the law, it would proceed as though gay persons were not morally depraved individuals undeserving of equal protection of the law. Similarly, we should be disturbed if the Court in *Craig v. Boren*<sup>24</sup> communicated that, while it believed that women were fundamentally inferior to men for the purposes of the law, it would proceed as though women ought to be able to participate equally in society. In these examples, while one effect of the decisions in *Lawrence* and *Craig* would be to protect Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) persons and women from discrimination, the decisions would also likely perpetuate problematic ideas about the same groups that they protect. The same is true about the Court and biological race. It is certainly accurate that the Court explicitly rejects biological race. The Court's implicit commitment to it, however—communicated most directly through American Indian law and Title VII case law—should not be ignored or dismissed as irrelevant. Indeed, the Court is communicating its commitment to an idea that is responsible for some of the greatest tragedies of the modern era.

Thus, this Article takes seriously the dialectical relationship between law and culture. Pursuant to this theory, law produces culture just as culture produces law.<sup>25</sup> To the extent that the law communicates the idea that

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23. 539 U.S. 558, 575 (2003) (striking down Texas's criminal sodomy law because, among other reasons, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres").

24. 429 U.S. 190, 199 (1976) (holding that intermediate scrutiny is the appropriate level of review for laws that contain a gender classification because "[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it [is] necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact").

25. See Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 458 (2013) (discussing the dialectical relationship between law and culture); see also Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 839 (Richard Terdiman trans., 1987) ("It would not be



biological race is real, then it produces a culture that assumes that biological race is real. Furthermore, to the extent that this culture assumes that biological race is real, it will inevitably produce a law that communicates that biological race is real. And the dialectic turns. Thus, this Article is an important intervention into the dangerous cycle that has functioned to sustain the mythology of biological race. This Article calls upon the Court, and lawmakers generally, to recognize the fallacy of racial biology and to produce law that does not reproduce, either explicitly (as in American Indian jurisprudence) or implicitly (as in Title VII jurisprudence), this devastating modern myth. If law refuses to reproduce the myth, then perhaps culture will refuse to believe the mythology. In turn, we, as a society, would make great, essential strides away from a thought that is responsible for genocides, ethnic cleansings, and innumerable disenfranchisements—past and present.

### I. A PRIMER ON RACIAL THEORIES

Essentially, there are two competing theories about the nature of race. One theory argues that race has a biological essence. Accordingly, individuals belonging to a race are united by shared genes and are genetically more similar to one another than to those of different races. An opposing theory argues that race is a social construction—that race is a biologically arbitrary grouping of individuals. Accordingly, individuals belonging to a race are not united by shared genes, but rather are united by a shared political, social, and cultural identification. While advances in genomic science have worked to discredit the theory that there is a biological truth to race, it has been defended of late. Indeed, one may refer, disturbingly, to recent surges in its popularity as a “renaissance.” This Part gives a history of the idea—tracing its origins, decline, and revitalization. The Part then offers an accurate definition of race, defining what race is when commitments to a fantasied biological origin are rejected.

#### A. *A Brief History of Racial Biology: Birth, Death, and Rebirth*

Narratives that are told about the origins of biological race tend to begin with Europeans’ encounters with the various inhabitants of the African continent during the sixteenth century. Indeed, famed historian of race, Winthrop Jordan, began his seminal tome on the origin and development of white racial hostility towards black people with the arrival of the English on the shores of West Africa.<sup>26</sup> By the mid-eighteenth century, physician and

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excessive to say that [law] *creates* the social world, but only if we remember that it is this world which first creates the law.”).

26. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812*, at 3–7 (1968) (describing the circumstances that first brought Europeans to Africa in the sixteenth century and noting that most descriptions that Europeans gave of the Africans they encountered focused on their physical bodies and how they differed from those of the observers); *see also* Nicholas Hudson, *From “Nation” to “Race”: The Origin*

botanist Carl Linnaeus proffered that the species of *Homo sapiens* could be divided into four distinct types: *H. sapiens africanus*, *H. sapiens europaeus*, *H. sapiens asiaticus*, and *H. sapiens americanus*.<sup>27</sup> Linnaeus's primitive division of humankind was not, however, the final word on the matter. Anatomist Georges Cuvier disputed Linnaeus's schematization, submitting that humans could only be divided into three groups: Caucasian, Mongolian, and Ethiopian.<sup>28</sup> Meanwhile, physician Johann Friedrich Blumenbach theorized that man was properly divided into five racial groups: Caucasian, Mongolian, Ethiopian, American, and Malay.<sup>29</sup> Although they disagreed on the particulars, these theorists agreed that biology demarcated racial groups.<sup>30</sup>

Scientific and philosophic endeavors to partition human beings into discrete racial groups were not simply academic exercises. Rather, they served to legitimate and justify political arrangements in societies around the globe.<sup>31</sup> Particularly, biological race theory played a significant role in justifying the extermination and displacement of Native American societies and the establishment of the institution of African slavery in the United States.<sup>32</sup> Racial biology operated to explain the seeming incongruence that describes a nation being founded on principles of the liberty and equality of individuals, while simultaneously tolerating the enslavement and massacre of specific groups of people.<sup>33</sup> According to the science of the day, the biology of certain individuals made them unfit for freedom.<sup>34</sup>

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*of Racial Classification in Eighteenth-Century Thought*, 29 EIGHTEENTH-CENTURY STUD. 247, 249–51 (1996) (same).

27. Holly Long, *DNA Profiling: The Ability To Predict an Image from a DNA Profile*, in NONHUMAN DNA TYPING: THEORY AND CASEWORK APPLICATIONS 185, 187 (Heather M. Coyle ed., 2008).

28. See ROBERTS, *supra* note 1, at 30.

29. See JOHANN FRIEDRICH BLUMENBACH, *On the Natural Variety of Mankind*, in THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 99–100 n.4 (Thomas Bendyshe ed. & trans., 1865).

30. See Long, *supra* note 27, at 187.

31. See *Statement on "Race," supra* note 16 (“[Race] became a strategy for dividing, ranking, and controlling colonized people used by colonial powers everywhere.”); see also Braman, *supra* note 20, at 1392–93 (“The intermarriage of scientific theories of race and legal doctrine throughout the nineteenth century is well documented, showing a strong link between schemas of racial difference and a variety of legal undertakings by government actors, including slavery, imperialist expansion, segregation, and eugenic sterilization.”).

32. See *Statement on "Race," supra* note 16 (“Thus ‘race’ was . . . a growing ideology of inequality devised to rationalize European attitudes and treatment of the conquered and enslaved peoples.”).

33. Rose M. Brewer, *Thinking Critically About Race and Genetics*, 34 J.L. MED. & ETHICS 513, 513 (2006) (arguing that the racial hierarchies that were constructed were used to “explain the so-called inferiority of those with whom [Europeans] came into contact” and that non-European people “were ultimately conquered, colonized, enslaved, and drawn into European empires”).

34. Most racial schematizations featured not just a description of the physical features possessed by each race, but also personality and character traits suggesting that freedom was only appropriate for some races. See, e.g., JORDAN, *supra* note 26, at 220–21 (quoting Linnaeus's description of the physical appearance and character traits of “American[s] as] red, choleric, erect. Hair black, straight and thick; Nostrils wide; Face freckled; Beard

The view that race is a social construction, with no fundamental moorings in biology or genetics, began to gain ascendance in the 1940s, when the murder of millions of Jewish persons and others in Nazi Germany demonstrated one of the most horrific consequences of biological race.<sup>35</sup> The Holocaust was not the only tragedy that biological race wrought, however—the eugenics movement in the United States deserves mention as well. Premised on the belief that traits such as “intelligence, ‘feeble-mindedness,’ criminality, alcoholism, [and] pauperism” were genetically determined, the eugenics movement sought to prevent the dissemination of the genes that determined such traits throughout the population.<sup>36</sup> Efforts to purify the U.S. population of these problematic genes included immigration restrictions, antimiscegenation laws, and forced sterilizations.<sup>37</sup> Indeed, it is no misnomer that eugenics was also referred to as “racial hygiene.”<sup>38</sup> Due to the belief that racial groups were distinct, genetically homogenous subsets of humans, nonwhite groups bore the brunt of eugenic policies, as the racial scientists of the day were convinced that undesirable genes were disproportionately found in nonwhite races.<sup>39</sup> As Professor Obasogie explains:

[B]etween 1937 and 1968, federal funds were used to sterilize over 35 percent of women in Puerto Rico who were in their reproductive years. Native American women were similarly targeted for eugenic sterilization as early as the 1930s. Between the early 1970s and early 1980s, the Indian Health Services forcibly sterilized 42 percent of all Native American women of childbearing age. Black people have also been disproportionately targeted. . . . Forced sterilization became so routine in some Southern Black communities that they were commonly referred to as “Mississippi [a]ppendectom[ies].”<sup>40</sup>

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scanty. Obstinate, content, free. Paints himself with fine red lines. Regulated by habit”; of “European[s as] white, sanguine, brawny. Hair abundantly flowing. Eyes blue. Gentle, acute, inventive. Covered with close vestments. Governed by customs”; of “Asiatic[s as] yellow, melancholy, rigid. Hair black. Eyes dark. Severe, haughty, covetous. Covered with loose garments. Governed by opinions”; and of “African[s as] black, phlegmatic, relaxed. Hair black, frizzled. Skin silky. Nose, flat. Lips tumid. Women’s bosom a matter of modesty. Breasts give milk abundantly. Crafty, indolent, negligent. Anoints himself with grease. Governed by caprice” (emphasis omitted).

35. See *Statement on “Race,”* *supra* note 16 (“During World War II, the Nazis under Adolf Hitler enjoined the expanded ideology of ‘race’ and ‘racial’ differences and took them to a logical end: the extermination of 11 million people of ‘inferior races’ (e.g., Jews, Gypsies, Africans, homosexuals, and so forth) . . . .”); Braman, *supra* note 20, at 1424 (“[T]he rise of Nazi racial politics helped to crystallize much of the dissatisfaction with consistently unproven theories of racial difference.”).

36. Garland E. Allen, *Eugenics and Modern Biology: Critiques of Eugenics, 1910–1945*, 75 *ANNALS HUM. GENETICS* 314, 314 (2011).

37. See Obasogie, *supra* note 16, at 14 (describing the eugenics movement in the United States in the nineteenth century as a legal and political implementation of Linnaeus’s racial typologies).

38. *Id.* at 18.

39. *Id.*

40. *Id.* (alteration in original).

By 1951, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) was so confident in the fallacy of biological race—and so aware of the danger of the concept—that it issued a “Statement By Experts on Race Problems,” noting that race “is not so much a biological phenomenon as a social myth.”<sup>41</sup> That race is a social and political category, and not a biological one, has been reiterated officially from time to time by disciplines that are imagined to have expertise in addressing the issue. For example, the American Anthropological Association (AAA) issued yet another “Statement on Race” in 1998, reaffirming what, by then, was close to becoming a truism: race is a social construction.<sup>42</sup> Perhaps as an apology for its own history as a thought collective that proudly created and legitimated biological notions of race,<sup>43</sup> the AAA spoke for the discipline of anthropology, observing:

In the United States both scholars and the general public have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups.<sup>44</sup>

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41. Press Release, Ashley Montagu, United Nations Educ., Scientific & Cultural Org., Statement By Experts on Race Problems 3 (July 20, 1950), *available at* <http://unesdoc.unesco.org/images/0012/001269/126969eb.pdf>. The author of the statement, Ashley Montagu, was one of the more famous students of renowned granddaddy of anthropology, Franz Boas. *See* Kamala Visweswaran, *Race and the Culture of Anthropology*, 100 *AM. ANTHROPOLOGIST* 70, 72 (1998). Boas is fairly described as not only the granddaddy of modern anthropology, *see* GEORGE W. STOCKING, JR., *THE ETHNOGRAPHER’S MAGIC WAND AND OTHER ESSAYS IN THE HISTORY OF ANTHROPOLOGY* 118–19 (1992) (arguing that Boas “more than anyone else shaped the character of American anthropology in the twentieth century”), but is also fairly described as being on the forefront of the intellectual movement to distance the discipline of anthropology from its racist past. *See* Paul Rabinow, *For Hire: Resolutely Late Modern*, in *RECAPTURING ANTHROPOLOGY* 59, 60 (Richard G. Fox ed., 1991) (“Boas’ case against racial hierarchies and racial thinking has thoroughly carried the theoretical day. . . . Of course, racism has hardly disappeared, but it no longer is a scientifically credible position.”). His primary move was to assign race to biology while arguing that biological/racial differences among humans were irrelevant; the more relevant human differences (indeed, the only relevant human differences) were cultural. *See* Visweswaran, *supra*, at 70–74 (describing the development of a Boasian school of thought in which race was understood as a biological category that could not explain variations among human societies, while the concept of culture came to have explanatory value for all divergences among groups and civilizations).

Interestingly, UNESCO backtracked on its first Statement on Race in a subsequent Statement on Race released a year later, in which the authors left open the possibility that perhaps racial differences did, indeed, reflect biological differences. *See* JENNY REARDON, *RACE TO THE FINISH: IDENTITY AND GOVERNANCE IN AN AGE OF GENOMICS* 29–31 (2005) (noting that the second UNESCO Statement on Race, unlike the first iteration, asserted “the possibility that traits pertaining to ‘intellectual and emotional response’ could vary according to genetic differences between races”).

42. *See* Statement on “Race,” *supra* note 16.

43. *See id.*

44. *See id.*

The position that races are not biologically coherent categories of humans appeared to receive its final, and most unimpeachable, validation with the Human Genome Project's mapping of the entirety of genes possessed by the human species in 2003.<sup>45</sup> The Project revealed that all persons, without regard to racial ascription or identification, share 99.9 percent of the same genes, and it concluded—definitively—that humans could not be divided into coherent biological races.<sup>46</sup> The imagined end of biological race was announced in happy and pithy sound bites, including then-President Clinton's pronouncement that he believed that "one of the great truths to emerge from this triumphant expedition inside the human genome is that in genetic terms, all human beings, regardless of race, are more than 99.9 percent the same."<sup>47</sup>

Perhaps it should have been expected that attention would then turn to that 0.1 percent genetic difference. And that is precisely what happened. Shortly after the Human Genome Project provided proof that biological race was the stuff of myth, the *New York Times* ran an article proclaiming in its lead paragraph, "Scientists planning the next phase of the human genome project are being forced to confront a treacherous issue: the genetic difference between human races."<sup>48</sup> The article was paradigmatic of something that then-President Clinton and others likely did not foresee: the persistence of biological race. Scientists and physicians continued to go on record proclaiming their enduring belief in racial biology. For example, in another *New York Times* article titled *I Am a Racially Profiling Doctor*, psychiatrist Sally Satel contended, "In practicing medicine, I am not colorblind. I always take note of my patient's race. So do many of my colleagues. We do it because certain diseases and treatment responses cluster by ethnicity. Recognizing these patterns can help us diagnose disease more efficiently and prescribe medications more effectively."<sup>49</sup> Satel legitimated her practice of treating her patients differently on the basis of race by looking to that 0.1 percent of genetic difference:

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45. The Human Genome Project was an international joint venture, undertaken by China, France, Germany, Great Britain, Japan, and the United States, in which the participating countries were responsible for sequencing different portions of the human genome. See ROBERTS, *supra* note 1, at 49.

46. See *id.* at 50.

47. *Id.* Other jubilant sound bites include the head of the program's statement that "I'm happy that today the only race that we are talking about is the human race." *Id.* The happy declaration that "the only race worth talking about is the human race" (and its logical sequitur that race should be ignored in biological science) sounds eerily similar to Justice Scalia's declaration that "we are just one race . . . American" (and its logical nonsequitur that race should be ignored in law). *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

48. Nicholas Wade, *For Genome Mappers, the Tricky Terrain of Race Requires Some Careful Navigating*, N.Y. TIMES, July 20, 2001, at A17. The article further noted that the question geneticists faced was whether to map differences across "population groups," and further defined the "principal population groups" as "Africans, Asians, and Europeans." *Id.*

49. Sally Satel, *I Am a Racially Profiling Doctor*, N.Y. TIMES MAG., May 5, 2002, at 56, 56.

What does it really mean, though, to say that 99.9 percent of our content is the same? In practical terms it means that the DNA of any two people will differ in one out of every 1,000 nucleotides, the building blocks of individual genes. With more than three billion nucleotides in the human genome, about three million nucleotides will differ among individuals. This is hardly a small change; after all, mutation of a single one can cause the gene within which it is embedded to produce an altered protein or enzyme. It may seem counterintuitive, but the 0.1 percent of human genetic variation is a medically meaningful fact.<sup>50</sup>

The question becomes: does the 0.1 percent difference prove the existence of biological race—or, stated differently, is racial difference located in the 0.1 percent of genes that we do not all share? The question must be answered in the negative. It is simply not true that two unrelated black people (that is, two people of the same race) share more of the same genes than an unrelated black person and a white person (that is, two people of different races).<sup>51</sup> It simply does not follow that while a black person and a white person share 99.9 percent of the same genes, two black people will share 99.99 percent of the same genes and two white people will share 99.99 percent of the same genes as well.<sup>52</sup> The truth is that a black person

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50. *Id.* at 58.

51. Sharona Hoffman, “Racially-Tailored” Medicine Unraveled, 55 AM. U. L. REV. 395, 414 (2005) (“[I]ntra-group genetic variation is dramatically greater than inter-group variation. For instance, Black people originating in Africa demonstrate more genetic variation than do people with recent ancestry from any other continent, so that two Black individuals are likely to be more dissimilar genetically than two members of any other ‘race.’”); Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 HARV. C.R.-C.L. L. REV. 391, 409 (2004) (“But with only a few exceptions, the variation *within* a race for a given trait is much greater than the variation *across* races.”); Sundquist, *supra* note 20, at 262 (“The vast majority of geneticists have affirmed that race has no biological meaning. The DNA molecule simply does not give biological meaning to extant historical categories of race. Geneticists have discovered that the greatest genetic variation occurs within so-called ‘racial’ population groups.”).

52. In this hypothetical, the example of a white person and a black person is used because popular racial logic holds that white people and black people represent “opposite” races and are, therefore, most dissimilar. The reality, however, is that Africans and Europeans are more likely to share the same genes than, say, Africans and American Indians, because of the geographic proximity of Africa and Europe. According to most legitimate accounts, *homo sapiens* originated in Africa. See Long, *supra* note 27, at 187. Some of these groups of *homo sapiens* eventually migrated out of Africa. *Id.* After thousands of years of migration, humans populated the globe. The result is that human populations that are geographically close to one another are more likely to share the same genes because they are more likely to have shared ancestors. *Race & Genetics FAQ*, NAT’L COALITION FOR HEALTH PROF. EDUC. GENETICS, [http://www.nchpeg.org/index.php?option=com\\_content&view=article&id=142&Itemid=64](http://www.nchpeg.org/index.php?option=com_content&view=article&id=142&Itemid=64) (last visited Sept. 20, 2013) (“[P]opulations that are geographically closer together tend to be genetically more similar to one another. . . . [G]eographic neighbors are more likely to have historical connections and to exchange mates.”). As Professor Roberts explains,

Evolutionary biologists posit that geographic distance is a good predictor of genetic distance, and parts of Africa and Europe are swimming distance from one another. The intimate intertwining of Europeans and Africans in the ensuing centuries through trade, conquest, enslavement, and migration make it absurd to consider them opposites from a genetic standpoint.

and a white person are more likely to share *more* of the same genes than two black people.<sup>53</sup> This is due to the fact that, based on most accounts, the human species originated in Africa and, as a result, there is more genetic variation within African peoples than there is within non-African peoples.<sup>54</sup> As Professor Dorothy Roberts summarizes, “It turns out that the genes contributing to [racial markers like skin color, hair texture, nose width, lip size, and eye shape] represent a minute and relatively insignificant fraction of our genotypes and do not reflect the total picture of genetic variation among groups.”<sup>55</sup> Instead, the 0.1 percent of genetic difference among humans is spread across the globe in a spectrum, making the demarcation of the human population into four or five (or ten or twenty or two hundred) races an exercise in arbitrariness.<sup>56</sup>

Some genes, however, are traceable to specific geographic locations. This is because many members of an ancestral group that resided in a particular region may have possessed a particular gene; consequently, descendants of these ancestral groups are more likely to have that gene.<sup>57</sup> Therefore, it is more accurate to speak of *geographic ancestry*, as opposed to *racial ancestry*—with “ancestry” denoting the “geographic regions where one’s biological ancestors lived.”<sup>58</sup> It is imperative to note, however, that it is generally *incorrect* to talk about “principal” geographic regions and to assume that those are Africa, Europe, Asia, and the Americas. It is a fallacy to assume that geographic ancestry proves the existence of racial groups.<sup>59</sup> As Professor Roberts helpfully explains:

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ROBERTS, *supra* note 1, at 69. It may remain accurate, however, to state that white people and black people are “opposite” races when race is acknowledged to be a social construction, primarily because whiteness has been defined as that which is not black. See Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CALIF. L. REV. 907, 916–17 (2006) (describing white and black as having been discursively constructed as opposite races).

53. See ROBERTS, *supra* note 1, at 52 (“A person from the Congo, a person from South Africa, and a person from Ethiopia are more genetically different from each other than from a person from France.”).

54. See Bolnick, *supra* note 8, at 71 (“Because *Homo sapiens* evolved in Africa before dispersing throughout the rest of the world, African populations are older and have had more time to accumulate genetic differences through mutation.” (citations omitted)).

55. ROBERTS, *supra* note 1, at 52.

56. See Bolnick, *supra* note 8, at 72 (“Allele frequencies change gradually across geographic space, with few sharp discontinuities.”).

57. Professor Obasogie explains, “Over time, . . . evolutionary dynamics can lead certain markers to become strongly associated with [a] group. . . . This uneven distribution of genetic markers can provide clues to their geographic origins, which can then point to the most closely associated population.” Obasogie, *supra* note 16, at 32. However, individual “populations” do not match up with individual socially defined “races,” namely because “races” within current racial typologies are products of social, political, and socioeconomic forces. See *id.* at 36–37; see also Lillquist & Sullivan, *supra* note 51, at 425–46 (“[M]ost genetic differences are really differences between population groups, rather than between races.”).

58. Bolnick, *supra* note 8, at 70.

59. While “ancestry” purports to be a term that is more scientifically accurate than “race,” it is often used in ways that are as problematic as race. Professor Bolnick notes that since current racial definitions are based on continental geography, “anthropologists and human geneticists use the term ‘ancestry’ much as the general public uses the term ‘race.’”

If you look at a map of the world, you will see that parts of Africa are very close to Europe and the Middle East and other parts are very far from these regions. Because they are closer to the Arab Peninsula, African Somalis are genetically more similar to people in Saudi Arabia than they are to people in western or southern Africa. Likewise, the Saudis are more similar to the Somalis than to Norwegians, who are geographically more distant.<sup>60</sup>

Accordingly, a gene that traces to the Arab Peninsula may be found in the descendant of a Somali (who, according to popular racial logic, may be identified as a black person) and in the descendant of a Saudi (who, according to popular racial logic, may be identified as a white person). Roberts continues, “The same is true for Europe and Asia. . . . Europe occupies the same land mass [sic] as Asia. England is much closer to Turkey, the nation seen as bridging the two continents, than it is to the eastern edge of Russia. Most of Russia is much closer to China than it is to Germany.”<sup>61</sup> Accordingly, a gene that traces to Turkey may be found in the descendant of a Russian person (who is likely to be identified as white) and in the descendant of a Chinese person (who is likely to be identified as Asian).

What this all means is that one cannot make (good) assumptions about the genetic composition of a person based on his race. Thus, for example, if a person “looks like” she has an ancestor from Africa, it may mean that she is statistically more likely to possess a gene that has been traced to ancestral groups that resided in Africa. A person who does not “look like” she has an ancestor from Africa, however, may also possess that same gene that has been traced to ancestral groups that resided in Africa. As Professor Paul-Emile powerfully summarizes, “Studies have shown that . . . a person whose skin color is perceived as white can have eighty percent recent West African ancestry, while a person whose skin color is perceived as black can have a predominance of alleles that indicate European ancestry.”<sup>62</sup> Moreover, a person who does “look like” she has an ancestor from Africa may *not* possess the gene that has been traced to ancestral groups that resided in Africa. This exemplifies the simultaneous genetic underinclusiveness and overinclusiveness of socially constructed racial categories.

It is worth underscoring that throughout the birth, death, and rebirth of racial biology, the Supreme Court has not explicitly entered the debate and declared whether or not it believes racial biology exists. Yet, a closer review of its jurisprudence shows its commitment to biological race. Part II

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*Id.* at 81. Moreover, ancestry among laypersons has come to be defined by political and cultural forces, and it is no longer a “purely scientific” term that indexes associations of people who share the same ancestors. *Id.* (observing that “ancestry is not that different from race in practice” as “ancestry is sometimes defined politically or culturally”).

60. ROBERTS, *supra* note 1, at 74–75.

61. *Id.* at 75.

62. Kimani Paul-Emile, *The Regulation of Race in Science*, 80 GEO. WASH. L. REV. 1115, 1137 (2012).



explores the Court's complicated approach to biological race. First, however, an accurate definition of race is necessary.

### B. An Accurate Definition of Race

While race is not a biological phenomenon, there is no denying that it is real. Indeed, in the United States, one's race impacts the length of one's life<sup>63</sup> and the quality thereof.<sup>64</sup> Race certainly exists and it has profound consequences. The question then becomes: when "scientific" definitions of race are rejected as pseudoscience, what is left of race?

Anthropologist Kamala Visweswaran offers a helpful starting point for etching a definition of race. She writes,

The Middle Passage, slavery, and the experience of racial terror produce a race of African Americans out of subjects drawn from different cultures; genocide, forced removal to reservations, the experience of racial terror make Native Americans, subjects drawn from different linguistic and tribal affiliations, a race; war relocation camps and legal exclusion, the experience of discrimination make Asian Americans, subjects drawn from different cultural and linguistic backgrounds, a race; the process of forming the southwestern states of the United States through conquest and subjugation, the continued subordination of Puerto Rico constitute Chicanos and Puerto Ricans as races.<sup>65</sup>

For Visweswaran, social events like enslavement, genocide, displacement, and disenfranchisement have created races. Yet this definition (or perhaps simply her framing of it) may problematically privilege subordination, deprivation, and exploitation. Race may be experienced by the racialized as more than a constellation of historical wrongs; it may also be a source of pride, joy, and strength.<sup>66</sup> Nevertheless,

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63. See generally Elizabeth Arias, U.S. Dep't of Health & Human Servs., United States Life Tables, 2008, NAT'L VITAL STAT. REP., Sept. 24, 2012, at 3, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf) (showing different life expectancies for different racial groups).

64. See, e.g., U.S. Census Bureau, *Money Income of People—Number by Income Level and by Sex, Race, and Hispanic Origin: 2009*, 2012 STAT. ABSTRACT U.S. 459 tbl. 705, available at <http://www.census.gov/compendia/statab/2012/tables/12s0705.pdf> (showing different per capita income levels for different racial groups).

65. KAMALA VISWESWARAN, UN/Common Cultures: Racism and the Rearticulation of Cultural Difference 71 (2010); cf. Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 93 (1995) ("[W]hat really unites Latino/as is their unique history of oppression."). Professor Visweswaran is likely indebted to the definition of race offered by Professors Omi and Winant in their highly influential sociology of race: "race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies." MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (1994).

66. Cf. Ian F. Haney López, *Race, Ethnicity, Erasure: The Saliency of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1196–97 (1997) ("Although racial victimization has been instrumental in the cultural formation of group identity . . . this is not the same thing as suggesting that racial group identities are solely determined by the negative forces of invidious racial discrimination.").

Visweswaran's concept of race is useful as a model for building an appropriate definition of race because it does not attempt to define race independent of history—such an attempted definition would imply that there *is* a truth to race that is independent of history. Instead, race must always be historically grounded. As such, to arrive at a definition of race, we must ask what race has done and been asked to do throughout history.

The one feature that has been constant when considering race, throughout history, is differentiation. Race has always been used to differentiate groups of humans in ways that are *essentializing*—that is, in ways that overwhelm the other aspects of the individual or group and reduce the multiplicity to a single racial element.<sup>67</sup> Now, while a belief in the biological sameness of a group inevitably functions both to differentiate it from others who are not imagined to share that biology and to render opaque the heterogeneity within the group, this belief in biological sameness is not necessarily intrinsic to the concept of race. Thus, the definition of race proposed by this Article differs from that proposed by Professor Haney Lopez, for example, who would require that the racial difference always be conceived as having biological origins.<sup>68</sup> This Article does not require that the essentialized difference necessarily be imagined to have a biological origin—largely because such a requirement ignores the fact that culture can justify exclusions, deprivations, and subordinations equally *racist* as those justified by race.<sup>69</sup> This is true even when culture is recognized as entirely learned and having no basis in biology or “nature.”<sup>70</sup>

Accordingly, *race is a term that purports to denote essentialized difference that is frequently, though not always, based in biology.* Thus, the way that one determines whether a term is racial (and, thus, whether a group defined by that term is a racial group) is not to ask whether it falls within some preexisting order of the world, but rather to ask about how the term is used. If the term denotes essentialized difference, then one has stumbled upon a race. While it is undeniable that at many (if not most) times over the course of history, the essentialized difference denoted by race has been framed in terms of inferiority and superiority, this hierarchical ordering is not intrinsic to the denotation.

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67. Notably, Omi and Winant include the element of essentialism in their definition of racism: “A racial project can be defined as *racist* if and only if it *creates or reproduces structures of domination based on essentialist categories of race.*” OMI & WINANT, *supra* note 65, at 71.

68. See Haney López, *supra* note 66, at 1152 (“Race is best understood as a process of social differentiation rooted in culturally contingent beliefs in the biological division of humans.”).

69. See KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 131 (2011); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 848 (1997) (“Designations of cultural difference are used effectively by some in dominant power positions to justify excluding racialized groups from the polity.”).

70. See BRIDGES, *supra* note 69, at 131; Yamamoto, *supra* note 69, at 848.

Insofar as this Article defines race in terms of the work that it is being used to accomplish, the Article offers a definition of race that finds a kindred spirit in sociologist Paul Gilroy's argument that race is a product of racism. He describes race as an "impersonal, discursive arrangement, the brutal result of the raciological ordering of the world, not its cause."<sup>71</sup> In other words, the idea of race does not produce racism; instead, racism produces the idea of race. Similarly, this Article argues that one does not determine whether a group is a race by looking to see if it falls within some division of human populations (in terms of biology, ancestry, nation, ethnicity, etc.); instead, one determines whether a group is a race by looking to see whether some need for differentiation has produced it as a race.

Questions may arise, in any given instance, about whether an imagined difference is essentialized—an inquiry that bears on the ultimate question of whether a group is a racial group. To answer these questions, history is instructive. Is the difference similar to a difference attributed to other groups that history has called races? An affirmative answer makes the attribution of racial status to the group easier. It is an inquiry not entirely unlike determining that a group is a racial group by asking whether it has been a victim of racism. Moreover, antiblack racism does not have to be the model against which all other groups' experiences are compared.<sup>72</sup> Anti-Jewish racism is instructive, as are anti-Chinese, anti-Mexican, and anti-Muslim racisms. As history progresses, the number of comparators will increase. This is a good thing. As race scholar Winant writes, "The main task facing racial theory today . . . is to focus attention on the significance and *changing meaning of race*."<sup>73</sup> As race and racial meanings inevitably change, a theory that identifies race by looking to the experiences of groups over time, and not just at one discrete historical moment, is capable of recognizing the evolving, pragmatic nature of race. Such a

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71. PAUL GILROY, *POSTCOLONIAL MELANCHOLIA* 39 (2005).

72. There is a current in the intellectual movement of Critical Race Theory that argues in favor of "black exceptionalism," a position that contends that the experience of black persons should be understood as the paradigmatic experience of race and racism in the United States. See Leslie Espinosa & Angela P. Harris, *Afterword: Embracing the Tar Baby—Lat-Crit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1596 (1997) ("The claim of black exceptionalism can be supported in at least two ways: by examining the historic and continuing centrality of African-American ethnicity to American political and social life; and by examining the centrality of anti-black racism to the patterns of domination we call white supremacy."). This position is based on the sense that, throughout history, antiblack racism was the stuff upon which race, as a concept, was built in the United States. Moreover, extant laws designed to address racial discrimination are not a response to racism, generally, but rather to antiblack racism, specifically. See *id.* at 1599–1600 ("American anti-discrimination law emerged in response to experiences of and with black people.").

The problem with black exceptionalism is that it appears to intentionally fail to recognize the evolving nature of race, and therefore "misses" the experiences of other racialized groups, like Latinos, whose racial deprivations are justified on grounds different than those of black people (i.e., language, accent, nationality). See *id.* at 1612–19.

73. HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* 14 (1994).

theory avoids stagnation and the unfair elevation of one group's experiences over others. This is the racial theory that this Article proffers.

Accordingly, "black" is a racial term (and "black people" a race) because it is used to denote essentialized difference. "Muslim" is a racial term (and "Muslim people" a race) because it is used to denote essentialized difference.<sup>74</sup> Similarly, "Mexican" and "Puerto Rican" are racial terms (and "Mexicans" and "Puerto Ricans" races) because they are used to denote essentialized difference.

Consider more closely the examples of "Mexicans" and "Puerto Ricans." People are considered "Mexican" even when they have never been to Mexico, and even when they are not citizens of Mexico, but rather, the United States.<sup>75</sup> People are considered "Mexican" even when they do not

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74. That "Muslim" is a racial category raises the question of when, if ever, it is proper to classify religious groups as racial groups. Interestingly, the law has struggled with this question somewhat—specifically in dealing with Muslim and Jewish plaintiffs who have claimed that they were discriminated against on the basis of their race. For example, *Shaare Tefila Congregation v. Cobb* concerned a synagogue that had been spray-painted with anti-Semitic slogans and symbols. 481 U.S. 615, 615 (1987). The synagogue sued under § 1982 of the Civil Rights Act, which prohibits racially discriminatory interference with property rights. *See* 42 U.S.C. § 1982 (guaranteeing all citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property"). The lower court had dismissed the synagogue's claim, reasoning that Jewish people were not a race, and, consequently, discrimination against Jewish persons was not racial discrimination. *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 527 (4th Cir. 1986), *rev'd*, 481 U.S. at 615. The Supreme Court reversed, noting that at the time that § 1982 was passed, "Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race." *Cobb*, 481 U.S. at 617–18. Ultimately, it has been unnecessary for courts to determine whether Jewish people, Muslim people, and other ethnoreligious groups are races or religions, as both race and religion are commonly protected categories within antidiscrimination law. What is important is that the plaintiff falls into one of the protected categories and not into which precise category the plaintiff falls. *See* Nomi Maya Stolzenberg, *Righting the Relationship Between Race and Religion Within Law*, 31 OXFORD J. LEGAL STUD. 583, 585 (2011) ("Because the civil rights statutes recognize all of these categories as creating 'suspect' or protected classes, there is no need to sort out *which* protected group a particular plaintiff falls into, or what kind of discrimination he or she endured."). Nevertheless, this Article argues that Muslim and Jewish people should be considered races because they have been treated like races. When racial biology is rejected, and races are understood to constitute groups of people who have been differentiated from other groups of people on the basis of some imagined characteristic, then it is clear that Muslim and Jewish groups are races. *Cf. id.* at 587 ("If the lesson of European history . . . is that race will ultimately be defined negatively, by the beliefs that racists impose on those they victimize, rather than positively, in terms of the self-conception of the group, then it makes sense to conclude that Jews and Muslims are races protected under civil rights laws.").

75. During the Great Depression, the United States deported massive numbers of persons classified as "Mexican." *See* Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 433 (2002). Many of those deported were U.S. citizens and had a legal right to remain in the country. *See* U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 11 (1980) ("Among those caught up in the expulsion campaign were

know how to speak Spanish<sup>76</sup> and are otherwise unfamiliar with what (when homogenized) can be labeled “Mexican culture.” People are considered “Mexican” just because their parents are Mexican. Finally, people cannot stop being “Mexican” by some act of will. Because “Mexican” denotes an essentialized difference, it is a racial term.<sup>77</sup> The “Puerto Rican” example reveals that what is true about “Mexican” is not simply a matter of having a relationship to a country other than the United States. Puerto Rico is not a nation, but a commonwealth of the United States. Yet, like “Mexican,” people are considered “Puerto Rican” even though they are citizens of the United States.<sup>78</sup> People are considered “Puerto Rican” even when they do not know how to speak Spanish and are otherwise unfamiliar with what (when homogenized) can be labeled “Puerto Rican culture.” People are considered “Puerto Rican” just because their parents are Puerto Rican. Finally, people cannot stop being “Puerto Rican” by some act of will. Because “Puerto Rican,” like “Mexican,” “Muslim,” and “black,” denotes an essentialized difference, it is a racial term.

The Supreme Court appears to accept this accurate definition of race. That is, the Court’s race jurisprudence appears to be premised on a rejection of racial biology and an acceptance of the socially constructed nature of race. This ostensible acceptance of racial social constructionism, however, hides an implicit commitment to racial biology. The next Part discusses how the Court has developed a definition of race within law that indexes socially constructed groups, even while it has clung tenaciously to an outmoded belief that race within science refers to biologically distinct groups.

## II. A JUDICIAL APPROACH TO RACE

Presently, the Court does not treat race as if it were a scientific term. Instead, it would appear that the Court understands that race is a social

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American citizens of Mexican descent who were forced to leave the country of their birth.”). Thus, their “Mexicanness” endured despite their legal status as “Americans.”

76. See Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules As the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347, 1364 (1997) (“But Latinos, whether fluent Spanish speakers or not, all have some common connection with the [Spanish] language. If we do not speak it ourselves, then it is the language of our ancestors.” (alteration in original)).

77. This is not to say that biology has never been used to define “Mexicans” as a group. Professor Kevin Johnson notes that race scholars once explained Mexicans’ imagined propensity towards crime in terms of their biological composition. Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 163 (2005) (describing the infamous Sleepy Lagoon murder case, in which the Los Angeles County Sheriff testified “about the biological propensity of Mexicans toward crime,” stating that “because of their Indian roots, Mexicans had a ‘total disregard for human life that has always been universal throughout the Americas among the Indian population, . . . [and] this character flaw could not be remedied because ‘one cannot change the spots of a leopard’”).

78. Jones-Shafroth Act, 48 U.S.C. §§ 731, 733 (2006) (creating a civil government for Puerto Rico and making residents of Puerto Rico U.S. citizens).

construction and that races are entities that do not fit within the various “scientific” schematizations offered by Linneaus, Cuvier, Blumenbach, and anthropologists of yore.<sup>79</sup> Accordingly, the Court recognizes *racial* discrimination as discrimination against any racialized social grouping of individuals—even those groups that are not races within “scientific” schematizations. For example, the Court does not require that racial discrimination be discrimination against an individual because she is “Caucasian,” “Ethiopian,” “Malay,” or “Mongolian.” Rather, the Court recognizes that it is racial discrimination within the purview of the Fourteenth Amendment or the Civil Rights Acts when a person is discriminated against because she is “Mexican” or “Japanese” or “not Hawaiian.” Moreover, the Court does not seem to imagine that a “Mexican,” “Japanese,” or “Hawaiian” person shares the same biology as others in her racial group.

While the Court appears to embrace a nontraditional, fairly progressive understanding of race, this Part argues that this appearance is specious. A close reading of the Court’s jurisprudence on the issue of race reveals that the Court has never rejected biological race. The Court’s seeming embrace of race as a social construction is simply a façade. The Court continues to embrace racial biology, albeit implicitly.

A. *Distinguishing “Scientific” Race and Legal Race:  
The Racial Prerequisite Cases*

*Ozawa v. United States*<sup>80</sup> and *Thind v. United States*<sup>81</sup> are usually cited for the proposition that the Court has accepted that race is a social construction.<sup>82</sup> A searching reading of the cases, however, demonstrates that the Court never really rejected racial biology. Instead, the Court simply found that the meaning of race within law is different from its meaning within “science.” Accordingly, when the cases are read in the context of the time—in a historical period in which the dominant belief was that racial biology existed and “most theorists of the time assumed a link between human biology, ability, character, and culture, all understood as integral aspects of determining racial types”<sup>83</sup>—*Ozawa* and *Thind* indicate that, through its articulation of race as a legal term of art that departs from its usage as a “scientific” term, the Court left open the possibility that racial biology exists.

Furnishing the background for both cases is the Naturalization Act, which provided that only “aliens, being free white persons, and . . . aliens of African nativity and . . . African descent” could naturalize and become citizens of the United States.<sup>84</sup> *Ozawa* raised the question of whether Takao

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79. See Toro, *supra* note 19, at 1238–39.

80. 260 U.S. 178 (1922).

81. 261 U.S. 204 (1923).

82. See, e.g., HANEY LÓPEZ, *supra* note 11, at 56.

83. Braman, *supra* note 20, at 1410.

84. *Ozawa*, 260 U.S. at 190.

Ozawa, a highly educated person of Japanese descent with fair skin, was a “white person” within the meaning of the statute.<sup>85</sup> The Court easily answered in the negative:

[T]he federal and state courts, in an almost unbroken line, have held that the words “white person” were meant to indicate only a person of what is popularly known as the Caucasian race. . . . The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.<sup>86</sup>

Thus, the Court sided with the “science” of the day, arguing that “white person” as used within the statute aligned with “scientific” schematizations of whiteness, referenced by the category of Caucasian. As the Japanese were not Caucasian within any biological or anthropological schema, a Japanese person was not a “white person” within law and was ineligible for naturalization.

*Thind*, decided the following year, challenged the Court’s commitment to the prevailing scientific conception of race. The litigation was initiated by a “high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India,”<sup>87</sup> who argued that, as a “Caucasian”—the race to which South Asians indisputably belong in most “scientific” racial categorizations of human variation—he was a “white person” and was eligible to become a United States citizen under the Naturalization Act. The Court disagreed, departing from its finding in *Ozawa* that “white persons” meant “Caucasians” in the law at issue. Instead, it found that “white persons” was properly interpreted in line with common parlance, as the authors of the statute and others untrained in the racial sciences would have used it.<sup>88</sup> As the statute’s authors, and most people living in the United States at the time, would not have contemplated that a South Asian man, high caste or not, was a white person, the statute did not permit South Asians like *Thind* to become U.S. citizens.<sup>89</sup>

In holding that “white person” within the Naturalization Act was properly defined in accordance with popular understandings of the term and not in accordance with “science,” the Court did not reject the proposition that race is a biological grouping of persons. Nowhere in the opinion does the Court dispute the biological facticity of race. Instead, it simply does not like what that facticity would compel: the admission of dark-skinned “others” into the polity and the discursive construction of these “others” as

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85. *See id.* at 189–90.

86. *Id.* at 197–98.

87. *United States v. Thind*, 261 U.S. 204, 206 (1923).

88. *Id.* at 214–15 (“What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs.”).

89. *Id.* at 215 (holding that “the body of people to whom the appellee belongs” is ineligible to naturalize).

equal to those whom the Court thought were *actually* white—i.e., persons hailing from “the British Isles and Northwestern Europe.”<sup>90</sup>

This is not to say that the Court is not critical of “scientific” racial schematizations. Indeed, the Court justifies its refusal to align *legal* race with *scientific* race by looking to the disputes “in the science of ethnology” on the proper division of the human population into racial categories.<sup>91</sup> That there was no one definitive “scientific” schematization of race provides a justification for the Court’s reliance upon common understanding when defining who is included within the category of “white persons.” This does not mean, however, that the Court rejects the ultimate truth of biological race. Consider the Court’s statement:

The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine. The explanation probably is that “the innumerable varieties of mankind run into one another by insensible degrees,” and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.<sup>92</sup>

Two things are notable about this passage. First, the Court speaks about uncertainty. It states that analysts of human variation cannot be sure that their divisions of the human population are the correct ones. It does not, however, contend that correct divisions do not exist. Instead, it simply observes that it is difficult to know whether any particular “scientific” schema is correct. Second, the Court speaks about the lack of common agreement among analysts of human variation. It is a leap of logic to conclude that, because the Court recognizes the practical difficulty of agreement, it is arguing that there is no objective truth about which to agree. Thus, the Court appreciates that researchers of human variation had not yet been able to decide upon racial truths; it does *not* appreciate that there are no racial truths upon which researchers of human variation can decide.<sup>93</sup> Moreover, even when it arrives at racial truths, the Court does not recognize a commitment to incorporate that truth into law, especially when the authors of those laws did not intend for that truth to be so reflected.

Thus, it is an overstatement—perhaps even wishful thinking—to read *Thind* as an articulation of the Court’s recognition that race is a social construction. Instead, the case merely represents the Court’s dissatisfaction

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90. *See id.* at 213 (“The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come.”).

91. *Id.* at 208.

92. *Id.* at 212.

93. Professor Braman reads this passage as indicating the Court’s rejection of racial biology. He writes that, with this acknowledgement of the uncertainty that characterized contemporary scientific endeavors into racial classification, “the Court dismissed racial science.” *See* Braman, *supra* note 20, at 1406. Professor Braman is correct as long as one adds the qualification that the Court dismissed racial science *as relevant to the law*.



with racial “science” (with respect to both its findings as well as the intradisciplinary quarrels about those findings), and its desire to direct the law away from a troublesome, albeit dominant, episteme.

Moreover, it is important to take seriously what the Court actually held in *Thind*: the term “white person” within the Naturalization Act should be defined in accordance with *ordinary* conceptions of race.<sup>94</sup> Given the fact that the belief that races were biologically distinct entities was a widely held, infrequently disputed position when *Thind* was decided, the ordinary conception of race incorporated biological race.<sup>95</sup> Thus, *Thind*’s holding that race within law should follow its common definition outside of law is not one that represents a rejection of biological race primarily because ordinary meanings of race were informed by biological race. This is a profoundly different position from the one commonly attributed to *Thind*—that is, a position holding that race is a social construction with no basis in biology.<sup>96</sup>

It is worth noting that if the Court had actually accepted the socially constructed definition of race, it might have found that both Ozawa and *Thind* were “white persons,” and, consequently, eligible to become U.S. citizens. In other words, when whiteness is understood as a position of relative, racialized privilege,<sup>97</sup> then both Ozawa and *Thind* inhabited some degree of whiteness<sup>98</sup>—Ozawa as a non-Chinese,<sup>99</sup> educated man with

94. *Thind*, 261 U.S. at 214–15. Of course, the Court’s holding in *Thind*—that “white persons” should mean what ordinary persons understood the term to mean—does not commit the Court to using for perpetuity the ordinary concept of race as it existed when *Thind* was decided. The ordinary concept of race has transformed. In other words, racial lines are drawn in changing and oft-confused ways. Race is a social construction because racial definitions (and who is considered a member of a particular race) change over time. To the extent that the Court committed itself to allowing race within law to reflect these changing meanings, then, indeed, it is true that the Court dedicated itself to the proposition that race is a social construction.

95. For example, the ordinary person at the time of *Thind* would believe that South Asians were biologically distinct from “real” white people.

96. See, e.g., HANEY LÓPEZ, *supra* note 11, at 6 (arguing that the Court rejected racial biology in *Thind*).

97. See Harris, *supra* note 52, at 916 (“[W]hiteness in the United States has never been simply a matter of skin color. Being White is also a measure . . . of ‘one’s social distance from Blackness.”) (quoting LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 224 (2002)). She goes on to explain:

Within the Black/White binary that undergirds prevailing social relations, “Black” and “White” signify ideological concepts and do not operate as phenotypic markers, nor even as racial categories in the sense of creating socially constructed communities. Rather, Black and White are relationally constructed. Whiteness is the position of relative privilege marked by distance from Blackness; Blackness, on the other hand, is a legal and social construction of disadvantage and subordination marked by the distance from White privilege.

*Id.* at 917.

98. Professor Braman observes that certain immigrant groups had attained “whiteness” in previous historical periods by establishing a degree of privilege over other groups. See Braman, *supra* note 20, at 1405 n.117 (noting that “Irish immigrants . . . had established their whiteness by breaking their long-standing alliance with black Americans and taking up the

some degree of social capital,<sup>100</sup> and Thind as a member of a caste that historically enjoyed a pronounced racialized privilege over other castes. Of course, this was the argument that both petitioners made. And the Court rejected the argument, refusing to accept the radical demands of a *true* commitment to the socially constructed nature of race.

Perhaps it is essential for the law to recognize racial discrimination against social groups that do not fit within “scientific” racial schematizations in order to demonstrate that it has completely disavowed that biological race is relevant to the legal definition of race. The Court has done this. Interestingly, however, the path to this recognition has been rather timid and circuitous. Moreover, along the way, the Court has avowed that its task is to proffer a legal definition of race that, as a practical matter, departs from a “scientific” definition.<sup>101</sup> *Korematsu v. United States*<sup>102</sup> is an entrée to an exploration of the Court’s timid acceptance of “nonscientific” races as races within law.

### *B. Legal Race As Ethnicity, Nationality, and Ancestry*

This section engages in a close reading of the Court’s decisions in *Korematsu* and *Hernandez v. Texas* in order to demonstrate that underlying the Court’s acceptance of “nonscientific” races as races within law is a thinly veiled conviction that there is a biological truth to race. A review of more recent cases follows, revealing that the Court has never strayed from this implicit principle.

#### *1. Korematsu v. United States*

In 1944, the Court, in *Korematsu v. United States*, was called upon to determine the constitutionality of Civilian Exclusion Order No. 34, which required that “all persons of Japanese ancestry” leave San Leandro, California, and, pursuant to another executive order, report to a concentration camp.<sup>103</sup> The case is famous for many reasons, namely its status as the Court’s first articulation of the demand that strict scrutiny be

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antiabolitionist cause,” observing that “successive waves of immigrants had learned that one of the prices of American citizenship was a cultivated sense of black inferiority,” and highlighting that “just as the Irish claimed antiabolitionist positions as the price for entry into white America, eastern and southern Europeans . . . adopted anti-Asian sentiments to consolidate their positions as white Americans”).

99. The Chinese were the subject of extensive racial prejudice at the time that *Ozawa* was decided. *See id.* at 1402 (noting that, at oral argument, Takao Ozawa’s counsel contended that “if restrictions were in order, they were to be directed against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race” (internal quotation marks omitted)).

100. *See Ozawa v. United States*, 260 U.S. 178, 198 (1922) (noting that “the culture and enlightenment of the Japanese people” could be referred to in “complimentary terms”).

101. *See infra* Part II.B.

102. 323 U.S. 214 (1944).

103. *Id.* at 215–16.

used to review laws that contain racial classifications,<sup>104</sup> and its tragic upholding of the law at issue despite the Court's purported application of strict scrutiny.<sup>105</sup> Yet *Korematsu* is most relevant to the present discussion because of its unremarked-upon assumption that discrimination against the Japanese is *racial* discrimination. Indeed, the Court does not waste any time wringing its hands about the fact that because Japan is a *nation*, "Japanese" might be something more akin to a *nationality*,<sup>106</sup> or perhaps an *ethnicity*<sup>107</sup> or *ancestry*,<sup>108</sup> as opposed to race.<sup>109</sup> It does not waste any ink questioning whether discrimination against a nationality, ethnicity, or ancestry is racial discrimination. Nor does it answer the latter question in the negative and uphold the law because it does not contain a racial classification. Instead, the Court assumes that Japanese is a race and upholds the law notwithstanding.<sup>110</sup> The majority writes,

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . [and] because [the military authorities] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.<sup>111</sup>

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104. *Id.* at 216 ("It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

105. *See id.* at 219 (upholding the law).

106. Of course, because many of the Japanese who were interned were U.S. citizens, their "nationality" was not "Japanese," but rather "American." *See* Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 583 n.55 (1995) ("Many of the interned Japanese Americans were citizens because of birth in the United States. Their national origin was, therefore, the United States.").

107. Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 983 (1995) ("Under a broad definition, ethnicity refers to physical and cultural characteristics that make a social group distinctive, either in the group members' eyes or in the view of outsiders."). English and African American Studies scholar Werner Sollors offers an instructive definition of ethnicity:

An ethnic group is . . . a collectivity within a larger society having real or putative common ancestry, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood. Examples of such symbolic elements are: kinship patterns, physical contiguity (as in localism or sectionalism), religious affiliation, language or dialect forms, tribal affiliation, nationality, phenotypal features, or any combination of these. A necessary accompaniment is some consciousness of kind among members of the group.

Werner Sollors, *Foreword: Theories of American Ethnicity*, in THEORIES OF ETHNICITY: A CLASSICAL READER, at xii (Werner Sollors ed., 1996).

108. *See* Perea, *supra* note 106, at 574 (defining ancestry as "family descent or lineage").

109. Notably, there was precedent for the Court's recognition of a grouping of individuals by relationship to a nation as "races." *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872) ("If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese *race* within our territory, [the Fourteenth A]mendment may safely be trusted to make it void." (emphasis added)).

110. *Korematsu*, 323 U.S. at 223.

111. *Id.*

The dissent shares the majority's assumption that discrimination against the Japanese is *racial* discrimination—and not discrimination on the basis of ethnicity, nationality, or ancestry that is distinct from racial discrimination. In Justice Murphy's passionate dissenting opinion, he states plainly his position that the law at issue is "an obvious racial discrimination"<sup>112</sup> and, further, "[t]his exclusion of all persons of Japanese ancestry, both alien and non-alien, from the Pacific Coast area . . . goes over the very brink of constitutional power and falls into the ugly abyss of *racism*."<sup>113</sup> Indeed, Justice Murphy's understandable disgust with the law is due to the fact that it is informed by the most traditional racial logic. The act treats the Japanese as a racial group in the sense that it imagines a behavioral homogeneity amongst the multiplicity of individuals comprising the group—and moreover, that behavioral homogeneity is a product of birth. The traditional racial logic argues that a Negro is a Negro by virtue of his birth to Negro parents, and, because of his being a Negro, he is presumed to behave as Negroes are wont to behave. Similarly, the act at issue in *Korematsu* argued that a Japanese person is Japanese by virtue of his birth to Japanese parents, and, because of his being Japanese, he is presumed to behave as Japanese are wont to behave.<sup>114</sup> Thus,

the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshaled in support of such an assumption.<sup>115</sup>

However, Justice Murphy's conceptualization of *why* the Japanese are a race deserves further scrutiny. Although Justice Murphy rejects the law's presumption that one of the qualities inherent in being Japanese is an enduring and treasonous loyalty to Japan, he appears to accept the law's conceptualization of Japanese in racial biological terms.<sup>116</sup> Justice Murphy

112. *Id.* at 234–235 (Murphy, J., dissenting) (describing the law as a "racial restriction").

113. *Id.* at 233 (emphasis added) (internal quotation marks omitted).

114. Justice Murphy's dissenting opinion documents that the military officer responsible for the exclusion order, Lieutenant DeWitt, was a virulent racist who believed both in biological notions of race and that biology determined behavior and personality. DeWitt is quoted as describing the Japanese as "an enemy race" whose "racial strains are undiluted." *Id.* at 236. Further, "Japaneseness," and its concomitant tendency to commit treason, was imagined to be as immutable as one's biological constitution: "It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map." *Id.* at 236 n.2 (alteration in original).

115. *Id.* at 235.

116. *Id.* There is great historical work that has been done on how the Japanese were seen as a bad *race* of people, while Italians and Germans, with whom the United States was also at war, were seen as *Fascists* or *Nazis*. That is, the Japanese were constructed as an essentialized race of evil people, while Italians and Germans were not constructed as a racial group, but rather were conceived to be nonessentialized persons, some of whom embraced a problematic political philosophy of fascism. Professor Renteln writes, "German Americans were distinguished from the Nazis and Italian Americans were distinguished from the Fascists. However, no differentiating nomenclature existed for the Japanese." Alison

appears to believe that the Japanese are coherent *as Japanese* because of their shared biology: “[t]he exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation.”<sup>117</sup> By invoking the familiar trope of “blood,” Justice Murphy reveals that he—like other believers in biological race, likely including his colleagues on the Court who would uphold the law—views “race” as a discrete, clearly demarcated group of individuals sharing the same blood or biology. Thus, Justice Murphy’s reasoning shows that he may have disagreed with Linnaeus, Cuvier, and Blumenbach only to the extent that they divided humanity into four or five racial groups. For Justice Murphy, these schematizations simply were not exhaustive. There were more than five racial groups in the world, and Japanese, clearly, was one.

Justice Jackson, also writing in dissent, shares Murphy’s assumption that the exclusion law is a form of racial discrimination.<sup>118</sup> Justice Jackson’s separate opinion, however, contains an interesting moment revealing his racial worldview:

Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu’s presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that *he was born of different racial stock*.<sup>119</sup>

It is not quite clear how to read Justice Jackson’s pronouncement that Korematsu was born of “different racial stock” than the German, Italian, and (presumably white) American in his hypothetical. It could be that Justice Jackson conceptualizes them all as born from different racial stock than the others; thus, his hypothetical contains four people of four different racial stocks. Or, more likely, Justice Jackson could be arguing that it is only Korematsu who is of different racial stock than the German, Italian, and American persons; thus, the German, Italian, and American are of the same stock and Korematsu is not. If the latter alternative is what Justice Jackson is offering, then his thinking is clearly indebted to the race scientists who proposed four or five principal races. Accordingly, the

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Dundes Renteln, *A Psychohistorical Analysis of the Japanese American Internment*, 17 HUM. RTS. Q. 618, 621 (1995). Professor Dower expands on this point as such:

German atrocities were known and condemned from an early date, but in keeping with their practice of distinguishing between good and bad Germans, Allied critics tended to describe these as “Nazi” crimes rather than behavior rooted in German culture or personality structure. This may have been an enlightened attitude, but it was not a consistent one, for in the Asian theater enemy brutality was almost always presented as being simply “Japanese.”

JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 34 (1986).

117. *Korematsu*, 234 U.S. at 235.

118. *See id.* at 246 (Jackson, J., dissenting) (arguing that the majority’s opinion has “validated the principle of racial discrimination in criminal procedure and of transplanting American citizens”).

119. *Id.* at 243 (emphasis added).

German, Italian, and (white) American would share the racial stock of “Caucasian,” while Korematsu’s “different racial stock” would presumably be that of “Malay” or “Asian.”

What is important here is that Justices Jackson and Murphy, political liberals who would strike down the law as intolerable racial discrimination under the Constitution, both accepted the truth of racial biology. It is not unreasonable to assume that, at the time of *Korematsu*, they were not outliers on the Court in this regard. Thus, it should be unsurprising if the jurisprudence of the time reflects a commitment to biological race.

## 2. *Hernandez v. Texas*

Almost a decade later, however, the *Korematsu* logic that discrimination against a group of people based on nationality or ancestry is *racial* discrimination did not carry over to *Hernandez v. Texas*.<sup>120</sup> In *Hernandez*, the Court was called upon to determine whether a Mexican man convicted of murder was denied equal protection of the laws if “persons of Mexican descent” were excluded from jury service in the county in which he was tried.<sup>121</sup> In the lower court, Texas argued (and the court agreed) that, even if Mexicans had been excluded from jury service, Hernandez had not been denied equal protection of the law as long as white people served on juries.<sup>122</sup> The State contended that Mexicans were “white” within racial schemas. Accordingly, as long as “white” persons had not been excluded from jury service, then Mexicans qua white persons had been represented in juror selection rolls, as mandated by the Constitution.<sup>123</sup>

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120. 347 U.S. 475 (1954).

121. *See id.* at 476.

122. *See Hernandez v. State*, 251 S.W.2d 531, 535–36 (Tex. 1952).

123. *See id.* at 536 (“Mexicans are white people . . . . The grand jury that indicted appellant and the petit jury that tried him being composed of members of his race, it cannot be said . . . that appellant has been discriminated against in the organization of such juries and thereby denied equal protection of the laws.”). Interestingly, Texas’s argument that Mexicans were white was justified by the fact that Mexicans were *legally* white by virtue of the interaction between the Treaty of Guadalupe Hidalgo and the naturalization laws of the United States. To explain, the Treaty of Guadalupe Hidalgo, the signing of which ended the war between Mexico and the United States in 1848, made the Mexican nationals, who inhabited the land that the United States annexed as part of the spoils of war, United States citizens. *See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*, U.S.-Mex., art. IX, Feb. 2, 1848, 9 Stat. 922 (“Mexicans who . . . shall not preserve the character of citizens of the Mexican republic . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution . . . .”). The naturalization laws that existed at the time, however, provided that only “white persons” could become citizens. An Act to Establish a Uniform Rule of Naturalization, 1 Stat. 103, 103–04 (1790) (limiting naturalization to “white persons”). Thus, Mexicans, as citizens, were legally considered white. *See Kevin R. Johnson, Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN’S L.J. 142, 143–44 (1996) (“[S]ome persons often classified today as ‘non-Whites’ were treated as ‘Whites’ for naturalization purposes. For example, persons of Mexican origin were classified as ‘White’ while Asians were not.”).

The Supreme Court overruled the lower court, ultimately deciding that Mexicans were not treated as white persons in society.<sup>124</sup> Instead, they were treated as a distinct class, as revealed by the discrimination to which they were subjected.<sup>125</sup> Because Mexicans were not white within the “attitudes of the community,” the Court found that they were not white within law.<sup>126</sup> The logic that the Court uses to arrive at this holding, however, makes apparent that it did not believe that Mexican, like Japanese, is a racial category.

The most obvious sign that the Court did not recognize Mexican as a race is because it never says that it does. The Court spends a lot of time proclaiming that its past precedents have clearly held that it is inconsistent with the Fourteenth Amendment to exclude jurors on the basis of their “race or color.”<sup>127</sup> The Court does not find, however, that if Mexicans were excluded from jury participation, it would be an exclusion on the basis of

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Of course, the position argued by Texas—that Mexicans are white—is absolutely consistent with present problematic racial logic. “Hispanics” or “Latinos” are not deemed to be a racial group; they are considered an “ethnicity.” See Haney López, *supra* note 66, at 1148 (“[I]t is clear that in the United States there exists no widespread consensus that Latinos/as share a separate identity that can be specified in terms of race, as opposed to, say, ethnicity, national origin, or culture. Indeed, if anything, the consensus seems to run the other way, rejecting any notion of racial distinctiveness and positing that while Latinos/as may constitute an ethnic group, individuals of this heritage are of every race.”). Indeed, the 2010 Census asks individuals to note if they are of “Hispanic, Latino, or Spanish origin” and, if so, whether they are “Mexican/Mexican-American/Chicano,” “Puerto Rican,” “Cuban,” or of another origin, like “Argentinean,” “Colombian,” “Dominican,” “Nicaraguan,” “Salvadoran,” and “Spaniard.” Then, in a separate question, individuals are asked to note to which of fifteen itemized “races” they belong (i.e. “White,” “Black, African-Am., or Negro,” “Asian Indian,” “Native Hawaiian,” etc.). See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, FORM D-61, UNITED STATES CENSUS 2010 (2009), available at [http://www.census.gov/2010census/pdf/2010\\_Questionnaire\\_Info.pdf](http://www.census.gov/2010census/pdf/2010_Questionnaire_Info.pdf). Scholars have expressed much dissatisfaction with this racial logic. See, e.g., Oquendo, *supra* note 65, at 93 (condemning “‘racial’ subcategories, such as ‘Black Hispanics’ and ‘White Hispanics’” because “they project onto the Latino/a community a divisive racial dualism that, much as it may pervade U.S. society, is alien to that community”).

Some who argue that Latinos are as much of a race as the white and black races tend to do so by using problematic biological racial argumentation. See, e.g., Cameron, *supra* note 76, at 1359 (“Cortes, in leading the Conquest, initiated the uniquely Latino tradition of *mestizaje*, or the mixing of European and Indian blood by miscegenation, thus creating a race of people who never existed before.”). Of course, Latinos are as “mixed” as are most, if not all, other racial groups. See Haney López, *supra* note 66, at 1184 n.127 (“[W]e should maintain a certain skepticism toward the claim that Latinos/as are ‘racially diverse’ in ways that other ‘racial’ groups are not. In fact, the *mestisaje* [sic] or mixing of peoples that is often singularly associated with Latinos/as is a quintessential American tale for all groups.”).

124. *Hernandez*, 347 U.S. at 479.

125. *Id.* (citing various instantiations of anti-Mexican discrimination and noting that “the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between ‘white’ and ‘Mexican’”).

126. *Id.*

127. See *id.* at 477 (“In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular *race or color* under an indictment issued by a grand jury, or before a petit jury, from which all persons of his *race or color* have, solely because of that *race or color*, been excluded . . .” (emphasis added)).

“race or color.” Instead, the Court—looking to *Strauder v. West Virginia*<sup>128</sup> for its contention that a law that excludes “naturalized Celtic Irishmen” from serving on juries may run afoul of the Equal Protection Clause<sup>129</sup>—asserted that it must also be wary of exclusions that are *like* those made on the basis of race or color.<sup>130</sup> The question, then, was whether discriminating against Mexicans was a discrimination that was *like* one made on the basis of race or color. The Court held that it was, stating that excluding “persons of Mexican descent” from jury service is an exclusion on the basis of “ancestry or national origin”<sup>131</sup>—presumably *like* an exclusion on the basis of “race or color”—that is prohibited by the Fourteenth Amendment.

That the Court was drawing an analogy between—and not directly equating—racial discrimination and discrimination against persons of Mexican descent is demonstrated quite clearly by the Court’s explanation of what it found relevant. To determine whether Mexicans had, in fact, not been called to serve on juries, the Court observed it was appropriate to compare the percentage of persons with “Mexican or Latin-American” surnames residing in the county with the percentage of persons with those surnames who had served on juries.<sup>132</sup> The Court reasoned: “[J]ust as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class.”<sup>133</sup> According to the Court, Mexicans were not a race that could be identified by color.<sup>134</sup> Instead, they were something distinct from a race that could be identified by Spanish surname.<sup>135</sup> It is not unreasonable to conjecture that the Court’s

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128. 100 U.S. 303 (1879).

129. See *Hernandez*, 347 U.S. at 477 (citing *Strauder* for the proposition that “the exclusion of a class of persons from jury service on grounds *other than race or color* may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws” (emphasis added)).

130. *Id.* at 478 (“[D]ifferences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define *other groups which need the same protection.*” (emphasis added)); see also Haney López, *supra* note 66, at 1145 (noting that the Court overturned *Hernandez*’s conviction not because of a finding that Mexicans or Mexican Americans were a race, but rather because of a finding that differences other than race or color “might define groups needing the same protection” as racial groups).

131. *Hernandez*, 347 U.S. at 479, 482 (finding that juries should be composed of “all qualified persons regardless of national origin or descent”). Of course, to the extent that some of the Mexicans who were excluded from juries were born in the United States, as many were, they were not discriminated against because of their “national origin”—their national origin was the United States. See Perea, *supra* note 106, at 587–88 (“For those persons who were United States citizens by birth, their national origin—their place of birth—was the United States. The *Hernandez v. Texas* opinion refers to the terms ‘ancestry’ and ‘national origin’ as though they meant the same thing when they do not.”).

132. *Hernandez*, 347 U.S. at 480–81.

133. *Id.* at 480 n.12.

134. *Id.*

135. See Haney López, *supra* note 66, at 1146 (arguing that *Hernandez* is exceptional because, “at least on the surface the Court refused to consider Mexican Americans as a group



consistent underlying commitment to “scientific” schematizations of biological races, into which Latinos and Mexicans do not discretely fit, at least partly motivated the Court’s failure to comprehend Mexicans as a race.<sup>136</sup>

### 3. The Modern Era

There is no longer any question that a group that is defined by its relationship to a nation, or that otherwise does not fit within “scientific” schematizations of race, is a “race” within the meaning of the law. Thus, the Court in *City of Richmond v. J.A. Croson Co.*,<sup>137</sup> and *Fullilove v. Klutznick*<sup>138</sup> before it, never worried about whether a law contained a racial classification if it demanded that a certain amount of contracting dollars go to a company owned by a “Spanish-speaking,” “Oriental,” “Indian,” “Eskimo,” or “Aleut” person. That these groups are races within the meaning of the law, despite the fact that they are not races within “science,” is assumed.<sup>139</sup>

*Saint Francis College v. Al-Khazraji* offers the Court’s most explicit articulation of this principle. Majid Ghaidan Al-Khazraji, a U.S. citizen who had been born in Iraq, sued his employer under § 1981 of the Civil

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defined by race or color”). Professor Haney López suggests that the reason why the Court refused to treat Mexicans as a racial group was because Hernandez’s attorneys had argued throughout the litigation that Mexicans were members of the white race. If Mexicans were white, then the case would involve white people who were victims of racial discrimination practiced by other white people. *See id.* at 1161.

136. *See id.* at 1163 (stating that the Court avoided “a racial understanding” of Mexicans because of “a biological conception of race”). Another reason for the Court’s avoidance of “a racial understanding” of Mexicans may have been because the Court believed that “Mexicans” are not always visually identifiable as such, and, consequently, are unlike other paradigmatically visible racial groups that are treated with solicitude under the Equal Protection Clause. *See* 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, 496 (1998) (describing the Court’s former requirement that, in order to be considered a suspect class, a group must have “obvious, immutable, or distinguishing characteristic[s]” and noting that these characteristics “stand as proxies for the concept of visibility”).

137. 488 U.S. 469 (1989).

138. 448 U.S. 448 (1980).

139. Nevertheless, it is clear that the *authors* of the statute embraced “scientific” race and its schematization of (three, or four, or five) principal races. It defines the “Negro” who is preferred under the statute as “[a]n individual of the black *race* of African origin”; meanwhile, all the other preferred groups (“Spanish-speaking,” “Oriental,” “Indian,” “Eskimo,” or “Aleut”) are not defined as “races,” but instead “cultures” or “origins.” *Id.* at 494–95. Now, within “scientific” racial logic, it may be that (American) “Indians” ought to be referred to as a race. The likely reason why the authors of the statute did not refer to this group as a race may be that, because American Indians have a special relationship with the United States, the statute could define “Indians” by reference to those organizations that afford them protection pursuant to their special relationship with the United States—and not by reference to race. *See id.* at 495 (defining “Indian” as “[a]n individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community,” which includes “education institutions, religious organizations, or state agencies”).

Rights Act, claiming that he had been denied tenure because of his race.<sup>140</sup> The question for the Court was whether an Arab person, who would be considered Caucasian within “scientific” definitions of race, could be a victim of discrimination wrought by another member of the Caucasian race.<sup>141</sup> Simply put: was Caucasian-on-Caucasian discrimination cognizable as racial discrimination under § 1981?

In an opinion filled with dicta evidencing a progressive, nonbiological understanding of race,<sup>142</sup> the Court held that Arab should be considered a racial group distinct from a Caucasian race, and, as such, a white person could discriminate against an Arab person on the basis of the latter’s race.<sup>143</sup> The Court noted that, as a general matter, the term “race” had been used throughout history to refer to groups that did not fall within “scientific” schematizations of race.<sup>144</sup> Equally convincing to the Court was the legislative history of § 1981, which revealed that the authors of the statute did not seem to believe that race, as used within the statute,<sup>145</sup> ought to refer only to those groups that “science” would identify as such.<sup>146</sup> Yet,

140. *Saint Francis Coll. v. Al-Khazrji*, 481 U.S. 604 (1987).

141. *Id.* at 609–10 (asking whether § 1981 “encompass[es] claims of discrimination by one Caucasian against another”).

142. Indeed, the Court’s opinion contains a discussion of race that seems to foreshadow the pronouncement made by geneticists in the wake of the Human Genome Project’s conclusion that race is a biologically arbitrary category:

There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogenous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the ‘average’ individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.

*Id.* at 610 n.4. Importantly, this discussion is dicta and located in a footnote.

143. *Id.* at 609–10.

144. *See id.* at 611–12 (looking to nineteenth-century encyclopedias, which had used the term “race” to refer to “Finns,” “gypsies,” “Basques,” “Hebrews,” “Swedes,” “Norwegians,” “Germans,” “Greeks,” “Italians,” “Spanish,” “Mongolians,” “Russians,” “Arabs,” “Jews,” and “Hungarians”).

145. To be precise, the statute does not mention the term “race.” *See* 42 U.S.C. § 1981(a) (2006) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .”). The statute has been construed, however, to condemn all racial discrimination. *See Al-Khazrji*, 481 U.S. at 609 (“Although § 1981 does not itself use the word ‘race,’ the Court has construed the section to forbid all ‘racial’ discrimination in the making of private as well as public contracts.” (citing *Runyon v. McCrary*, 427 U.S. 160, 168, 174–75 (1976))).

146. *Id.* at 612 (citing the legislative history, which used “race” to refer to “Scandinavian[s],” the “Chinese,” “Latin” groups, the “Spanish,” “Anglo-Saxon[s],” “Jews,” “Mexicans,” “blacks,” “Mongolians,” “Gypsies,” and “Germans”).

this is the crux of the Court's disappointing conceptualization of race: *the finding that race as used within the law is distinct from, and more expansive than, biological race presupposes that there are actual biological races*. The Court says as much, stating that discrimination on the basis of "ancestry or ethnic characteristics" is racial discrimination within the meaning of § 1981, "whether or not it would be classified as racial in terms of modern scientific theory."<sup>147</sup>

Moreover, there should be no doubt that the Court believes that it is biology, or more specifically genetics, that is the stuff of race within "modern scientific theory": the Court approvingly cites the lower court's holding that the statute bans discrimination against "an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'"<sup>148</sup> This statement deserves a little unpacking. First, the Court rejects the lower court's pronouncement with respect to its inclusion of the term "physiognomically,"<sup>149</sup> thus rejecting any requirement that an individual must prove that he or she was a member of a group that has physical markers of difference in order to assert a claim for racial discrimination under § 1981. More importantly, however, the Court does not reject the lower court's language with respect to genetics; that is, when the problematic reference to physiognomy is stricken, one sees that the Court accepts the proposition that the statute bans discrimination against "an individual because he or she is genetically part of an ethnically . . . distinctive subgrouping of *homo sapiens*."<sup>150</sup> This is interesting, partly because the term "ethnicity" is thought to refer to groupings along the lines of culture, as opposed to groupings along the lines of genetics.<sup>151</sup> The Court's problematic inclusion of genetics in the concept of ethnicity, however, makes it appear that it believes that an ethnicity is a genetically similar subgrouping of a larger grouping of a genetically similar race.<sup>152</sup> Differently stated, the Court's language suggests that, within its ontology of race and ethnicity, it is genetics that makes ethnic "subgroupings," which are nevertheless cognizable as races within law.

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147. *Id.* at 613.

148. *Id.*

149. *See id.* ("It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection.")

150. *Id.*

151. *See Toro, supra* note 19, at 1227.

152. Professor Haney López has explained how ethnicity, which is supposed to be premised on shared *culture*, nevertheless remains conceptually tethered to biology and genetics:

Yet even as ethnicity ostensibly offered an alternative to the vocabulary of race, it remained closely tied to the complex of racial ideas. . . . [E]thnicity sought to preserve the notion that descent powerfully shaped individual and group identity; it did so by emphasizing cultures closely associated with and indeed handed down generation by generation within distinct groups. Because ethnic culture depended on familial and kinship ties, ethnicity was not primarily a matter of volition but, like race, of blood.

Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1007 (2007).

Thus, the Court appears only to reject biological race in the sense of schematizations that offer only four or five “principal” or “primary” races. What is significant, and problematic, is that if legal race includes ethnicity, and if biology is relevant when defining ethnicity, then biology remains relevant within legal race.

Nevertheless, even if the Court misspoke in *Al-Khazraji* and understands ethnicity as a biology-free concept, the Court’s jurisprudence has never completely endorsed the belief that race is socially constructed and simultaneously completely refuted the idea of racial biology. Consider the admission program at issue in *Regents of the University of California v. Bakke*,<sup>153</sup> which reserved sixteen seats in the entering class at UC Davis medical school to members of a “minority group,” defined as “Blacks,” “Asians,” “American Indians,” and “Chicanos.”<sup>154</sup> It is possible to understand the first three groups as “scientific” races—*H. sapiens africanus*, *H. sapiens asiaticus*, and *H. sapiens americanus* (or Ethiopian, Mongolian, and American, depending on which racial scientist’s schema is favored). However, “Chicano” refuses “scientific” schematization as it is not a “scientific” race. Perhaps this explains why Justice Powell’s oft-cited and highly influential opinion concerns itself with the constitutionality of decisions based on “race or *ethnic origin*” or “race and *ethnic background*.”<sup>155</sup> His opinion wonders about the legality of lines that are “drawn on the basis of race and *ethnic status*.”<sup>156</sup> It also worries about the consequence of “[r]acial and *ethnic distinctions*”<sup>157</sup> made by and within law. It is not unreasonable to conclude that this concern with “race and *ethnicity*” is due to the fact that Justice Powell is drawing a distinction between “scientific” races (like the blacks, Asians, and American Indians preferred by the admissions program) and “ethnicities” (like “Chicanos”), which are distinct from “scientific” races.

That this is Justice Powell’s view of the ontology of race (for him, a biological concept) and ethnicity (for him, a nonbiological concept) is affirmed by his decidedly nonoriginalist explanation of why strict scrutiny under the Equal Protection Clause is appropriate for all racial classifications and not solely those that burden the historically disadvantaged while privileging the historically advantaged. Citing the *Slaughter-House Cases*, Justice Powell acknowledges that the Fourteenth Amendment was ratified with the “one pervading purpose” of facilitating equality for the “slave race.”<sup>158</sup> He notes, however, that it became “no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one *racial* minority”<sup>159</sup>—that is, black people. There was the eventual

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153. 438 U.S. 265 (1978).

154. *See id.* at 274.

155. *Id.* at 287, 299 (emphasis added).

156. *Id.* at 289.

157. *Id.* at 291 (emphasis added).

158. *Id.* at 291 (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873)).

159. *Id.* at 292 (emphasis added).

recognition that the historically advantaged race—the white race—was composed of “various minority groups of whom it was said . . . that a shared characteristic was a willingness to disadvantage other groups.”<sup>160</sup> Citing cases that provided relief to “Celtic Irishmen,” “Chinese,” “Austrian resident aliens,” the “Japanese,” and “Mexican-Americans,” Justice Powell writes, “As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all *ethnic* groups seeking protection from official discrimination.”<sup>161</sup> Notably, when Justice Powell intends to refer to black people—that is, a “scientific” (Negro) race—he uses the term “*race*” or “*racial minority*.”<sup>162</sup> In contrast, when he intends to refer to groupings of people that are not “scientific” races, he uses the term “*ethnic groups*.”<sup>163</sup> In this way, he demonstrates his assent to “scientific” schematizations of race and the biological difference that they presuppose. Sadly, the Court’s jurisprudence has never departed from this path.

To be clear, Justice Powell, and the Court’s jurisprudence on race as a general matter, accepts the notion that a law that contains a preference for an ethnic group distinguishes groups on the basis of race.<sup>164</sup> This race is a legal term of art; race as used within law is understood as broader than race

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160. *Id.* at 292. Professor Haney López has conducted an insightful, historically informed reading of Justice Powell’s opinion in *Bakke*. See generally Haney López, *supra* note 152. Justice Powell began his argument in favor of using strict scrutiny for laws that benefited racial minorities by contending that there was no “white majority” that disadvantaged nonwhite minority groups; instead, the purported “white majority” actually consisted of various white minority ethnic groups. See *id.* at 1035. Accordingly, nonwhite racial minorities in the United States were not accurately described as being *uniquely* systematically disadvantaged by political processes and, therefore, the *sole* just beneficiaries of heightened judicial review of laws that burdened them. See *id.* at 1036 (quoting Justice Powell’s assertion that “[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of *special wards* entitled to a degree of protection greater than that accorded others”). Instead, nonwhite racial minorities were just one of many minority groups competing for political power; they, like every other minority group, deserved heightened judicial review of laws that disadvantaged them. See *id.* at 1040 (describing Justice Powell as arguing that “the possibility of the group subordination—of whites—justified special solicitude in racial cases”). Professor Haney López writes that Justice Powell’s rhetorical move of analogizing nonwhite racial groups’ experiences to those of white racial groups “erased the enormous differences in historical experience between white immigrants and racial minorities, and gave new legitimacy to the belief that not structural disadvantage but inability, now cultural rather than innate, explained the social and material marginalization of racial minorities in the United States.” *Id.* at 1009.

161. *Id.* at 1035 (emphasis added).

162. See, e.g., *Bakke*, 438 U.S. at 293 (“[M]any of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro *race* and the white ‘majority.’” (emphasis added)).

163. See *id.* at 292 n.32 (noting that “[m]embers of various religious and *ethnic* groups . . . such as Jews, Catholics, *Italians*, *Greeks*, and *Slavic* groups” continue to experience discrimination (emphasis added)).

164. *Id.* at 314–15 (framing the question posed by the case as whether the “racial classification” contained in the UC Davis Medical School’s admission program is “necessary to promote [ethnic diversity]”); *id.* at 319 (“[I]t is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class.”).

as used within “science.”<sup>165</sup> In distinguishing legal race from biological race, however, the Court implicitly validates biological race.<sup>166</sup> For those interested in both revealing biological race as one of the most enduring (and dangerous) myths of the modern era, as well as freeing the culture of it, the law’s implicit acceptance of it is disturbing.

The next Part shows the law’s continuing commitment to biological race by examining American Indian law and Title VII case law.

### III. BIOLOGICAL RACE IN TITLE VII AND AMERICAN INDIAN LAW

This Part completes the exploration of biological race in the law by investigating American Indian law, in which the Court clearly assumes that race is a biological category of individuals. Indeed, to be recognized as an “American Indian” within law, one must demonstrate that one has a certain degree of “Indian blood”—an explicit biological classification. The Part then turns to Title VII law, in which discrimination on the basis of biological characteristics is cognized as racial discrimination while discrimination on the basis of nonbiological characteristics is cognized as national origin discrimination. The reason for this dichotomy, of course, is courts’ implicit commitment to biological race.

#### *A. Legal Race As Biological Race: American Indian Law*

The body of law regulating the relationship between the United States government and American Indian tribes and their members is an interesting source of information in an examination of the Court’s racial ontology. Notably, within American Indian law, race clearly denotes biological race. Simply put, the Court made its otherwise implicit acceptance of racial biology explicit with this body of law. Thus, American Indian law can and should be read as revealing the Court’s conceptualization of race generally.

The Court’s decision in *United States v. Rogers*<sup>167</sup> is an instructive place to begin, as this case indelibly inscribed the relevance of biological race into American Indian law. In *Rogers*, the Court had to decide whether it was possible for a white person to be an Indian.<sup>168</sup> The litigation began when Rogers, a white man, was accused of murdering another white man who, like he, had lived as a Cherokee Indian.<sup>169</sup> When Rogers was brought to the Arkansas District Court to answer for his crime, he argued that he, as

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165. See, e.g., *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (stating that “racial discrimination” occurs when a law treats differently “identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics”).

166. Of course, Powell’s intention when distinguishing legal race and biological race in *Bakke* likely had little to do with validating biological race and everything to do with allowing the white majority—reconceptualized as a group of white minority ethnic groups—to become a suspect class deserving of the same protections as traditional racial minorities. See Haney López, *supra* note 152, at 1035–36.

167. 45 U.S. (4 How.) 567 (1846).

168. *Id.* at 571.

169. *Id.* at 567–68.

well as his victim, were Indians and, as a consequence, the U.S. government did not have jurisdiction over him pursuant to the Trade and Intercourse Act of 1834.<sup>170</sup> The question for the Court was, could (and should) a white man who had joined the Cherokee Nation, married a Cherokee woman, and lived as a Cherokee Indian be considered a Cherokee Indian?<sup>171</sup> The Court answered in the negative.<sup>172</sup> Justice Roger B. Taney, who would go on to author the infamous *Dred Scott v. Sandford* decision a little over a decade later,<sup>173</sup> wrote the opinion of the Court, noting:

[W]e think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian. . . . He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception [in the Trade and Intercourse Act] is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians . . . .<sup>174</sup>

It is quite reasonable to conclude that the Court's reluctance to believe that a white man could be an Indian was based on the idea that race has a biological essence.<sup>175</sup> If race is in the biology—in the genes—then, naturally, it would be impossible for a biologically white man to transform himself into a biological Indian. That Rogers had lived his life as a Cherokee Indian and was accepted as a Cherokee Indian was irrelevant: “He was still a white man, of the white race, and therefore not within the exception in the act of Congress.”<sup>176</sup>

*Rogers* has been read as establishing a two-part test for determining “Indianness”: an “Indian” is a person who has (1) a certain degree of “Indian blood,” and (2) is recognized as an Indian by a federally recognized

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170. *Id.* at 568; see also Gregory D. Smith, Note, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country Why Congress Should Run the Erie Railroad into the Major Crimes Act*, 27 *HAMLIN L. REV.* 483, 492–93 (2004) (stating that the General Crimes Act, which stems “from the 1790 Indian Trade and Intercourse Act . . . expressly exempted from federal jurisdiction Indians who commit an offense against another Indian while in Indian country”).

171. *Rogers*, 45 U.S. (4 How.) at 570–71.

172. *Id.* at 572–73.

173. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding that a black man was not a “person” within the U.S. Constitution), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

174. *Rogers*, 45 U.S. (4 How.) at 572.

175. See Frank Shockey, Note, “*Individious*” *American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, and Other Recent Cases*, 25 *AM. INDIAN L. REV.* 275, 285–86 (2001) (arguing that Taney’s opinion in *Rogers* “interpreted the exception in the Trade and Intercourse Act as applicable only to a pseudo-scientifically defined race of Indians” and contending that “Taney saw American Indians in this case as a physically defined race”).

176. *Rogers*, 45 U.S. (4 How.) at 573.

tribe or government.<sup>177</sup> Thus, in order to be an Indian in law, there is a sociological prerequisite (i.e., recognition by a tribe) and a racial prerequisite (i.e., possession of Indian “blood”).<sup>178</sup> Importantly, the racial prerequisite is clearly based on biological notions of race. Race is in the blood—the telltale symbol of biological, now genetic, race.

Not only is the *Rogers* two-part test still used by courts to determine whether a person is an Indian for the purposes of establishing federal jurisdiction in criminal cases,<sup>179</sup> but the case, as a general matter, ushered into federal Indian law the notion that Indians are a “biological population” as opposed to a political population.<sup>180</sup> It also set the tone for American Indian jurisprudence.<sup>181</sup> The jurisprudence has explicitly accepted that biological race determines whether a person is an Indian and, therefore,

177. See Quintin Cushner & Jon M. Sands, *The Outdated “Blood” Test To Determine Indian Status in Federal Criminal Prosecution*, 59 FED. LAW. 31, 34 (2012) (describing the two-part test).

178. That “Indianness” is not comprised solely of a racial component has saved statutes that give preference to Indians from strict scrutiny review under the Equal Protection Clause. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court had to determine whether a law that gave a hiring preference to “Indians” within the Bureau of Indian Affairs (BIA) contained a racial classification that is properly reviewed with strict scrutiny. The Court answered in the negative. In holding that rational basis review was appropriate, the Court differentiated “members of quasi-sovereign tribal entities” from Indians as a race. *Id.* at 554 (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . [T]he preference is reasonably and directly related to a legitimate, nonracially based goal.”). Rational basis review was appropriate for the law at issue because it did not classify on the basis of race, an admittedly suspect classification for which strict scrutiny was appropriate. Instead, the law distinguished members of “federally recognized tribes” from “others,” a nonsuspect classification: “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes” and thus “the preference is political rather than racial in nature.” *Id.* at 553 n.24. Within the Court’s logical apparatus, Indians is a discrete racial group while a “federally recognized tribe” is a discrete political group. When the Court expands upon its distinction between the political category that is referenced in the statute and the racial category of Indians not referenced, it looks to the guidelines set out in the law and notes that those who may benefit from the preference “must be one-fourth or more degree Indian blood and be a member of a Federally-recognized [sic] tribe.” *Id.* at 553 n.24. Thus, reflecting the Court’s decision in *Rogers*, there are two qualifications—one racial and one political—that those who can enjoy the preference must have. The Court reads the statute as indexing a political category because the Court allows the political qualification, membership in a federally recognized tribe, to erase (or satisfy) the racial qualification. What is important here is that the racial qualification is clearly based on a biological notion of race; racial membership is defined in terms of blood—again, the telltale symbol of biological, and now genetic, race.

179. See Cushner & Sands, *supra* note 177, at 33. (“Federal courts continue to use this two-pronged test to determine who is an Indian for purposes of criminal jurisdiction.”).

180. See Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 48 (2006) (describing *Rogers* as constructing Indians as a “biological population”).

181. Shockey, *supra* note 175, at 286 (“Most importantly, *Rogers* approved the use of racial criteria in determining tribal membership, and implicitly, in other matters relating to Indians. Subsequent cases expanded that approval luxuriantly.”).



entitled to the benefits that are a product of the “special relationship” that the United States has with the Indian tribes.<sup>182</sup>

The biological definition of Indianness is probably most apparent in the requirement that individuals prove the quantum of Indian blood that they possess in order to be deemed an “Indian” for purposes of federal Indian law.<sup>183</sup> This question of “blood quantum” is ubiquitous in American Indian law. It arose most dramatically during the era of government allotment of Indian lands to individual members of Indian tribes,<sup>184</sup> but remains relevant in current disputes about whether the federal government has jurisdiction over a crime that has been committed.<sup>185</sup>

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182. The “special relationship” that American Indian tribes have with the United States is a product of the fact that they are considered to be “sovereign” nations within the tribal nation’s borders. *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832) (holding that the Cherokee Nation was a sovereign entity, “a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress”). The sovereignty of the American Indian tribes is compromised, however, because of the tribes’ location within the borders of the United States; as a consequence, they are reduced to “domestic dependent nations” within the United States. *See* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (denominating American Indian tribes “domestic dependent nations”). Accordingly, the United States has duties to them that it does not have to other sovereigns. *See id.* (“[American Indian tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”).

183. *See* Spruhan, *supra* note 180, at 1 (“Both for federal recognition as an ‘Indian’ and for membership in a tribal nation, a person generally must possess a threshold amount of Indian or tribal ‘blood,’ expressed as one-half, one-quarter, or some other fractional amount.”). Commentators have argued that “blood” became relevant in American Indian law because it was thought that the more white “blood” an Indian had, the more civilized and capable of independence he became. *See id.* at 44 (quoting a 1917 “Declaration of Policy” by the Commissioner of Indian Affairs stating that “it is almost an axiom that an Indian who has a larger proportion of white blood than Indian . . . so far as the business world is concerned, he approximates more closely to the white blood ancestry”). For example, Spruhan writes,

The use of blood quantum combined the concepts of Indian as a member of a biological group and Indian as an incompetent ward. Both Congress and the Bureau of Indian Affairs used blood quantum as one of the defining elements of competency to release whole classes of Indians, while retaining restrictions on others. Congress then conditioned funding and, for certain tribes, membership itself, based on blood quantum, limiting its responsibilities to a subset of biological wards.

*Id.* at 49. Thus, Indians without a certain amount of Indian blood quantum were deemed, essentially, white and without need of state assistance, while those with a high degree of Indian blood were deemed still Indian and, consequently, in need of paternalistic protection.

184. The 1887 General Allotment Act authorized the federal government to divide up communal Indian lands and give them to individual Indians. *See* Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358 (2006)). The alienability of an allotment possessed by a member of an Indian tribe depended on the blood quantum of the Indian who owned it. *See* Spruhan, *supra* note 180, at 40–41 (describing how the Dawes Commission deemed allotment lands alienable or inalienable based on the blood quantum of the land’s owners).

185. *See* Spruhan, *supra* note 180, at 2 (“Classification as an Indian or non-Indian or a member Indian or non-member Indian is central to jurisdictional questions in Indian law, as

As many commentators have argued over the years, incorporating notions of blood quantum—and the corollary notion that biological race exists—into American Indian jurisprudence has the effect of producing law that is antithetical to American Indians' interests.<sup>186</sup> Arguably, however, the most evident demonstration of this “bad law” occurs in the context of determining which groups even qualify as tribes and, thus, are deserving of the benefits that accrue from that status.

The Court's decision in *Montoya v. United States* established the criteria for legal recognition as a “tribe,” finding that a tribe is “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”<sup>187</sup> Thus, according to *Montoya*, a tribe has an element of racial similarity—racial purity.<sup>188</sup> Groups without this requisite racial purity are not tribes, even though they may consider themselves as such.

The unfortunate consequences of building a requirement of racial purity into the definition of tribe were illustrated in the case of the Mashpee Tribe, who sued the Town of Mashpee on Cape Cod, Massachusetts in order to reclaim lands that they had historically inhabited.<sup>189</sup> The Mashpee Tribe claimed that their lands had been taken from them in violation of the Indian Non-Intercourse Act of 1790, which prohibits the sale of Indian lands to non-Indians without federal approval of the transfer.<sup>190</sup> The Town of Mashpee, on the other hand, argued that the Mashpee Tribe was not a tribe under the current legal definition, and consequently, federal approval was not required prior to the transfer of their lands.<sup>191</sup> Thus, it was necessary to determine whether the Mashpee Tribe was a legal tribe.

The court determined it was not, in large part because the Mashpee lacked racial purity.<sup>192</sup> During their long history, the Mashpee had

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both Congress and the Supreme Court demarcate federal, tribal and state authority on Indian lands based on an individual's status.”). Accordingly, there is a wealth of case law dealing with the question of whether a particular defendant possesses a sufficient blood quantum and a sufficient relationship to an Indian tribe to be considered Indian for the purposes of establishing jurisdiction in a criminal matter. See Lindsey Trainor Golden, *Embracing Tribal Sovereignty To Eliminate Criminal Jurisdiction Chaos*, 45 U. MICH. J.L. REFORM 1039, 1062–63 (2012) (discussing cases in which individuals with Indian blood quanta of forty-five percent and four percent were found not to be Indian, and comparing these cases with others in which an individual with an Indian blood quantum of thirteen percent and an individual with an *unknown* Indian blood quantum were considered Indian).

186. See generally Golden, *supra* note 185; Spruhan, *supra* note 180.

187. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

188. Gerald Torres & Kathryn Milun, *Translating Yonnundio By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 634 (describing *Montoya* as “rooted in notions of racial purity”).

189. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

190. *Mashpee Tribe*, 592 F.2d at 579.

191. See *id.* at 581.

192. Pratt has argued that many Indian tribes attempted to protect their status as legally recognized tribes—and, therefore, sovereigns—by prohibiting Indians from marrying black individuals.

intermarried with white colonists, runaway black slaves, and Indians from other tribes.<sup>193</sup> As a consequence, the Mashpee had become a “mixed race” of Indians. That a group of Indians could be composed of individuals who are white, black, Native American, and various intermixtures of those three imagined ordinary races is a possibility that is incongruent to notions of biological race. Further, it was a possibility that was specifically rejected by the definition of tribe announced in *Montoya*, which required that a tribe be composed of individuals of the “same or similar race.”<sup>194</sup> Thus, despite the fact that the Mashpee Tribe considered themselves a tribe irrespective of their racial “intermixture,”<sup>195</sup> the Town of Mashpee successfully defeated the Mashpee’s claim by arguing that they were not an *Indian* tribe protected by the Non-Intercourse Act, as “black intermarriage made the Mashpees’ proper racial identification black and not Indian.”<sup>196</sup> It should be underscored that, if the Court rejected biological race when defining what it means to be an Indian or an Indian tribe, such statuses would depend on how individuals and groups define themselves and would produce more just results.

In sum, American Indian law makes explicit the Court’s otherwise implicit acceptance of racial biology. Title VII case law brings the Court’s commitment to this anachronistic idea into even greater relief.

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The tribes probably understood that the willingness of the federal government and the states to recognize the tribes as “domestic dependent nations” was contingent upon the state and federal governments viewing them as groups of indigenous people—that is, racially Indian people. The federal government recognized the sovereignty of Indian nations because, from its perspective, the tribes were a self-governing race of people who had existed in the Americas before European conquest.

Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 448. Accordingly, many tribes protected their Indianness, which was intimately connected to their status as tribes and sovereign entities, by proscribing their members from marrying “outside of their race.” She writes, “It is plausible that the tribes’ primary goal in enacting anti-black miscegenation laws was to protect the tribe’s racially Indian identity. . . . Racial transformation of the tribe from Indian to Negro would have meant the loss of federal recognition, which entailed losing sovereignty.” *Id.* at 447–48. The Mashpees demonstrate that these tribes were not at all incorrect in their valuation of the relationship between race and tribal status.

193. See Torres & Milun, *supra* note 188, at 638 (describing how the Mashpees had married white colonists, runaway slaves, and members of other Indian tribes).

194. *Montoya v. United States*, 180 U.S. 261, 266 (1901) (“By a ‘tribe’ we understand a body of Indians of the same or a similar race . . .”).

195. See Torres & Milun, *supra* note 188, at 638 (“What was clear to the Mashpee, if not to outside observers, was that this mixing did not dilute their tribal status because they did not define themselves according to racial type, but rather by membership in their community.”); see also Pratt, *supra* note 192, at 444 (“[R]acialization of Indian people further destabilize[s] tribal sovereignty by imposing an identity on indigenous people that they may not have chosen for themselves.”).

196. See Torres & Milun, *supra* note 188, at 650.

*B. Title VII, Language, Accents, and Discrimination on the Basis of National Origin*

There is a robust literature that analyzes claims alleging discrimination on the basis of national origin that are brought by employees who have been subjected to adverse employment actions because of language or accent. Many of the claims involve employees who were fired because they spoke Spanish at work, thus violating an employer's English-only rule.<sup>197</sup> There are also claims alleging that employees or potential employees were subjected to adverse employment actions because they spoke with accents.<sup>198</sup> At present, plaintiffs typically lose these cases. First, employers tend to succeed by arguing that they have legitimate business reasons for prohibiting employees from speaking other languages while at work, or for firing or refusing to hire a plaintiff because of an accent.<sup>199</sup> Second, courts tend to treat both a bilingual individual speaking a non-English language and an individual speaking with an accent as demonstrating "preferences" that are "voluntary." Courts argue that Title

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197. *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993) (upholding employer's English-only policy because bilingual employees were capable of speaking English and Title VII's ban on national origin discrimination is not properly interpreted as actively promoting cultural expression); *Cosme v. Salvation Army*, 284 F. Supp. 2d 229, 239 (D. Mass. 2003) (holding that bilingual plaintiff who could speak English was not a victim of disparate treatment under Title VII on the basis of national origin when her supervisor requested that she refrain from speaking Spanish at work).

198. *See, e.g.*, *Fragante v. City & Cnty. of Honolulu*, 888 F.2d 591, 595–99 (9th Cir. 1989) (denying a Title VII national origin discrimination claim brought by a plaintiff who was not hired for a civil service job because he spoke with a "[h]eavy Filipino" accent, but stating that discrimination solely because of an employee's or potential employee's accent "does establish a prima facie case of national origin discrimination"); *Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (holding that a prima facie case of national origin discrimination can be established by alleging that an employee suffered an adverse employment action because he spoke with a "foreign" accent). *See generally* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329 (1991) (exploring Title VII case law involving accent discrimination).

199. *See, e.g.*, *Fragante*, 888 F.2d at 597–99 (finding no Title VII discrimination based on national origin because the plaintiff's Filipino accent made him hard to understand and his job required clear communication abilities); *Garcia v. Gloor*, 618 F.2d 264, 270–71 (5th Cir. 1980) (finding that defendant's English-only policy did not violate Title VII by discriminating against Mexican American plaintiffs on the basis of national origin because the rule was limited to the time when they were on the clock and fulfilled legitimate business necessities); *Barber v. Lovelace Sandia Health Sys.*, 409 F. Supp. 2d 1313, 1334–35 (D.N.M. 2005) (finding no Title VII national origin discrimination in an employer's English-only policy because it had a legitimate worry that employees were making derogatory remarks in Spanish); *EEOC v. Teleservices Mktg. Corp.*, 405 F. Supp. 2d 724, 729 (E.D. Tex. 2005) (denying summary judgment on the plaintiff's claim of discrimination based on national origin under Title VII after he was fired due to his Sudanese accent because there was a dispute over whether or not this accent made him unable to do his job); *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997) (finding no Title VII discrimination based on national origin against a bilingual plaintiff because the defendant had a legitimate interest in trying to get employees to approach customers primarily in English).

VII is only concerned with protecting plaintiffs from discrimination based on “involuntary,” “immutable” characteristics.<sup>200</sup>

This jurisprudence raises several questions, notably the question of why claims of language and accent discrimination are rarely alleged as a form of racial discrimination, despite Title VII’s prohibition of discrimination on the basis of an individual’s “race, color, religion, sex, or national origin.”<sup>201</sup> Rather, as noted above, plaintiffs usually argue that they were discriminated against on the basis of *national origin*.<sup>202</sup> Moreover, courts,<sup>203</sup> the Equal Employment Opportunity Commission<sup>204</sup> (EEOC), and commentators within the academy<sup>205</sup> tend to accept, without question, that language and

200. See, e.g., *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (“An employer can properly enforce a limited, reasonable and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as ‘a matter of individual preference.’” (quoting *Garcia*, 618 F.2d at 270)); *Garcia*, 618 F.2d at 269 (“Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are . . . beyond the victim’s power to alter . . . . No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics. . . . ‘Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin.’” (emphasis omitted) (quoting *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975))).

201. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006).

202. Carlo A. Pedrioli, *Respecting Language As Part of Ethnicity: Title VII and Language Discrimination at Work*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 97, 100 (2011) (“Federal protection against language-based discrimination by employers frequently, although not always, comes under the national origin category in Title VII.”).

203. See, e.g., *Fragante*, 888 F.2d at 596 (“Accent and national origin are obviously inextricably intertwined in many cases.”).

204. See 29 C.F.R. § 1606.7(a) (2012) (“The primary language of an individual is often an essential *national origin* characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of *national origin*. It may also create an atmosphere of inferiority, isolation and intimidation based on *national origin* which could result in a discriminatory working environment.” (emphasis added)). Notably, courts have refused to accept the EEOC’s interpretation of Title VII. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (“Nothing in the plain language of [Title VII] supports [the] EEOC’s English-only rule Guideline.”).

205. Professor Rich’s insightful piece on this area of Title VII case law contains an interesting moment where she wrestles with the fact that language and accent discrimination cases tend to allege discrimination on the basis of national origin and not race. She writes:

For the purposes of this discussion, I recognize four races: blacks, whites, Latinos, and Asians. I recognize, however, that many ethnic groups cannot be assigned consistently to any of the four race categories. For example, Filipinos are recognized variously as Latino or Asian. Samoans also defy easy categorization. My decision to treat Latinos as a race may raise some concerns, particularly since Title VII claims brought by members of this “race” typically frame their claims as national origin claims, each concerning a specific Latin ethnicity. . . . While recognizing these problems, I characterize Latinos as a racial group because much of their experience of discrimination in the United States is premised on stigmatic associations broadly attributed to a Latin identity, real or imagined.

See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1146 n.31 (2004). Professor Rich arrives at the same conclusion as this Article: Latinos should be understood as a racial group because, when commitments to racial biology have been abandoned, one clearly sees that

accent discrimination, if cognizable under Title VII, is discrimination based on national origin and not race.<sup>206</sup>

But what makes language and accent inherent characteristics of national origin but not of race?<sup>207</sup> In truth, plaintiffs who are fired because they spoke Spanish at work or spoke with a Spanish accent are not terminated because they are from Mexico, or Cuba, or Spain; rather, they are fired because they spoke Spanish at work or spoke with a Spanish accent. The offending characteristic or behavior is speaking a non-English language or speaking English with an accent, not the nation of origin.<sup>208</sup> In fact, it is unclear that plaintiffs even have to allege that they were born in another country—that is, that they have a national origin other than the United States—in order to assert a claim of discrimination on the basis of national origin.<sup>209</sup> Indeed, many plaintiffs who are victims of language or accent

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they constitute a race (when race is understood to index essentialized difference). Professor Rich arrives at this conclusion, however, within a paradigm that appears to be modeled off of racial biology. Namely, she believes that there can only be a handful of races. Moreover, whites, blacks, and Asians are clearly races, while Latinos are only controversially so.

206. Professor Rich theorizes that the reason why plaintiffs seeking relief for discrimination on the basis of language and accent tend to claim that the relevant characteristic is their national origin, and not their race, is because these plaintiffs tend to belong to ethnic groups that have retained a distinct identity “independent of racial constructs.” See *id.* at 1204 n.265. She concludes that “the main distinction between national origin cases and race cases is that the plaintiff in the national origin case can offer evidence which shows a tighter fit between a stereotype and her ethnic identity.” *Id.* Thus, Rich can be read to argue that race discrimination claims involve a general “otherness,” while national origin discrimination claims involve a specific “otherness.” But, this analysis just does not seem to be supported by the case law. When plaintiffs allege national origin discrimination because they experienced an adverse employment action due to speaking Spanish or accented English, they do not claim that the Spanish they spoke was of a variety unique to a specific nation; neither do they claim that their accent clearly indexed that they belonged to a distinct country. Instead, their claims tend to allege that they experienced discrimination because, in speaking a language other than English or in speaking English in a way that indicated that it was not their first language, they performed a general racial/ethnic otherness, i.e. not “white,” not “American.”

207. Notably, lower courts, when holding against plaintiffs claiming national origin discrimination after experiencing discrimination due to speaking a non-English language at work, have *failed to find* that language is a characteristic that inheres in national origin. See, e.g., *Garcia v. Gloor*, 618 F.2d 264, 268–69 (5th Cir. 1980) (“Neither the statute nor common understanding equates national origin with the language that one chooses to speak. . . . National origin must not be confused with ethnic or sociocultural traits . . .”).

208. See *Perea*, *supra* note 106, at 572–73 (“Most of the discrimination we currently label ‘national origin’ discrimination is actually discrimination because of ethnic characteristics. . . . To the extent that the current constitutional prohibition focuses on national origin, it misses the problem: discrimination because of the ethnic characteristics of certain Americans.”).

209. See *Pedrioli*, *supra* note 202, at 108–09 (noting that a plaintiff claiming that he was discriminated against on the basis of national origin because he spoke a language other than English at work may have been born in the United States, asserting that “[c]laiming that one suffered discrimination because he or she was born in the United States does not make sense,” and concluding that the claim is only appropriate “when the employee was born in another country that does not have English as one of its major languages”).

discrimination were born in the United States.<sup>210</sup> Professor Perea observes the discursive problem created by a doctrine that forces persons who are born in the United States to allege that they were discriminated against on the basis of their national origin in order to be protected from what is, essentially, racial discrimination. He notes, “Such individuals must deny their actual national origin, the United States . . . . [E]thnically different Americans must claim a treacherous fiction, that they belong to another country, in order to fit a . . . recognized category of claims.”<sup>211</sup>

This Article suggests that the reason why language and accent fail to be understood as racial characteristics and are, instead, (somewhat illogically) construed as characteristics indexing a national origin, is because the case law is built on the assumption that race is biologically based. Because biological race is the racial paradigm that lower courts<sup>212</sup> embrace in these cases, and because no one seriously argues (anymore)<sup>213</sup> that one’s language is rooted in one’s biology, then courts<sup>214</sup> do not cognize language and accent discrimination as racial discrimination.

The accuracy of this analysis of language and accent discrimination cases is made apparent when one considers Title VII cases involving discrimination on the basis of a plaintiff’s hairstyle. These hair-related cases, typically involving employers’ grooming codes, invariably are understood to concern questions of race and not national origin.<sup>215</sup> It is

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210. See Deborah F. Buckman, Annotation, *Requirement That Employees Speak English in Workplace As Violative of Federal Constitutional and Statutory Law*, 24 A.L.R. FED. 2d 587, 603 (2008) (discussing a language discrimination case where “[t]he plaintiffs were two American-born bilingual medical assistants” subjected to an English-only policy).

211. See Perea, *supra* note 106, at 578.

212. The Supreme Court has never heard a language or accent discrimination case. See Pedrioli, *supra* note 202, at 103 (noting the lack of Court precedent on language discrimination and the resultant necessity for the lower courts to develop case law in this area).

213. See, e.g., *United States v. Thind*, 261 U.S. 204, 206 (1923) (noting in the syllabus to the opinion the defense counsel’s argument that “[i]t has been pointed out by many scholars that identity of language does not necessarily prove identity of blood, for ordinarily anyone can learn a foreign language.”); see also Braman, *supra* note 20, at 1411 (noting the idea in older anthropology that there was “organic unity” among race, language, and culture).

214. The EEOC, although disagreeing with lower courts inasmuch as it interprets Title VII to protect plaintiffs from accent discrimination, agrees with lower courts inasmuch as it considers accents to be a matter of national origin and not race. See Matsuda, *supra* note 198, at 1348.

215. Like plaintiffs asserting discrimination on the basis of language or accent, plaintiffs asserting discrimination on the basis of hairstyle tend to lose their claims. Paradigmatic of these cases is *Rogers v. American Airlines*, involving a black woman plaintiff who claimed racial discrimination under Title VII after her employer informed her that the cornrows in which she wore her hair violated the grooming policy. 527 F. Supp. 229 (S.D.N.Y. 1981). The court held in the employer’s favor, noting that the grooming code did not “regulate on the basis of any immutable characteristic of the employees involved.” *Id.* at 231. Arguing that Title VII allowed discrimination on the basis of “mutable” characteristics (like the braids in which one wears one’s hair) while prohibiting discrimination on the basis of “immutable” characteristics (like the texture of one’s hair), the Southern District of New York noted that a grooming policy that disallowed black employees from wearing their hair in an “Afro/bush style” may be illegal under Title VII. *Id.* at 232. The court explained that

easy to understand why. First, plaintiffs bringing these cases tend to be black, and the hairstyles that are the subjects of the disputes typically tend to be worn by other black persons.<sup>216</sup> Because black people historically have been thought to comprise a racial category, it is not difficult for courts to cognize discrimination against them—or against a characteristic that is asserted to be unique to them—as racial discrimination.

Second, hair (and its texture) has often been thought to be one of the primary indicators of race, along with skin color, nose width, lip size, and eye shape.<sup>217</sup> According to racial typologies, members of the black race have kinky or tightly curled hair; members of the Asian (or Malay) race have straight, black hair; and members of the white race have “flowing” hair.<sup>218</sup> Moreover, it was thought that the biological distinctiveness of the racial groups produced the distinctiveness in hair textures, colors, and characteristics.<sup>219</sup> Thus, it should come as no surprise that courts,

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this “would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.” *Id.* Unlike an Afro, cornrows and braids are “not the product of natural hair growth but of artifice. An all-braided hair style is an easily changed characteristic.” *Id.* (internal quotation marks omitted).

Where courts in language and accent discrimination cases tend to hold that the “voluntary” nature of a language or accent “preference” justifies withholding Title VII protection, courts in hairstyle discrimination cases tend to hold that the “mutability” of a chosen hairstyle justifies withholding Title VII protection. *See Rich, supra* note 205, at 1225–26.

216. *See, e.g., Booth v. Maryland*, 327 F.3d 377, 383 (4th Cir. 2003) (upholding a grooming policy that banned the plaintiff’s dreadlocks against his Title VII race discrimination claim because he failed to show the policy applied unequally based on race); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at \*6 (M.D. Ga. Apr. 25, 2008) (finding no violation of Title VII due to racial discrimination in a policy that banned “Afrocentric” hairstyles because the plaintiff’s choice to wear cornrow braids was not an immutable characteristic); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 264–65 (S.D.N.Y. 2002) (upholding a policy banning “unconventional hairstyles” that led to the firing of an African American plaintiff who wore his hair in dreadlocks because he failed to prove the policy was racially motivated, a requirement for Title VII race discrimination claims); *McPherson v. Shoney’s Colonial, Inc.*, No. 95-0069-C, 1996 WL 684437, at \*3 (W.D. Va. Nov. 21, 1996) (rejecting an African American plaintiff’s claim of Title VII race discrimination after her employer informed her she could no longer wear her hair in a braided style because she failed to show the employer acted with deliberate intention of having her quit); *Rogers*, 527 F. Supp. at 232 (finding no Title VII racial discrimination against an African American plaintiff in a policy prohibiting all braided hairstyles because braids are not “worn exclusively or even predominantly” by African Americans).

217. Devin D. Collier, *Don’t Get It Twisted: Why Employer Hairstyle Prohibitions Are Racially Discriminatory*, 9 HASTINGS RACE & POVERTY L.J. 33, 49–50 (2012) (describing how skin color is typically indicative of race, but when it is not definitive, a social “hair test” can be applied to visually gauge a person’s race).

218. *See JORDAN, supra* note 26, at 221 (citing Linnaeus’s description of the hair types possessed by various races).

219. In an instructive article, Professor Onwuachi-Willig argues that courts ought to recognize as racial discrimination employers’ penalizing black employees for wearing their hair in styles that employers believe violate their grooming codes. *See generally* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010). While conceding that race is socially constructed, she nevertheless makes an argument that is based on the biological distinctiveness of many black people’s tightly curled/kinky hair and the amenability of that texture to certain hairstyles for



proceeding from the baseline assumption that biological race exists, and that hair is an indicator of the biological race to which an individual belongs, would unquestioningly assume that discrimination on the basis of hairstyle is a question of race.

It does not necessarily follow, however, that *only* discrimination on the basis of biological characteristics is likely to be understood as racial discrimination. It is likely that courts could understand nonbiological characteristics as racial characteristics. For example, if a black person is discriminated against because he listens to hip hop music, a court may interpret that discrimination as *racial* discrimination because hip hop is associated with black people—although listening to hip hop is clearly not a biological characteristic. Because of courts' underlying commitment to racial biology, however, this discrimination would be understood as racial discrimination because it was practiced against a black person, an individual who falls neatly within schematizations of biological race. Importantly, the thrust of this Article is to underscore that if, for example, a Dominican person is discriminated against because he listens to *bachata* music, a court will likely understand this as discrimination on the basis of *national origin*, although the Dominican victim might have been born and bred in the United States. Courts would be led to conclude that this discrimination is national origin discrimination because Dominicans do not comfortably fit within schemas of biological race. Scholarship that has analyzed whether Title VII should protect persons who speak “black English” from adverse employment actions demonstrates that this is the correct analysis of the issue. This form of *language* discrimination is invariably understood as racial discrimination—likely because it concerns discrimination against a characteristic that is construed as unique to black people.<sup>220</sup>

Finally, it is also possible that the Title VII case law does not reflect the courts' understanding of race. Instead, it might be said that the case law reflects the racial worldview of the common discriminator. In other words, in the dialectical relationship between law and culture, perhaps it is not the law that has originated this understanding of race—instead, it might be said that the law is merely reflecting a culture that assumes the truth of biological race. That is, because the common discriminator believes that black people comprise a race, then discrimination against black people is racial discrimination under Title VII. Similarly, because the common discriminator believes that, for example, a person is Mexican even though

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which black female plaintiffs have been penalized, such as cornrows, braids, locks, and twists. *See id.* at 1103 (“What antidiscrimination law needs is for lawyers and courts to make explicit this understanding of race as a social construct and extend such racialized analysis for the protection of the Afro hairstyle—which is based on biology—to braids, locks, and twists for black women.”).

220. *See, e.g.,* Jill Gaubing, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 637 (1998) (“[E]mployers who reject Black English speakers because of their speech patterns are in fact violating Title VII’s prohibition against race discrimination.”).

he may have been born in the United States and may have never even been to Mexico, then discrimination against that person is discrimination on the basis of national origin under Title VII. Consequently, an analogy may be drawn between this context and that of *Thind* where the Court held that “white person” within the Naturalization Act should be defined in accordance with ordinary conceptions of race.<sup>221</sup> To the extent that the law reflects the racial assumptions possessed by the common discriminator, then the law reflects the belief that biological race exists. This is because the common discriminator likely has not been disabused of the notion that racial biology is real.

### 1. Language As a Racial Characteristic: *Hernandez v. New York*

When the Court has addressed the issue of discrimination on the basis of language outside of the Title VII context, it has interpreted it as a racial characteristic. Consider *Hernandez v. New York*,<sup>222</sup> an equal protection case concerning a prosecutor’s use of peremptory challenges to strike Latino persons from a jury.<sup>223</sup> The prosecutor claimed that he did this because an interpreter was going to translate the testimony of Spanish-speaking witnesses during the trial, and the prosecutor was afraid that Spanish-speaking jurors would be unable to ignore the witnesses’ direct speech and accept, as final, the translator’s interpretation of the testimony.<sup>224</sup> The Court held that the prosecutor had offered a “race-neutral” explanation for striking the Latino jurors, thus denying the equal protection challenge.<sup>225</sup>

The Court, consistent with its approach throughout much of its jurisprudence, appears to use race as a legal term of art, allowing race to denote groups of individuals united not by biology, but rather because of social, political, cultural, and historical reasons—which the Court uses the

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221. See *supra* notes 94, 96 and accompanying text.

222. 500 U.S. 352 (1991).

223. *Id.* at 355–56.

224. *Id.* at 356–57. Jurors had been questioned as to whether they could accept the interpreter’s translation of the Spanish testimony, and they had hesitated before offering an answer in the affirmative; after the defense attorney raised a *Batson* objection to the challenges, the prosecutor explained,

I didn’t feel, when I asked them whether or not they could accept the interpreter’s translation of it, I didn’t feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

*Id.*

225. *Id.* at 361. (“The prosecutor here offered a race-neutral basis for these peremptory strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals.”). The Court admitted that striking jurors because they spoke Spanish would have a disparate impact on Latinos; however, discriminatory intent, not simply disparate impact, has to be proven in order to sustain an equal protection challenge. See *id.* at 360 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976)).

term “ethnicity” to encompass.<sup>226</sup> This is illustrated by the Court’s framing of the question before it:

Petitioner Dionisio Hernandez asks us to review the New York state courts’ rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity. . . . We must determine whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors . . . .<sup>227</sup>

The petitioner claimed that the jurors were struck from the jury because of their *ethnicity*; the Court queried whether a *race*-neutral reason had been given. In essence, the Court appears to use “race” and “ethnicity” interchangeably.

Moreover, the Court clearly understands that language may be a racial characteristic in some contexts:

In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.<sup>228</sup>

The Court appears to be aware that there is a close relationship between language and race. The Court knows that in some contexts, a class will consist mostly, or entirely, of persons of a certain race if the class has been defined by its members’ relationship to a language. Thus, in Atlanta, Georgia, for example, a class will consist mostly of Latino persons if “Spanish-speakers” is the characteristic that defines the group. The same

226. Professor Perea makes this observation with respect to the Court’s jurisprudence generally, but he argues that using “race” to denote “ethnicity” is wrong and confusing, as he considers the terms distinct. *See* Perea, *supra* note 106, at 572 (“Although the Court has recently referred to a constitutional prohibition against discrimination because of ethnicity or language, the Court seems to be using the term ‘ethnicity’ as part of its unclear conception of ‘race.’ The Court’s language reveals and creates confusion and obscures discrimination.”).

227. *Hernandez*, 500 U.S. at 355. Professor Oquendo takes note of this language and accuses the Court of confusing “race” and “ethnicity.” He writes,

If the Court is considering potential discrimination because of ethnicity, as the plurality appears to recognize, then it should be determining whether the prosecutor’s reason was ‘ethnicity-neutral,’ not ‘race-neutral.’ This distinction is more than a semantic difference because many reasons that can be deemed ‘race-neutral’—meaning ‘not race’—such as bilingualism, accent, or Latino surname, may not be ‘ethnicity-neutral.’

Oquendo, *supra* note 65, at 596. However, the tension that Professor Oquendo perceives in the Court’s usage of “ethnicity” and “race” neutrality is resolved when one understands the Court as using “race” as a legal term of art that indexes both “race” and “ethnicity.” Moreover, it reveals Professor Oquendo’s own commitment to racial biology, a commitment that allows him to recognize race in only those characteristics of a person that bear on their biological composition.

228. *Hernandez*, 500 U.S. at 371.

would not be true in other places—like Miami, Florida, or New York City, for example, where many non-Latino persons speak Spanish. In the Atlanta example, language proficiency would have acted as a “surrogate of race,” allowing the person that is defining the class to speak about and manipulate race without mentioning it explicitly.

The Court’s reference to skin color, however, deserves a little more exploration. Essentially, the Court states that, like language proficiency, skin color may be treated as a “surrogate for race.”<sup>229</sup> At first blush, this is a peculiar argument, if only because skin color has been widely thought to be one of the defining characteristics of racial groups: black persons have dark skin, white persons have light skin, and Asians and Native Americans have skin colors somewhere in between. Indeed, in the past, the races were referenced by skin color: black, white, red, and yellow.<sup>230</sup> Yet a brief glance across a racially diverse classroom, for example, reveals this to be a gross simplification of the truth: many black persons have skin that is fairer than many white persons, while the skin colors of Asian and Native American persons fall at all points along the spectrum.<sup>231</sup> Thus, perhaps the Court’s statement is not peculiar at all. The color of a person’s skin does not determine the racial group to which she has been ascribed or with which she identifies; it operates alongside other characteristics (i.e., parents’ racial identification/ascription, socioeconomic class, the country of birth, etc.) in defining a person’s racial status. Therefore, only in certain contexts will a class consist mostly or entirely of people of one race if the class has been defined by its members’ skin color. In effect, the Court notes that skin color is not race; it could, however, be a proxy for race.

It is worth leaving open the possibility that the Court is calling upon biological race here, however. That is, it would not be unreasonable to wonder whether the Court, consistent with its jurisprudence generally, is proceeding from the assumption that biological race exists. Thus, skin color can only be a surrogate for race because the color of one’s skin does not necessarily reveal the racial truths that are contained in the genes. The racial status that a person inhabits by virtue of her skin color (operating together with the racial identification/ascription of her parents, her class, her

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229. *Id.*

230. For example, the lyrics to the popular children’s song “Jesus Loves the Little Children” include:

Jesus loves the little children,  
All the children of the world.  
Red and yellow, black and white,  
All are precious in His sight,  
Jesus loves the little children of the world.

C. H. Wolston & George F. Root, *Jesus Loves the Little Children*, in *THE LIBRARY OF HYMNS* 211 (Wayne Yankie ed., 2006).

231. See Am. Anthropological Ass’n, *The Human Spectrum: Where Do You Draw the Line?*, RACE: ARE WE SO DIFFERENT?, <http://www.understandingrace.org/humvar/spectrum.html> (last visited Sept. 20, 2013).

country of birth, etc.) can only be a “surrogate” for her race—that is, the “real” race that is revealed when her biology is investigated.

Finally, it deserves mention that the Court has to divorce Spanish-speaking ability from being Latino in order to find that the prosecutor gave a “race-neutral” reason for striking Latino jurors. That is, if speaking Spanish were considered part and parcel of being Latino, then striking a juror because he speaks Spanish would be equivalent to striking a juror because he is Latino. The Court rejects this simultaneity, and rightly so: one can be Latino without knowing how to speak Spanish.<sup>232</sup> The logic of the approach is inconsistent, however, with the logic that courts use with language discrimination cases in the Title VII context. Courts in these cases, framed as questions of national origin discrimination, characterize speaking a language as part and parcel of “originating” in another nation. Thus, firing an employee because she speaks Spanish at work is constructed as equivalent to firing the employee because she is from a Spanish-speaking country. There is, therefore, a strange inconsistency between lower courts’ approach to language ability in the Title VII national origin discrimination context and the Court’s approach to language ability in *Hernandez v. New York*.

## 2. Language and Accents Are Racial Characteristics, of Course

Using the definition of race that this Article offers,<sup>233</sup> one can easily see that language and accent discrimination are racial discrimination without having to rely on some definition of race as ethnicity. When race is acknowledged as an entirely pragmatic entity that indexes essentialized difference while having no actual relationship to biology, then one can appreciate language as a racial trait. If Spanish-speaking groups (i.e., Mexicans, Puerto Ricans, Latinos) are as much races as are white and black people, then differences in language are just as racial as differences in skin color, nose width, lip size, and hair texture. It bears noting that the incomprehension of the words that a person speaks—indeed, failing to recognize *as words* that which a person speaks, and hearing only a rhythmical cadence—may be thought to demonstrate the radical difference between the hearer and the speaker.<sup>234</sup> Language difference may make it

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232. See Cameron, *supra* note 76, at 1364 (“But Latinos, whether fluent Spanish speakers or not, all have some common connection with the [Spanish] language. If we do not speak it ourselves, then it is the language of our ancestors.” (internal quotations omitted)); see also Tracy López, *Non-Spanish Fluent Latinas: “Don’t Judge Us,”* NEW LATINA (March 9, 2012), <http://newlatina.net/non-fluent-latinas-dont-judge-us/>; Carolina Moreno, *Latinos Not Speaking Spanish, Does That Makes Someone A “Fake” Hispanic?*, HUFFINGTON POST (Sept. 17, 2012, 2:21 PM), [http://www.huffingtonpost.com/2012/09/17/latinos-not-speaking-spanish\\_n\\_1890501.html](http://www.huffingtonpost.com/2012/09/17/latinos-not-speaking-spanish_n_1890501.html); Raul A. Reyes, *Opinion: Not Speaking Spanish Doesn’t Make You Less Latino*, NBCLATINO (Sept. 10, 2012, 5:00 AM), <http://nbclatino.com/2012/09/10/opinion-not-speaking-spanish-doesnt-make-you-less-latino/>.

233. See *supra* Part I.B.

234. Cf. *Hernandez*, 500 U.S. at 371 (“Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response

impossible (or, at least, extremely difficult) to reconcile other apparent differences between two persons. Moreover, there should be no doubt that groups that speak different languages are essentialized because of this difference. Speaking a non-English language identifies a person with a group—a group that is heterogeneous, but whose heterogeneity is denied by its construction as a homogeneous group, i.e., Latino, Mexican, Dominican.

Finally, Spanish, or any non-English, proficiency does not identify a person with any particular nation; rather, within a particular racial logic, it disidentifies that person from the United States.<sup>235</sup> Moreover, when (United States) “Americanness” and racialized whiteness are understood as simultaneous,<sup>236</sup> then a disidentification from Americanness is a disidentification from whiteness.<sup>237</sup> Accordingly, discriminating against a

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from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility.”).

235. Philip C. Aka, Lucinda M. Deason, & Augustine Hammond, *Measuring the Impact of Political Ideology on the Adoption of English-Only Laws in the United States*, 13 SCHOLAR 1, 14 (2010) (attributing English-only laws to xenophobia and noting that such laws are more likely to be passed in states with high populations of foreign-born residents or residents whose first language is not English). Indeed, if one only scratches the surface of English-only movements, one can see the racism undergirding them. See Matsuda, *supra* note 198, at 1397 (“The recent push for English-only laws, and the attack on bilingual education, may represent new outlets for racial anxiety now that many traditional outlets are denied. The angry insistence that ‘they’ should speak English serves as a proxy for a whole range of fears displaced by the social opprobrium directed at explicit racism.”).

236. See BRIDGES, *supra* note 69, at 219–20 (discussing the relationship between “Americanness” and racialized whiteness); NICHOLAS DE GENOVA & ANA Y. RAMOS-ZAYAS, LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP 78 (2003) (“[N]either for African Americans nor for Puerto Ricans does birthright U.S. citizenship secure the status of ‘American’-ness, which constitutes a national identity that is understood, in itself, to be intrinsically racialized—as White.”). Professor Matsuda discusses a *Wall Street Journal* article exploring “accent reduction schools,” which market themselves as essential to the success of persons “whose careers have stalled because of thick accents, even though their grammar and vocabulary skills are good.” Matsuda, *supra* note 198, at 1365 n.138. She quotes the article, which contends that “[s]ometimes an American inflection is necessary not because of clarity, but because listeners tune out what they don’t like” and quotes a communications consultant who argues that “‘Americans have difficulty listening’ to Asian and Latin accents.” *Id.* She observes, “Note that in these statements, ‘American’ means white.” *Id.*

W.E.B. Du Bois eloquently described the simultaneity of Americanness and racialized whiteness in *The Souls of Black Folk*. In his description of the double consciousness, he argues that black people in the United States are always aware of their “two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.” W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 11 (Henry Louis Gates, Jr. & Terri Hume Oliver eds., W.W. Norton & Co. 1999) (1903). That the “Negro” identification of the “American Negro” is at war with the “American” portion of her identification is due to the fact that “American” and “Americanness” are associated with racialized whiteness. Thus, the “American Negro,” whose U.S. citizenship is her birthright, is produced as the unity of antithetical poles—that is, “Americanness,” and a “Blackness” that negates it. In light of the simultaneity of “Americanness” and whiteness, “American Negro” reveals itself to be an oxymoron, according to DuBois.

237. However, Americanness does not constitute the entire universe of whiteness; there are other universes of whiteness that exist simultaneously with Americanness. For example, being European is certainly an avenue for accessing whiteness. Consequently, Europeans’

person because there is some distance between her and a white racial status—that is, because she is not white—is racial discrimination. A rejection of racial biology allows one to see this argument.

Similarly, accents are as much a racial trait as language. Discussions of race and racial discrimination inevitably erupt from discussions of accents and accent discrimination, tending to evidence that the concepts share a similar logic. Consider Matsuda's discussion of *Kahakua v. Friday*.<sup>238</sup> The case involved a plaintiff who sued the National Weather Service under Title VII, claiming that, because he spoke with a Hawaiian accent, he was not hired as a meteorologist to issue weather reports on the radio.<sup>239</sup> Matsuda writes that, after losing the job to a less-qualified candidate who did not speak with an accent, Kahakua thought to sue because he sensed that he had been “passed over *because he didn't sound white*.”<sup>240</sup> Note that Matsuda describes Kahakua's accent in relationship to whiteness—clearly a racial term.<sup>241</sup>

Just as speaking a language other than English disidentifies a person from Americanness, and, ultimately, from racialized whiteness,<sup>242</sup> speaking with a non-English accent performs the same work and, as such, racializes a person as nonwhite. Thus, accent discrimination is understood properly as racial discrimination. Nevertheless, discrimination because an employee or potential employee spoke with an accent is understood by courts as national origin discrimination under Title VII. Again, this is due to courts', and scholars', continuing assumption that race has some relationship to biology. Because a person's accent clearly has no relationship to his biological constitution, most refuse to appreciate it as a racial characteristic.<sup>243</sup>

In summary, this Article agrees with other scholars who have argued that Latinos generally, and subsets of Latinos (i.e., Mexicans), ought to be understood as “races,” both inside and outside of law.<sup>244</sup> However, this Article diverges from the literature by refusing to argue that a shared

disidentification from Americanness does not constitute a disidentification from whiteness, as they have access to the whiteness that comes with being European.

238. 876 F.2d 896 (9th Cir. 1989).

239. *Id.*

240. Matsuda, *supra* note 198, at 1345 (emphasis added).

241. Nevertheless, the thrust of her argument is that he should have succeeded in his suit because accent discrimination ought to be recognized as national origin discrimination. *See id.* at 1349 (“[D]iscrimination against accent is the functional equivalent of discrimination against foreign origin.”).

242. *See supra* notes 235–37 and accompanying text.

243. Indeed, the district court that first heard the *Kahakua* case appeared to accept the logic that race concerns biology and, because one's accent has no relationship to one's biology, accent discrimination is not racial discrimination. *See Kahakua v. Hallgren*, No. 86-0434, slip op. at 23 (D. Haw. 1987) (“[T]here is no race or *physiological* reason why Kahakua could not have used standard English pronunciations.” (emphasis added)), *aff'd sub nom. Kahakua v. Friday*, 876 F.2d 896 (9th Cir. 1989). That race is paired with physiology, a branch of biology concerning the bodily functions of living organisms, suggests that the District of Hawaii believes that race has some relationship to biology.

244. *See, e.g., Oquendo, supra* note 65, at 94 (arguing that Latino/as ought to be considered a race).

“culture”<sup>245</sup> or shared biology<sup>246</sup> makes a race out of Latinos. Instead, Latinos are a racial group because they are imagined as such—and are treated as such. When they stop being imagined and treated as a race, then they will cease to be a race.<sup>247</sup> This is the pragmatism of race—shifting, serving needs, disappearing, and being reconstituted in different forms.<sup>248</sup>

### 3. Making a Difference: The Salutary Consequences of Reconceptualizing Language and Accent As Racial Characteristics Under Title VII

Understanding language and accent as racial characteristics is useful not simply because it accurately reflects what race is. This is because race is not a concept that indexes biologically distinct sets of homo sapiens, but rather is a tool that is deployed to construct essentialized, mutually exclusive groups of people. Conceptualizing language and accent as racial characteristics is also useful because it may make a difference for plaintiffs suing employers under Title VII. As noted above, plaintiffs generally lose when they challenge employer practices that penalize them for speaking with an accent or speaking a language other than English in the workplace.<sup>249</sup> It is possible that a reconceptualization of language and accent as racial characteristics, however, could produce different results in litigation.

With respect to accent discrimination cases, plaintiffs usually bring these cases under the disparate treatment prong of Title VII after an employer, due to the plaintiff’s accent, refused to hire or promote them.<sup>250</sup> The

245. See, e.g., *id.* at 101 (arguing that, while there are “infinite gradations of color” among Puerto Ricans, “there is a single Afro-Antillean ethos”).

246. See, e.g., *id.* at 105 (arguing that Latinos “physiognomically resemble each other” and, therefore, could be understood as a race). That Professor Oquendo understands “physiognomy” as biology is demonstrated when he talks about Mexicans as being a composite of the “physiognomic” influences supplied by Europe, Africa, and indigenous peoples. See *id.* at 100 (noting that “the main physiognomic influences” among Mexicans “are not even African and European” but rather the “indigenous peoples who populated the southern tip and southwest region of North America”).

247. Cf. Haney López, *supra* note 66, at 1163 (referencing *Hernandez v. Texas* and observing that the Court’s “opinion offered a sophisticated insight into the nature of race: whether a racial group exists is always a local question to be answered in terms of community attitudes”).

248. See generally Omi & Winant, *supra* note 65, at 4 (describing the theory of racial formation as one that “emphasizes the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, . . . and the irreducible political aspect of racial dynamics”).

249. See *supra* note 199 and accompanying text.

250. See, e.g., *Fragante v. Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989) (alleging disparate treatment after plaintiff was not hired due to his accent); *Kahakua v. Hallgren*, No. 86-0434, slip op. at 23 (D. Haw. 1987) (same), *aff’d sub nom. Kahakua v. Friday*, 876 F.2d 896 (9th Cir. 1989).

There are two possible avenues that plaintiffs may pursue in Title VII cases: disparate treatment and disparate impact. See *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009) (explaining that while Title VII has always prohibited disparate treatment on the basis of protected statuses, the disparate impact prohibition came later). Disparate treatment occurs when an employer has “treated [a] particular person less favorably than others.”



justification that employers usually offer for the adverse employment action is that a plaintiff's accent made it difficult or impossible for him to do the job.<sup>251</sup> The argument is that, essentially, the accent rendered them unqualified.<sup>252</sup> A serious commitment to the notion that race is a social construction with no biological moorings, however, allows for the recognition that race is much broader than what the Title VII case law presently recognizes it to be. At this time, the Title VII case law understands race to be a complex of immutable, biologically based characteristics.<sup>253</sup> Inasmuch as a person's accent is not thought to be immutable or based in biology, it is not considered a racial characteristic.<sup>254</sup> Yet, the lesson of history is that race is actually a complex of constantly shifting traits that are used to identify a group that needs to be distinguished from others.<sup>255</sup> Sometimes the traits that indicate race are immutable—like skin color, hair texture, and the width of one's nose. At other times, the traits that indicate race are mutable—like religion, style of dress, musical preferences, accent, or language. Understood in this way, accent *is* a racial characteristic.

Thus, when an employer refuses to promote or hire a plaintiff because she speaks with an accent associated with a group that society, history, and pragmatism have distinguished from others, that employer has treated the plaintiff differently because of her race. Differently stated: *if accents are racial characteristics, then failing to hire someone because she speaks with an accent is equivalent to failing to hire her because she has dark skin, kinky hair, or a wide nose.* This is a textbook case of disparate treatment

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Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988). Plaintiffs in these cases must prove that the employer acted with discriminatory intent. *Id.* at 986. In contrast, plaintiffs do not have to prove discriminatory intent when proceeding under the disparate impact prong, but only have to demonstrate that a practice disproportionately affects a protected group and that there is no business necessity for the practice. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

251. *See Fragante*, 888 F.2d at 596–97 (“An adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance. There is nothing improper about an employer making an *honest* assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance.”).

252. *See id.* at 598 (affirming the lower court's finding that the plaintiff's accent made it difficult for him to communicate effectively, and finding that an inability to communicate effectively is a “valid ground for finding a job applicant not qualified”).

253. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1991) (upholding the defendant's policy prohibiting the wearing of braided hairstyles against a Title VII challenge because the policy “does not regulate on the basis of any immutable characteristic of the employees involved”); *see also* Rich, *supra* note 205, at 1228 (noting that in Title VII cases, courts frequently assume that “protected traits are only those that one possesses by accident of birth . . . and cannot change,” thereby making immutability their focus).

254. Matsuda, *supra* note 198, at 1400–01 (noting that accents may be mutable, but also arguing that an alternative interpretation of Title VII—one that courts have not embraced—would make the statute capable of striking down rules that burden employees for having even mutable characteristics like accents).

255. *See supra* Part I.B.

under Title VII.<sup>256</sup> Moreover, the employer cannot argue that it is a bona fide occupational qualification (BFOQ) of the job to belong to a certain race (i.e., to speak without a racially salient accent) because, under Title VII, race may never be a BFOQ.<sup>257</sup>

An employer who refuses to promote or hire an individual because her accent *truly* impedes job performance is not refusing to promote an individual because she speaks with an accent that is associated with a group that society, history, and pragmatism have distinguished from others. Instead, the employer's action has everything to do with the plaintiff's inability to do the job effectively and nothing to do at all with the plaintiff's race. Thus, there is no need for the employer to argue (unsuccessfully) that belonging to a certain race (i.e., speaking without an accent) is a BFOQ because, in this instance, there is no action on the basis of race.

Of course, in many cases, it will be difficult for factfinders to determine the basis of an employer's actions; that is, it will be unclear whether an employer has refused to hire or promote a plaintiff because his accent identifies him with a racialized group or because his accent impeded job performance. It will be easier to prove that the employer discriminated on the basis of race where it is clear that the plaintiff's accent did not make his speech difficult to understand,<sup>258</sup> as well as where the job does not require customers or coworkers to understand the employee's speech. It will also be easier to prove unlawful discrimination where an employer has hired many other employees who speak with accents, but their accents identify them with a more racially privileged group than the plaintiff's.<sup>259</sup> Nonetheless, even in the hard cases, factfinders should be empowered to find that accent discrimination is racial discrimination—a finding that the Title VII jurisprudence currently precludes.

The same analytic applies to language discrimination cases, although it may be more difficult for plaintiffs to win in this context. Plaintiffs usually bring language discrimination cases under the disparate impact prong of

256. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”).

257. See 42 U.S.C. § 2000e-2(e)(1) (2006) (Title VII’s “bona fide occupational qualification” exception applies to all Title VII bases except race and color).

258. For example, Professor Matsuda notes that during the *Fragante v. City and County of Honolulu* trial,

Mr. Fragante testified for two days, under the stress of both direct and cross-examination. The judge and the examiners spoke to Fragante in English and understood his answers. A court reporter understood and took down his words verbatim. In the functional context of the trial, everyone understood Manuel Fragante’s speech. Yet the defendant’s interviewers continued to claim Fragante could not be understood well enough to serve as a DMV clerk.

See Matsuda, *supra* note 198, at 1338.

259. For example, the existing employees’ Spanish accents, read together with other racial characteristics (i.e., style of dress, the music that they listen to, etc.), might racialize them as “Argentinian” or “Spaniards”; meanwhile, the plaintiff’s accent, read together with other racial characteristics, might racialize him as “Mexican” or “Dominican.”

Title VII after an employer institutes an English-only rule<sup>260</sup> or has fired a plaintiff for violating an English-only rule.<sup>261</sup> The justification that employers usually offer for instituting English-only rules is that they are designed to alleviate tensions among employees, who may feel that their coworkers are talking negatively about them in a non-English language.<sup>262</sup> Employers also claim that English-only rules are implemented to increase workplace safety and product quality.<sup>263</sup>

Language, however, is a racial characteristic as much as accent. Thus, language discrimination is racial discrimination. The onus is on the plaintiff to show that the employer instituted the English-only rule in an effort to cleanse the workplace of racial otherness. Plaintiffs would be able to sue under the disparate *treatment* prong—a desirable happenstance inasmuch as plaintiffs with successful suits under the disparate *treatment* prong may be awarded legal damages, whereas legal damages may not be awarded for plaintiffs suing under the disparate *impact* prong.<sup>264</sup> As in the accent discrimination context, an employer cannot argue that it is a BFOQ of the job that employees belong to a certain race (i.e., speak English) because, as noted above, race may never be a BFOQ.<sup>265</sup>

Language discrimination cases are harder than accent discrimination cases because it will usually be difficult for a plaintiff to prove that the proffered justifications for the English-only rule are mere pretexts for the desire to rid the workplace of indicators of racial nonwhiteness. Plaintiffs may have a difficult time proving that the employer was not interested in easing tension or promoting safety, but rather was interested in forcing employees to hide their racial otherness. Easy cases would be those in which an employer institutes an English-only rule for particular Spanish-speakers (i.e., Mexicans and Dominicans) while excluding other, more racially privileged Spanish-speakers (i.e., Argentinians and Spaniards).

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260. *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993) (finding that plaintiffs could bring a disparate impact claim after an employer instituted an English-only rule although the rule only affected the “terms, conditions, and privileges of employment” and did not impose a barrier to hiring or promotion).

261. *See, e.g.*, *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) (rejecting a disparate impact claim brought by a plaintiff who was fired after he spoke Spanish on the job, thus violating an English-only rule).

262. *See, e.g.*, *Spun Steak Co.*, 998 F.2d at 1483 (explaining that the employer instituted the English-only rule after employees complained that some Spanish-speaking coworkers were making derogatory, racist comments about them and noting that the policy was intended to promote racial harmony in the workplace).

263. *See, e.g., id.* (noting that the employer thought that “the English-only rule would enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery, and [that it] would enhance product quality because the U.S.D.A. inspector in the plant spoke only English and thus could not understand if a product-related concern was raised in Spanish”).

264. 42 U.S.C. § 1981a(a)(1) (2006) (“In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . the complaining party may recover compensatory and punitive damages . . . from the respondent.”).

265. *See supra* note 257.

Other easy cases would be those in which an employer institutes a rule that prohibits the speaking of some languages (i.e., Spanish), while allowing the speaking of other, more racially privileged languages (i.e., Italian). However, one could reasonably expect that such easy cases would be rarities. Yet, even in hard cases, in which an employer has instituted an English-only rule with general applicability and for seemingly defensible reasons, a racialized group may be able to prove that the English-only rule was implemented with the intent to discriminate against them on the basis of race. This is especially true if the environment was already one in which they were being generally mistreated.

Consider the facts behind *EEOC v. Central California for Health*.<sup>266</sup> In this case, a group of Filipino employees sued their employer under Title VII, alleging discrimination on the basis of national origin after the employer instituted an English-only rule that prevented the plaintiffs from speaking Tagalog and other Filipino languages in the workplace.<sup>267</sup> The plaintiffs also alleged that the English-only rule was instituted in an environment marked by anti-Filipino racial hostility. The complaint alleged that management held meetings that only the Filipino employees were required to attend. During these meetings, they were informed about the English-only policy and told that management was considering installing surveillance equipment to insure that the plaintiffs did not violate the policy.<sup>268</sup> Moreover, the plaintiffs alleged that Filipinos were “regularly taunted, admonished and threatened” and that supervisors regularly ridiculed the English that plaintiffs did speak.<sup>269</sup> In this case, and in similar cases, the plaintiffs would have an easier time proving that the English-only rule was not instituted to increase workplace safety or to ease racial tensions. The policy seems to be a product of the desire to compel the plaintiffs to hide their particular instantiation of racial otherness. As such, it should be cognizable as *racial* discrimination, as opposed to the discrimination on the basis of national origin that was alleged.<sup>270</sup>

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266. First Amended Complaint in Intervention at 8–10, *EEOC v. Cent. Cal. for Health*, 2012 WL 2872791 (E.D. Cal. Mar. 4, 2011) (No. 1:10-cv-01492-LJO-JLT). The litigation was later settled, and the defendants agreed to pay the plaintiffs \$975,000 in addition to other injunctive relief. Proposed Consent Decree at 10, *Cent. Cal. for Health*, 2012 WL 2872791 (No. 1:10-cv-01492-LJO-JLT).

267. First Amended Complaint in Intervention, *supra* note 266, at 2.

268. *Id.* at 8 (“Defendants held mandatory meetings and required only Filipino employees to attend. During the meetings, management staff reprimanded the Filipino employees who attended and told them that they were prohibited from speaking Filipino languages and that they were required to speak English at the hospital. Management also threatened to install surveillance equipment to monitor them . . .”).

269. *Id.* at 9. Plaintiffs also alleged that the English-only policy was applied in a discriminatory manner. *See id.* (“Defendants did not target any non-Filipino employees for such strict enforcement of its language policy, nor did it ever subject its non-Filipino employees to the same meetings, heightened scrutiny, threats, warnings and disciplinary actions to which it subjected Filipino employees. Non-Filipino employees—including supervisors, doctors and nurses—regularly spoke in languages other than English without being monitored or censured.”).

270. *Id.* at 2.

In sum, conceptualizing race in a way that does not tether it to false biological origins enables a reconceptualization of what constitutes racial characteristics, which can create a more amenable legal landscape for those challenging employer practices under Title VII. At present, the Title VII case law misperceives race, and plaintiffs suffer from the misperception. A reoriented conception of race and racial discrimination may allow plaintiffs to be vindicated in instances that the current case law disallows.

#### CONCLUSION

Biological race is responsible for genocides, ethnic cleansings, slavery, eugenics, antimiscegenation laws, and various other diminishment of the humanity of racialized individuals. That is quite a legacy. It is disturbing that American law in the twenty-first century continues to reflect one of modernity's most dangerous fabrications. This Article has revealed two areas in which biological race has most obviously informed the construction of the legal landscape: American Indian jurisprudence and Title VII case law. It is time for the law to be rid of the myth. This Article has offered practical steps for reimagining these areas of law in such a way that they reflect what race really is—a pragmatic tool used to index essentialized difference.

This project of reimagination is important not solely because the law built around the notion that racial biology exists is bad law. It is also important because law invariably influences society and culture. To the extent that the law reflects biological race, the culture will reflect biological race. In turn, a culture saturated with the belief that racial biology is a truth will produce law that is saturated with the belief that racial biology is a truth. And the alarming dialectic will continue to turn.

This Article seeks to disrupt the dialectic. If law refuses to reproduce the myth, then the culture will be less inclined to believe the mythology. In turn, the culture will produce a law that does not reflect the myth. A more healthful and scientifically accurate dialectic will turn. And we, as a society, would be one step further removed from our lamentable history and one step closer to producing a world that will never have to witness the next genocide.