

RACE AS A LEGAL CONCEPT

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*Race is a legal concept, and like all legal concepts, it is a matrix of rules. Although the legal conception of race has shifted over time, up from slavery and to the present, one element in the matrix has remained the same: the background rules of race have always taken a view of racial identity as a natural aspect of human biology. To be sure, characterizations of the rule have oftentimes kept pace with developments in race science, and the original invention of race as a rationale for the subordination of certain human populations is now a rationale with little currency. The departure from this “classic liberal” conception of race, and its attendant and disturbing view of the function of race, did not, however, depart from the idea that race is a natural and organic part of being a human being. As this Article argues, this seminal background rule—that race is natural, neutral, and necessary—is deeply problematic and a substantial obstacle in the fight against the Supreme Court’s ascending anticlassification jurisprudence. Not to mention, it is also false. In an effort to make some headway against the idea that race is a natural idea, as opposed to a legal concept, the Article attacks the background rules of race via the unlikely field of Conflict of Laws. Taking the Supreme Court’s decision in *Parents Involved in Community Schools v. Seattle School District No. 1* as a benchmark, the discussion first suggests an early functionalist view of voluntary school integration by way of an analogy to the early twentieth-century transformations occurring in Conflicts of Laws. Second, and in the alternative, the discussion then situates the facts of *Parents Involved* as literally a problem of Conflict of Laws. In both instances, the hope is to focus legal discourse on the background rules of race so as to empower a new and emancipatory anti-subordination jurisprudence.*

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I. INTRODUCTION.....	3
II. FROM CLASSIC LIBERALISM TO RACIAL LIBERALISM.....	12
A. The Racial Contract.....	12
B. The Invention of Race as a Justification for Subordination.....	16
III. THE FUNCTION OF THE HUMAN RACES: AN ABRIDGED INTELLECTUAL HISTORY IN THE SCIENCE OF RACE.....	17
A. Monogenism, 1680–1850.....	17
B. Polygenism, 1815–1860.....	21
C. Evolution and Eugenics, 1860–1945.....	23
D. Ethnicity vs. Race, 1935–1980.....	27
E. The Biological Foundation of Race is Fiction.....	29
IV. NEOLIBERALISM AND POST-RACIAL COLORBLINDNESS.....	30
A. The Classic Liberal Style: From Slave Law to Jim Crow.....	34
B. The Modern Liberal Style: From Brown to Affirmative Action.....	38
C. The Neoliberal Style: The Road to Parents Involved.....	41
D. Neoliberalism and Neoracism.....	50
V. TOWARDS A CRITIQUE OF RACE AS A LEGAL CONCEPT: TWO IDEAS FROM CONFLICT OF LAWS.....	55
A. A Functionalist Rendering of Parents Involved.....	57
1. The Realist Critique of Formalism and the Rise of Functionalism.....	57
2. What is the Function of Race as a Legal Concept?.....	60
(i) Step One: Choose an Interpretive Method.....	61
(ii) Step Two: Foreground Neoracism and the Racial Contract.....	62
(iii) Step Three: Identify the Function of Race.....	62
(iv) Step Four: Decide.....	62
B. Conflict of Laws as “Cultural Conflict”.....	62
1. Why Conflict of Laws?.....	63
2. Thinking Sideways about Race and Culture.....	64
(i) Step One: Identify the Jurisdictional (Cultural) Conflict.....	65

(ii) Step Two: Characterization of the Claim.....	68
(iii) Step Three: Identify the Rules.....	69
(iv) Step Four: Identify the Interests.....	71
(v) Step Five: Decide.....	71
VI. CONCLUSION.....	73

All in all, race is the modern West's worst idea. – Richard King¹

I. INTRODUCTION

In the eighteenth and nineteenth centuries, a biological construction of race was created as a way of justifying the oppression of non-Europeans.² Not only was the notion of the “human races” a lie, it was an imperialist fiction intended to rationalize a system of domination and subordination.³ American courts have failed to account for the deeply transformed connections between biology and imperialism, despite the fact that these connections have been well-developed in the social sciences and critical race theory.⁴ Since its birth, our legal system has constructed race through the use of biology⁵—a use

¹ RICHARD KING, RACE, CULTURE, AND THE INTELLECTUALS, 1940–1970 1 (2004).

² “Though it would be foolish to suggest that evil, brutality, and terror commence with the arrival of scientific racism toward the end of the eighteenth century, it would also be wrong to overlook the significance of that moment as a break point in the development of modern thinking about humanity and its nature.” PAUL GILROY, BETWEEN CAMPS 31 (2004). *See also* ANTONIA DARDER & RODOLFO D. TORRES, AFTER RACE (2004).

³ HOWARD WINANT, THE WORLD IS A GHETTO: RACE AND DEMOCRACY SINCE WORLD WAR II 22–23 (2001); GILROY, *supra* note 2. For discussion of the so-called “racial realists” who do not see it this way, and the view that racial domination is a relic, see MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 1–33 (2004).

⁴ For a sample of the literature on critical race theory, see DERRICK BELL, RACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé W. Crenshaw et al. eds., 1995); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497 (2009); Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006).

⁵ *See, e.g.*, *Akins v. State of Tex.*, 325 U.S. 398, 404 (1945) (“Defendants under our criminal statutes are not entitled to demand representatives of their *racial inheritance* upon juries before whom they are tried.”) (emphasis added); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989) (“Title VII groups discrimination on grounds of race with discrimination on grounds of color; although Indians are Caucasians, they are generally of darker skin color than ‘white’ Americans.”); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 209 (N.D. Ala. 1973) (concluding that a white citizen has no standing to represent a class of black citizens in challenging employment practices discriminatory only towards black citizens); *United States v. Driver*, 755 F. Supp. 885, 888 (D.S.D. 1991) (holding that the evidence was insufficient to show that the individual was an Indian because he only had 7/32 Indian blood and did not receive assistance based on Indian blood in his childhood); *Saad v. Burns Int’l Sec. Serv., Inc.*, 456 F. Supp. 33, 37 (D.D.C. 1978) (discussing that race equated to skin color and that a plaintiff of Arabian descent is allowed to bring a Section 1981 complaint as long as alleged discrimination is on the basis of race or color). For a discussion of courts’ reliance on a concept of race requiring objective characteristics, see *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 560–63 (E.D. Cal. 1982) (“It has been suggested . . . the plaintiff must meet the burden of proving ‘racial animus’ [for the purposes of a Section 1981 claim] as the motivating factor of the discrimination or of some ‘objective’ display of the plaintiff’s ‘racial background.’”) (emphasis

informed by what David Hollinger calls the “ethno-racial pentagon.”⁶ According to this very old and completely fabricated view, there are five primordial human races, and a person’s belonging to one of these races is natural and unavoidable.⁷ Race is ancestry, blood, and genes.⁸

There are two ideas here, and they are linked. The first idea is political: the very notion of a biological thing called “race” was initially developed as a way for some people to justify the subordination of other people. The second idea is legal: this new invention was imported into the American legal system as a “background rule,”⁹ meaning that the very idea of race as a legal concept was constituted by a view of human biology. Taken together, we can understand the confluence of these two ideas as resulting in a legal concept that functioned to assist in the sustained oppression of the newly minted, disfavored races. This is a *classic liberal* style of framing race as a legal concept.¹⁰

In traditional accounts of our racial jurisprudence, the blatant racism of the eighteenth and nineteenth centuries gradually gave way to a more enlightened view of race—a view of race that was to triumph after World War II, *Brown v. Board of Education*, and the civil rights movement in the United States.¹¹ A pivotal shift involved an insight about biology, namely, that it was immoral to make judgments any longer about the worth of a person on the basis of his or her race.¹² Where in classic

added). *See also* Perkins v. Lake Cnty. Dep’t of Utils., 860 F. Supp. 1262, 1271–78 (N.D. Ohio 1994) (canvassing the treatment of discrimination claims in courts, variously relying on skin color, genetic makeup, biological descent, and general physical characteristics).

⁶ DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* (1995).

⁷ The pentagon includes: Euro American (White), Asian American, African American, Hispanic, and Indigenous. *Id.* at 23.

⁸ *See Colorline, infra* note 68.

⁹ This Article takes notice of but does not move deeply into the literature on constitutive and regulative rules. For example, the market’s background rules of property and contract may very well be “constitutive” in the sense used by writers like John Ruggie. Following John Searle, Ruggie explains that regulative rules are rules that take as a given the existence of some prior activity and seek to control that activity. Traffic rules are examples of regulative rules insofar as the decision to force drivers on to the right side of the road has little to do with the existence of the prior and predicate activity of driving. In contrast, the rules of chess are constitutive in that we cannot know the game of chess—there is no antecedent activity—without first knowing the rules of the game. As Ruggie says, “[C]onstitutive rules define the set of practices that make up any particular consciously organized social activity—that is to say, they specify *what counts* as that activity.” JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* 22 (1998). In this light, property and contract rules do appear to be constitutive in Ruggie’s sense, since we cannot know the nature of liberalism’s market game without property and contract rules. In contrast, antitrust laws cannot be constitutive, since they do, as a matter of definition, respond to an antecedent activity, namely, the competitive market. For discussion of constitutive and regulative rules, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995); Christopher Cherry, *Regulative Rules and Constitutive Rules*, 23 PHIL. Q. 301 (1973); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

¹⁰ The classic liberal style is discussed *infra* Section IV.A.

¹¹ *See generally* HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972* (1990); JOHN HOPE FRANKLIN & ALFRED A. MOSS, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* (1988).

¹² *See, e.g.,* Rice v. Cayetano, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”). Justice Scalia provided a good statement of the idea in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–21 (1989): “The difficulty of overcoming the effects of past discrimination is nothing

liberalism it was desirable to arrange social relationships on the basis of biological categories (e.g. slavery, “separate but equal”), the new view was “colorblind.”¹³ As Justice Harlan famously argued in his dissenting opinion in *Plessy v. Ferguson*, “Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.”¹⁴ The colorblind approach to racial justice was therefore initially situated as a progressive attack on the old racism, denouncing any efforts to deduce a person’s value from their race. Colorblindness did not, as a consequence, eliminate the old background rules of race; racial identity continued to be seen as natural, objective, and rooted in human biology. Rather, it reduced the importance and altered the nature of the background rules. In other words, while at one time a legal dispute could be resolved merely by identifying a person with a particular racial identity (i.e. if you are negro, you can be enslaved; if you are white, you can attend a certain school), in this later period the background rules of race as a legal concept were retained but hollowed out (i.e. if you are negro, we cannot make any deductive judgments about your place in the social order simply on the basis of your race). This is a *modern liberal* style of framing race as a legal concept.¹⁵

Race law in the United States bore witness to a third phase, during which we are apparently now living. Once again, civil rights law would retain the background rules of race, first articulated as a justification for systemic subordination. Like in the enlightened phase of modern liberalism, this third phase also adopted a colorblind approach to the background rules. Thus, the true nature of racial identity continued to be understood as a natural and objective matter of human biology, but now a biology free of any discernable political content.

What distinguished this phase from its predecessor was its approach to what can be termed the “foreground rules” of race. Foreground rules are those rules believed to be responsive to a pre-existing activity; they regulate, manage, and control. The suite of civil rights statutes that developed in the second half of the twentieth century is a good example of the kind of foregrounded regulation embraced in modern liberalism. In contrast, this current phase is notoriously hostile to the use of foreground rules, claiming that racial dynamics in the United States have progressed to the point where much of equal protection jurisprudence is actually fostering racial discrimination instead of remedying it. It is in this

compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.”

¹³ The critique of colorblindness is fundamental in the literature on critical race theory. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 2, 2 (1991) (“Though aspects of color-blind constitutionalism can be traced to pre-Civil War debates, the modern concept developed after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, and it matured in 1955, in *Brown v. Board of Education*. A color-blind interpretation of the Constitution legitimates and thereby maintains the social, economic, and political advantages that whites hold over other Americans.”); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760 (1990) (“I want to explore the ideological roots of this particular moment—in which the repudiation of race consciousness defines conventional civil rights thinking My argument, in summary form, is that the boundaries of today’s dominant rhetoric about race were set in the late 1960s and early 1970s, in the context of an intense cultural clash between black nationalists on one side, and integrationists (white and black) on the other. Current mainstream race reform discourse reflects the resolution of that conflict through a tacit, enlightened consensus that integrationism—understood as the replacement of prejudice and discrimination with reason and neutrality—is the proper way to conceive racial justice, and that the price of the national commitment to suppress white supremacists would be the rejection of race-consciousness among African Americans.”).

¹⁴ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

¹⁵ The modern liberal style is discussed *infra* Section IV.B.

sense that this most recent phase is *post-racial*.¹⁶ This also indicates a shift in what it means to be in favor of colorblindness: while it used to be a tactic to be deployed in favor of a disadvantaged group, any use of racial classifications is now to be seen as a threat to the background rules of race. Because the legal conception of race continues to be constructed out of an idea about human biology, the post-racial view of colorblindness makes the claim that because race is a natural, pre-political sphere of human identity, it is wrong for the state to make regulations on the basis of racial identity.¹⁷ At the same time, courts have not wished to appear oblivious to debates over identity politics and group difference, and what emerged was an allowable recognition of “difference” when the word “culture”¹⁸ or “ethnicity”¹⁹ replaced “race.”²⁰ Thus, where “racial balance” is understood today by the Supreme Court as a very dangerous

¹⁶ See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

¹⁷ This is a framing familiar to the context of liberal political theory. My discussion of liberalism follows a conventional breakdown into a classic, modern, and neoliberal periodization. Classic liberalism was especially popular during the Nineteenth and early Twentieth Centuries, and Modern Liberalism ascended the throne around World War II. For discussion, see ERIC HOBSBAWM, *THE AGE OF EMPIRE, 1875–1914* (1987); ERIC HOBSBAWM, *THE AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY, 1914–1991* (1994). For a discussion of neoliberalism, see DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* (2002); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007). This treatment of liberalism does not, however, track the manner in which liberalism is sometimes discussed in the context of race. For example, one textbook on discrimination law in the United States describes “classical-liberal thinking on civil rights as: ‘highly normative and rights-based in nature but cautiously incremental in scope and ambition [which] criticizes Supreme Court opinions, decries our recent inattention to the plight of women and persons of color, and urges a renewed commitment to racial injustice. It accepts the dominant paradigm of civil rights scholarship and activism, and urges that we work harder—litigate more furiously, press for new legislation, exhort each other more fervently than before—within that paradigm.’” ROY L. BROOKS, GILBERT PAUL CARRASCO & MICHAEL SELMI, *THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES* 11 (2011) (quoting Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1547–48 (1991)). In terms of my usage, this is much more akin to modern liberalism than classic liberalism. See Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387 (2012).

¹⁸ As Stephen Steinberg wrote more than thirty years ago, the problem with multiculturalism is that the basic idea is “built upon systematic inequalities that constituted an untenable basis for long-term ethnic preservation. This was the pitfall—the fatal flaw—that robbed ethnic pluralism of its cultural innocence. . . . In short, a pluralism based on systematic inequalities is inherently unstable because ethnic groups at or near the bottom of the social ladder have little reason to endorse the ethnic status quo.” STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* 254–56 (3d ed. 2001). Paul Gilroy has similarly argued: “An even blend of those deceptively bland terms ‘ethnicity’ and ‘culture’ has emerged as the main element in the discourse of differentiation that is struggling to supersede crude appeals to ‘race’ by asserting the power of tribal affiliations. These timely notions circulate in more specialized language, but any sense that they bring greater precision into the task of social division is misleading. The cultural approach still runs the risk of naturalizing and normalizing hatred and brutality by presenting them as inevitable consequences of illegitimate groups that wiser, worldlier, more authentically colonial government would have kept apart or left to meet only in the marketplace.” GILROY, *supra* note 2, at 27. For defenses of multiculturalism, see CHARLES TAYLOR, *MULTICULTURALISM AND “THE POLITICS OF RECOGNITION”*: AN ESSAY (2d ed. 1992) and *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995); Stephen May, *Multiculturalism*, in *A COMPANION TO RACIAL AND ETHNIC STUDIES* 124 (David Theo Goldberg & John Solomos eds., 2002).

¹⁹ For discussions on the relationship between the terms race and ethnicity, see Werner Sollors, *Foreward: Theories of American Ethnicity*, in *THEORIES OF ETHNICITY: A CLASSICAL READER* (1996); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994). A famous example of the idea that ethnicities are cultural groupings and therefore distinguishable from the immutable character of racial groupings is found in PIERRE L.VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 9–11 (1967).

²⁰ In legal theory, see López, *supra* note 4, at 990 (“Placing developments in equal protection law in the larger context of evolving racial ideas, my primary aim in this Article is to demonstrate that race-as-ethnicity provided the first

concept, “cultural diversity” is one of the only meaningful interests the Court has stamped with its imprimatur in the context of affirmative action cases (along with remedying past *intentional* discrimination).²¹ This is a *neoliberal* style of framing race as a legal concept.²²

The legal conception of race that emerged in the context of American slavery, the legal conception of race that developed in the early twentieth century as a reaction against the classic racism of Jim Crow, and the legal conception of race that has taken shape in the debates over post-racialism and cultural diversity at the turn of the twenty-first century, all share a commitment to a view of race as an aspect of human biology. Consequently, all three legal conceptions—the classic, modern, and neoliberal—have a constitutive background rule in common. All three legal conceptions are buoyed by an attachment to a biological concept of race—a concept that may be seen as one of modern science’s very first weapons of mass destruction.²³

The aim of the Article is to offer some practical suggestions for how to move civil rights law away from the biological foundations upon which the Court’s post-racialism and cultural pluralism depend, and it uses *Parents Involved in Community Schools v. Seattle School District No. 1*²⁴ as an illustration—a case that the late Derrick Bell has described as “the latest, and perhaps most devastating, obstacle in the two-century struggle of African Americans to obtain effective public schooling for their children.”²⁵ Of course, there is good reason to be pessimistic about the likelihood of such a shift away from the background rules of biological identity upon which the legal conception of race has for so long been

coherent intellectual justification for reactionary colorblindness.”). In social theory, see Étienne Balibar, *Is There a Neo-racism?*, in RACE, NATION, CLASS 17 (Étienne Balibar & Immanuel Wallerstein eds., 1991); MARTIN BAKER, *THE NEW RACISM* (1981); MILES & BROWN, *supra* note 20.

²¹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721–22 (2007) (“[I]t suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. . . . The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education”). In a recent article, Reva Siegel has argued that the old divide between anti-classification and anti-subordination, or in other words, the divide between proponents of a conservative colorblind approach and proponents of a liberal, race-conscious approach, does not adequately capture the facts. For Siegel, an analytically distinct principle can be found in the work of moderates like Justice Kennedy, and it involves a concern with social cohesion. Referring to the idea as an anti-balkanization principle, Siegel suggests that social cohesion is a concept that avoids the split between individual and group dynamics. To the extent this can be understood as an argument for racial arguments that elide the liberal framework that I am using here, I remain skeptical, but I admittedly do not directly deal with the question. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

²² The neoliberal style is discussed *infra* Section IV.C.

²³ Today, scientists agree that while the old race science was surely wrong, there appear on the horizon glimpses of a re-emerging racial biologism. More than a decade ago, Paul Gilroy was already calling for a move beyond neoracism, pointing to a “rebirth of biologism” where “social and cultural differences are being coded according to the rules of biological discourse, but it cannot be emphasized enough that this latest raciological regime differs from its predecessors.” GILROY, *supra* note 2, at 34. See also Alex M. Johnson Jr., *The Re-Emergence of Race As A Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547, 1582 (2009).

²⁴ *Parents Involved*, 551 U.S. at 701.

²⁵ DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 81–82 (2008). Of course, Bell wrote this before the Supreme Court’s decision in *Ricci v. Destefano*, 557 U.S. 557 (2009), which may have now taken the cake. For a discussion of *Ricci*, see Michelle Adams, *Is Integration A Discriminatory Purpose?*, 96 IOWA L. REV. 837 (2011).

defined. How can it be imagined that the Court is ready to make such an ideological about-face? Perhaps even worse, is it even practical to imagine race as a legal concept that *isn't* biologically founded?²⁶ How could standing for racial discrimination claims work, for example, if a court was prohibited from making assumptions about the viability of “Blackness”?²⁷ If race were no longer conceived in terms of ancestry, how would the court know when a claimant had been discriminated against on the basis of his or her race, which wasn't actually a matter of their genes after all?²⁸ As Donna Young has put it: “[T]he U.S. model [of anti-discrimination law] has been built upon a foundation that on the one hand requires racial categories in order to determine citizenship rights . . . but on the other, cannot define these categories without resorting to methods that reinforce racial hierarchy.”²⁹

To be sure, these are tough questions, and instead of trying to answer them, the strategy here is to reject them. After all, each of these questions is premised on a very common but very wrong assumption about the pre-legal nature of racial identity. As this Article argues, race is, *at best*, “relatively autonomous”³⁰ from law, and in no way should race be seen as existing independently of law. This view

²⁶ For discussion of the tactics that courts have used to get around the often murky territory of phenotypical assessments of racial identity, see ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008).

²⁷ For a discussion of how racial identity came to be associated with standing, see, e.g., e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998).

²⁸ For a relatively recent example of the sorts of judicial gymnastics that are involved, see *Malone v. Civil Serv. Comm'n*, 646 N.E. 2d 150 (Mass. App. Ct. 1995). The Malones, who were twin brothers, applied for firefighter positions with the Boston Fire Department (BFD) in 1975. In their initial application, they submitted “white” as their racial classification, but failed to get hired. Two years later, the Malones reapplied again after the BFD instituted a court-ordered affirmative action program. On their second try, however, the Malone brothers stated in their applications that they were black, and successfully got the jobs. In 1987, the Malones sought promotion, and in the process, a supervisor noticed that these apparently white guys had stated in their applications that they were black. The Malones were subsequently fired by the Department of Personnel Administration for having lied on their applications, but the brothers fought back. Taking the Fire Department to Court, the Malones argued that their employers had no business inquiring into the validity of their own self-identified racial identities. In order to figure out the racial identity of the Malones, the Supreme Judicial Court accepted the three-part test used by the Department of Personnel Administration: “(1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community.” Due to the fact that the Malones satisfied none of these tests, i.e. they had fair hair and skin, and ostensibly Caucasian features, had documentary evidence of three generations of Malones identifying themselves as whites, and no community evidence whatsoever, the court opted for a strategy that held out race to be, in part, a biological category subject to objective assessments, and more particularly, that the Malones belonged to something called the white race. The Appeals Court further rejected any possibility of appealing the case.

²⁹ Donna Young, *Defining Race Through Law: Enforcing the Social Norms of Power and Privilege*, 72 ALB. L. REV. 1041, 1041–42 (2009).

³⁰ The debate over the autonomy of the legal order has a long pedigree. After Marx, a serious effort to understand the social nature of law was attempted by Weber, who believed that a unique quality of classic liberalism was its ability to develop a legal mode of thought that was autonomous from other forms of social thought. The autonomy of the legal system served economic needs, since autonomy brought with it a sense of predictability. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 941–54 (2d ed. 1968). Legal autonomy also served political needs, as Locke had also argued: in order for government to be legitimate, executive and judicial authority needed to exist independently of individual caprice. For an excellent discussion, see David Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529 (1977); Isaac Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of Law*, 11 LAW & SOC'Y REV. 571 (1977).

of the constitutive relation between race and law is alien to liberalism, including the neoliberal style of race jurisprudence. From the neoliberal point of view, human races, like economic markets, are pre-legal and have the best chance of flourishing when free of regulation altogether. As Chief Justice Roberts stated in *Parents Involved*, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³¹ It is in this light that foreground rules—the rules that wrought the shift from classic liberalism to modern liberalism—actually become discriminatory.

The strategy of this Article is to reject this perspective on the relationship between law and race—a perspective that holds that law is merely a means for regulating a pre-legal entity—and assert that race is itself a *legal concept*.³² On this view, law does not only regulate race; it *constitutes* race.³³

Looking to race as a legal concept highlights how the traditional view cloaks notions of race in a naturalized and objectified set of assumptions about the limits of legal reform. After all, if race were a natural thing, then one would naturally assume that certain decisions about the legal treatment of race would be more or less consistent with the natural parameters of racial identity. However, if we let go of the notion that there is anything “natural” about racial identity at all, jurists are empowered with a great deal of discretion to use the tools of legal discourse—the plurality of legal reasoning—in whatever way they like. Once we are forced to confront the legality of those spaces previously thought natural and neutral, we also receive, as Duncan Kennedy has explained, the “taking back of alienated powers that can be used [in service of] . . . equality, community, and wild risky play. But they are powers whose ethical exercise starts from accepting the existential dilemmas of undecidability that legal discourse has . . . staunchly denied.”³⁴ As all lawyers know, we are often handed a conclusion and assigned the task of marshaling the best argument on behalf of that conclusion. Indeed, the conclusions hardly matter: it is a matter of course to find ourselves on opposite sides of a question, and a clear indication of a successful lawyer is that she can, at will, provide dazzling arguments both in favor of and against a given legal conclusion (that is not clearly subject to precedent or rule). Consequently, once attention is drawn to race as a legal concept (a set of legal arguments),³⁵ and away from a racial concept that is naturalized and

³¹ *Parents Involved*, 551 U.S. at 748.

³² This follows the analytical framework established in *The Market as a Legal Concept*. See Desautels-Stein, *supra* note 17.

³³ If law not only regulates race but constitutes it as well, we can see how easily Justice Roberts’ thinking about racial discrimination dissolves into nonsense. As an example, imagine saying that the best way to further tort reform was to simply stop regulating torts, just as Justice Roberts suggests that the way to stop racial discrimination is to stop using law as a means for classifying people on the basis of race. In such a view, the reformer would have us believe that “torts” are just a part of the world, a part of modern life, and if we just stopped regulating them, liabilities, compensation awards, and attorney’s fees would eventually sort themselves out. Notice, however, that the argument here is not to abolish the legal concept of a tort; it is rather to de-regulate torts. But, of course, the very notion of de-regulating torts is incoherent, since we all know that torts do not somehow exist independently of the legal system, as if they could somehow be de-regulated or “self-regulating.” Torts are constituted through law, and because a tort is a legal concept, the central choice in tort reform is not about whether to regulate or not, it’s about which sorts of legal rules we prefer over other legal rules. In exactly the same way, race is also constituted through law, and as a consequence, it makes no sense to understand the basic problem of civil rights law as a determination of the proper scope of state regulation. The very notion of racial identity is always already legalized; racial identity is a set of rules, just like a tort or a contract.

³⁴ Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 679 (2003).

³⁵ See, e.g., Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

objectified (a set of conclusions),³⁶ it becomes rather natural to analyze that concept in a fashion that is at once subversive and also consistent with the richest of traditions in American legal thought.³⁷

In the early decades of the twentieth century, a great number of private law concepts transitioned away from objective, formal, natural foundations and towards an emerging realism and sociological jurisprudence.³⁸ Whatever we ultimately think of the outcome of this period in our jurisprudence, a “functionalist” perspective on legal concepts became commonplace.³⁹ It is in this light that this Article argues for a similar rethinking of race as a legal concept—a concept that might substantially benefit from a deliverance from its biological beginnings and an encounter with early twentieth-century realist jurisprudence.

In order to focus on race as a legal concept in the way that I am suggesting, and distance our jurisprudence from a notion of race as a natural and immutable quality of human identity, there are several analogues in the private law with which to work. In the present discussion, I have chosen the field of Conflict of Laws.⁴⁰ Conflicts is a good candidate because it experienced precisely the type of transition that I am suggesting here for race. At the hands of legal realists like Walter Wheeler Cook, Conflict of Laws went through the intellectual grinder, ripped out of its formalistic foundations and pushed through a newly minted functionalist jurisprudence—a jurisprudence which taught judges to ask

³⁶ See, e.g., Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001).

³⁷ For a sample of legal realist works and secondary discussions, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 27 (1927); Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933). For discussions of Hale and Cohen, see BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* (1998); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MODERN L. REV. 421 (1990); Joseph Singer, *Legal Realism Now: 1927–1960*, 76 CAL. L. REV. 465 (1988); Warren Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973). Some of Hale’s particularly well known other writings include *FREEDOM THROUGH LAW* (1952); *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149 (1935).

³⁸ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); *THE CANON OF AMERICAN LEGAL THOUGHT* (David Kennedy & William W. Fisher III eds., 2006). As for sociological jurisprudence, classic works include Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911), and Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260 (1940).

³⁹ To take a rather random example, consider the Supreme Court’s 2008 decision in *Medellin v. Texas*, 552 U.S. 491 (2008), dealing with the relation between the United States judiciary and the International Court of Justice’s *Avena* decision, as well as a subsequent executive order from President George W. Bush seeking to implement that decision. In making an argument that might be called *functionalist*, Justice Stephen Breyer suggested that in contrast to Justice Roberts’ chimerical focus on formal rules, Breyer’s claim was that the “case . . . law suggests practical, context-specific criteria” that should be used to help a court decide whether a treaty was self-executing. *Id.* at 548. Breyer’s approach demanded answers to a series of fact-based questions, such as the purpose of the treaty, its historical and political context, and whether the treaty seemed more or less focused on judicial application or not. Breyer recognized that these sorts of questions did not yield “a simple test, let alone a magical formula.” *Id.* at 550. But given the actual and realistic unavailability of a meaningful textual approach like Roberts’, Breyer argued that a judicial focus on the function of the treaty, as opposed to its form, is all a court can really ever hope to do.

⁴⁰ For a recent survey of the field, see Colloquy, *Transdisciplinary Conflict of Laws*, 71 LAW & CONTEMP. PROBS. 1 (2008).

what social needs and governmental interests would be served when deciding to allocate jurisdictional authority to one location or another.⁴¹

In the effort to make practical suggestions for affecting a de-naturalized race jurisprudence, this Article pushes on Conflict of Laws in two ways: (1) by analogizing race to Conflict of Laws, and (2) by analyzing race as literally a problem of Conflict of Laws. On the one hand, this Article will reimagine the Supreme Court's decision in *Parents Involved* in light of early twentieth-century functionalism. Race will be analyzed as a legal concept that has been the object of a long-standing social purpose, the legitimation of the subordination of certain groups of human beings at the expense of other groups. Instead of serving that purpose, a progressive functionalism might interpret race as a legal concept that might undermine rather than entrench that subordination. In making this argument, the discussion establishes Conflict of Laws as a useful analogy for understanding how a term like "jurisdiction" transitioned out of a naturalized jurisprudence and into a functionalist one. On the other hand, this Article will also give *Parents Involved* a very preliminary treatment as a Conflict of Laws problem, in a literal as opposed to an analogical sense. This will involve thinking about the dispute in the case as a dispute between cultural communities, and a conflict of various legal regimes—local government law, property law, tort law, and more. The purpose of the analysis is not, however, to argue that *Parents Involved* is best understood as a private law dispute rather than one sounding in public law. It is instead to highlight the creative possibilities for an effective anti-subordination jurisprudence in a context where the Court is not shackled by a presumption about which kinds of social needs, like diversity, are the trumps.

So there's the argument. Here's the roadmap. Part II introduces Charles Mills' theory of the Racial Contract. The Racial Contract is a useful intellectual construct for anchoring the important fact that human civilization since the beginnings of classic liberal political philosophy has been racially structured. Part III provides an abridged intellectual history of race science. The reason for having this history in mind is this: if the Racial Contract exposes a structure of racial domination, an acquaintance with race science instructs us to understand the scientific creation of race as an attempt to satisfy a dire social need, namely, the need to understand (in the context of an emerging Enlightenment) why it was acceptable for certain groups of people to oppress other groups of people. The invention of the idea of race helped answer this question, since it was increasingly (and wrongly) apparent that some peoples were objectively and scientifically superior to other peoples. This could be determined by methodological examination of the new "human races." Part IV shifts from race as a biological concept to race as a legal concept, and brings focus to how courts adopted the scientific development of "race" as a background rule for race as a legal concept. The discussion shows how in classic liberalism, modern liberalism, and neoliberalism, courts have always retained a biologically anchored background rule for structuring race as a legal concept. Part V begins the crucial work of trying to think of race as a legal concept that is not constituted by a biological background rule. It does so by introducing Conflict of Laws as a vehicle for re-thinking *Parents Involved* in a way that takes seriously the Racial Contract and its pseudo-scientific rationales. The decision is approached from two angles, and in the first Conflicts is used analogically

⁴¹ At the same time, Conflicts seems like an awful place to look for guidance in bringing attention to race as a legal concept. As is famous within the field itself, Conflict of Laws is a self-identified mess of intellectual postures and purposes. Despite this mess, or rather, perhaps because of it, some scholars have begun to wonder whether what appears to be so messy is actually a sign of something quite important. In a recent article looking at how Conflict of Laws might provide insights as to how to break the current deadlock in the debate over feminism and multiculturalism, Karen Knop, Ralf Michaels, and Annelise Riles argue that hidden in the apparently disparate and highly technical threads of conflicts jurisprudence are remarkably useful tools for dealing with cultural disputes. Karen Knop, Ralf Michaels & Annelise Riles, *After Multiculturalism: Feminism, Culture, and the Surprising Attraction of a Conflict of Laws Approach*, 64 STAN. L. REV. 589 (2012). For a wonderful discussion of Walter Wheeler Cook and his critique of Conflict of Laws, see JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

through a recollection of the legal realist critique of Joseph Beale in the early twentieth century. In this first rethink, *Parents Involved* is pushed through the sort of progressive functionalism that at the time dominated conflicts and so many other fields of private law. In the second rethink, instead of using Conflicts as an analogy, the dispute in *Parents Involved* is situated literally as a problem of Conflict of Laws.

II. FROM CLASSIC LIBERALISM TO RACIAL LIBERALISM

A. The Racial Contract

Classic liberal political theory has instructed its listeners for close to half a millennium on the paramount place of equality and freedom in the construction of the state.⁴² In one of the most famous versions of this teaching, we were told to imagine a world in which life was so horrible that it was necessary for its inhabitants to leave that world, renouncing the natural freedoms they enjoyed there in order to gain an artificial freedom in political society.⁴³ In choosing to exit that natural world and enter a political one, these people engaged in a sort of contract whereby they agreed to constrain their natural rights in exchange for a political authority capable of maintaining order.⁴⁴ The question that has plagued this theory of the “Social Contract” from the very beginning has been: *Who* were and are the parties to this contract? After all, the contract’s imagined terms were clear: all subjects of the new political authority were regarded as morally autonomous, free and equal, rights-bearing human beings. But, who was *really* in, and who was out?⁴⁵

Strangely, the answer has at once always seemed very clear and very murky. On the one hand, the answer has been: “Everyone is in! *All* members in the political community share these rights, and even further, classic liberal ideas should be understood as supporting a basic theory of human rights!”⁴⁶ According to this view, if society failed to provide all of its members with the benefits of the Social Contract, it was due to weakness and derivation. On the other hand, there is the long-standing view that full political membership was always already restricted, from the beginning, and that weakness and derivation had little to do with it. Referring to seventeenth-century British North America, the historian

⁴² The literature on liberalism is massive. For illustrative texts, see PIERRE MANENT, *AN INTELLECTUAL HISTORY OF LIBERALISM* (1996); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975).

⁴³ See, e.g., THOMAS HOBBS, *LEVIATHAN* (1651). For an interesting discussion of *Leviathan* as an origin story, see JOANNE WRIGHT, *ORIGIN STORIES IN POLITICAL THOUGHT* (2004).

⁴⁴ In addition to Hobbes, among the most famous examples are JOHN LOCKE, *A SECOND TREATISE ON GOVERNMENT* (1689); Immanuel Kant, *Theory and Practice*, in *PRACTICAL PHILOSOPHY* (1793); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁴⁵ On the topic of the proper bounds of political community from a liberal perspective, see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* (1990); Arash Abizadeh, *Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments*, 96 *AM. POLI. SCI. R.* 495 (2002). For philosophical accounts with a focus on race, see THOMAS MCCARTHY, *RACE, EMPIRE, AND THE IDEA OF HUMAN DEVELOPMENT* (2009); Charles Mills, *Multiculturalism as/and/or Anti-Racism?*, in *MULTICULTURALISM AND POLITICAL THEORY* 89 (Anthony Simon Laden & David Owen eds., 2007); Lucius T. Outlaw Jr., *On Race and Philosophy*, in *RACISM AND PHILOSOPHY* 50 (Susan E. Babbitt & Sue Campbell eds., 1999).

⁴⁶ As housed, for example, in the *DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN* (*Déclaration des droits de l’Homme et du Citoyen*) (Fr. 1789), available at http://avalon.law.yale.edu/18th_century/rightsof.asp. For theories of rights, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

Barbara Fields has said, “Whatever truths may have appeared to have been self-evident in those days, neither an inalienable right to life and liberty nor the founding of government on the consent of the governed was among them.”⁴⁷ Similarly, the philosopher Charles Mills has suggested that the genocidal terrors of the last 500 years cannot be conceived as a string of deviant exceptions to social contract theory.⁴⁸ According to Mills, the Social Contract has always been a contract intended to benefit one group at the expense of another group.⁴⁹

Enter Mills’ theory of the “Racial Contract.”⁵⁰ Unlike the Social Contract, Mills suggests that the Racial Contract was far more “real” than its more popular alter ego, though to be clear, he does not believe the Racial Contract to have ever been a literal thing.⁵¹ Indeed, just as it is rare to think about the Social Contract as an actual event, there is no need to think about the Racial Contract in that respect either. Nevertheless, in terms of the reality of the Racial Contract, it is real to the extent that it serves as an illumination of the social realities of mass oppression obscured by the apparent egalitarianism of the Social Contract.⁵²

Mills theorizes the Racial Contract as an abstraction capable of making sense of the classic liberal conundrum of being an imperialist ideology of equal rights. Comprised of a set of agreements among European persons (males), enjoying “personhood” in the classic liberal sense described above, the Racial Contract constructed non-Europeans as inferior and subordinate to full persons (Europeans)—those persons that lived under the auspices of the Social Contract in political society and endowed with constitutional rights. Different sets of rules were therefore understood to govern relations between full members of society as well as relations between the full members and the subordinated members—moral, political, legal, social, and economic. “[T]he general purpose of the Contract is always the differential privileging of [Europeans] as a group with respect to the [non-Europeans] as a group, the exploitation of their bodies, land, and resources, and the denial of socioeconomic opportunities to them. All [Europeans] are *beneficiaries* of the Contract, though some . . . are not *signatories* to it.”⁵³ Unlike the Social Contract, in which consent is understood as a critical element in the transition from natural to

⁴⁷ Barbara Fields, *Slavery, Race, and Ideology in the United States of America*, 1 NEW LEFT REV. 95, 102 (1990).

⁴⁸ CHARLES WADE MILLS, THE RACIAL CONTRACT 81–89 (1997) [hereinafter RACIAL CONTRACT]. For more samples of Mills’ work, see CHARLES WADE MILLS, FROM CLASS TO RACE (2003) [hereinafter FROM CLASS TO RACE]; CHARLES W. MILLS & CAROLE PATEMAN, CONTRACT AND DOMINATION (2007).

⁴⁹ I do not mean to imply that there was any single group of Europeans at issue here. As the history of race science itself demonstrates, divisions between European groups were just as common as divisions between Europeans and others. As Charles Gallagher has rightly said: “Missing from the common-sense understanding of white is how an amalgamation of diverse and warring populations from what is now Europe came to see themselves and their own self-interests as whites, place themselves at the top of this hierarchy, and impose a system of racial stratification on rest of the world.” Charles Gallagher, *White*, in HANDBOOK ON THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 9, 10 (Hernán Vera & Joe R. Feagin eds., 2007).

⁵⁰ For discussion, see RACIAL LIBERALISM AND THE POLITICS OF URBAN AMERICA (Curtis Stokes & Theresa Meléndez eds., 2003).

⁵¹ RACIAL CONTRACT, *supra* note 48, at 9–11.

⁵² FROM CLASS TO RACE, *supra* note 48, at 219–28.

⁵³ RACIAL CONTRACT, *supra* note 48, at 11.

political society, the Racial Contract could not depend on the consent of its subordinated objects. This Contract was expressly coercive.⁵⁴

Coupling the Racial Contract with the Social Contract adds further color to classic liberal abstractions about the shift from “natural person” to “citizen.” First, modern political society turns out to be far less egalitarian that we’d like to think—in fact, it is classically hierarchical. At the top are society’s full members and the rules fit for rights-bearing individuals. Below them, still physically present in this new political world, are the subordinated members. This stratification of membership may exist at the level of the city, state, or globe, because, unlike the received wisdom that the Social Contract only works in the context of the sovereign state (i.e., political society ends at the boundaries of the Leviathan’s territorial authority), the Racial Contract is worldwide: its terms govern the relation between the colonizing center and the subjugated colony, and ultimately, the rest of the “uncivilized” world.⁵⁵ In other words, where the Social Contract suggested the wholesale transition of all members from one kind of society to another, the Racial Contract clarifies that the essential demarcation was not the one drawn between a political and pre-political sphere, but rather the very real one drawn between certain humans capable of entering the political, and consequently becoming rights-bearing citizens, and those humans still in the state of nature, and therefore *not* rights-bearing citizens. Crucially, however, these subordinated non-Europeans do not retain natural rights, either; they enjoy neither the sovereign right of self-determination common to the natural state, nor the newly-minted public power of political society. The Racial Contract robs them of both.⁵⁶

If we look to Locke in particular, we find a classic liberal argument for the moral justification of the Social Contract, and a second way in which the Racial Contract underwrites the plausibility of the classic liberal model. For Locke, humans in the natural condition enjoyed a larger specificity of rights than they did in Hobbes’ version of the state of nature, which was essentially limited to an all-powerful right of survival.⁵⁷ Before politics, Locke believed, human beings enjoyed property rights, freedom of contract, the creation of currency, and participated in commercial transactions.⁵⁸ These rights, and the use of these rights in the context of a market system, were reflections of an ultimate and objective morality. Of course, Locke continued to extend the liberal attack on Aristotelian teleology: human beings did not have particular functions, but instead had the completely free and equal right to decide for themselves what they might become. Nevertheless, the moral content of these rights gave clear instructions for how to enter political society: constitutional government was necessary to enable and guarantee the effective enjoyment of individual rights.⁵⁹ This was a moral task, and to the extent

⁵⁴ *Id.* at 11–12.

⁵⁵ *Id.* at 12–13.

⁵⁶ *Id.* at 13.

⁵⁷ See, e.g., LOCKE, *supra* note 44; BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY (1967); MANENT, *supra* note 42.

⁵⁸ LOCKE, *supra* note 44, at 18–30.

⁵⁹ See, e.g., C.B. MACPHERSON, A POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 210. “Locke can assume that neither money nor contracts owe their validity to the state; they are an emanation of the natural purposes of men and owe their validity to man’s natural reason. It is, on this view, the postulated moral reasonableness of men by nature, not the authority of government, that establishes the conventional value of money and the obligation of commercial contracts. . . . But although the institutions of property that are established in the state of nature by the first kind of consent are morally valid, they are practically difficult to enforce in the state of nature. This difficulty of enforcement is the main reason Locke finds for men . . . entering civil society.”

government did not protect individual property rights, it was no government at all. The moral dimensions of the natural condition shape the normative contours of the political.

Again, the Racial Contract adds depth to the image. The moral duty of constitutional government to protect individual rights only extended to the beneficiaries of the Racial Contract, not to its subordinated objects. As Anthony Farley has suggested in this context, “[T]hose who want to possess must mark the others for dispossession. The haves must come together as one, as Leviathan, because no one can rule another alone.”⁶⁰ Thus, the appropriate interpretation of Locke’s classic liberalism is to situate it as an application to only Europeans, or in some instances, only to *certain kinds* of Europeans. Importantly, Locke’s articulation of a moral foundation, however, spread through both contracts; the Racial Contract had the sanction of providence in precisely the same fashion as the Social Contract.⁶¹

A third way in which the Racial Contract explains the lived experience of the Social Contract is epistemological.⁶² In the texts of its famous authors, there is the apparent sense that the terms of the Social Contract were universal. That is, one can read Hobbes, Locke and others and come away easily believing that classic liberalism was applicable to Europeans and non-Europeans alike, and that all human beings enjoyed natural rights and were essentially equal. According to Mills, this is exactly what Social Contract theory is intended to convey; when Europeans look at the world, they are meant to envision a political landscape of free and equal citizens in accordance with the natural rights everyone enjoyed in the natural condition.⁶³ No doubt, however, Europeans experienced a great deal of cognitive dissonance, since what they saw around them was certainly *not* the realization of a universalized and equally effective set of rights. The descriptive claim of equality was in stark tension with the descriptive counter-claim of inequality. Thus, in light of the Racial Contract’s prescription that Europeans could only recognize other Europeans as “persons,” one has an agreement to *mis*interpret the world. One had to learn to see the world wrongly, but with the assurance that this set of mistaken perceptions would be validated by [European] epistemic authority, whether religious or secular.⁶⁴

Thus in effect, on matters related to race, the Racial Contract prescribes for its signatories an inverted epistemology, an epistemology of ignorance, a particular pattern of localized and global cognitive dysfunctions (which are psychologically and socially functional), producing the ironic outcome that [Europeans] will in general be unable to understand the world they themselves have made . . . To a significant extent, then, [European] signatories will live in an invented delusional world, a racial fantasyland, a ‘consensual hallucination.’ . . . There will be white mythologies, invented Orients, invented Africas . . . with a correspondingly fabricated population, countries that never were—Calibans and Tontos, Man Fridays and Sambos—but who attain a virtual reality through their existence in travelers’ tales, folk myth, popular and highbrow fiction,

⁶⁰ Anthony Paul Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953, 953 (2008) [hereinafter *Colorline*].

⁶¹ RACIAL CONTRACT, *supra* note 48, at 16–17.

⁶² *Id.* at 17–19.

⁶³ *Id.*

⁶⁴ *Id.* at 18.

colonial reports, scholarly theory, Hollywood cinema, living in the [European] imagination and determinedly imposed on their alarmed real-life counterparts.⁶⁵

Classic liberalism systemically produced a bizarre dislocation between the manner in which certain humans came to understand their world, and the hierarchical world in which they actually lived. Mills suggests that the Racial Contract guaranteed this real world of inequality, but it is important to recognize that the Racial Contract itself went nowhere in resolving the discrepancy between (1) the notion of free and equal human beings, and (2) the notion that some humans were superior to other humans. Like any contract, it simply set out the terms of this inequality; it did not attempt to justify those terms.

B. The Invention of Race as a Justification for Subordination

The Racial Contract is an elegant intellectual construct for dealing with the contradictory manner in which classic liberalism so murderously played itself out in contexts like colonialism and slavery. What it does not do, however, is assist us in thinking about a psychological dilemma imminent in the confluence of these two imaginaries: why was it that when liberal texts referred to all members of the human species as free and equally autonomous persons, this was systemically interpreted as only referring to *certain* members? Or even worse, some might have wondered, might this interpretation have been wrong, or evil, and the conception of European superiority a mirage? Could the Racial Contract have been a delusional hallucination, a fantasyland? If it is clear that the Racial Contract taught its parties to view the world in a certain way, it does not explain how they were able to do so. The problem was that the widespread slaughter and subjugation of different peoples by European populations needed to be rationalized.⁶⁶ Not only was this a period in which religious justifications were increasingly under assault, it was also a time when liberalism was ascending—the new creed of equality and freedom.⁶⁷ If all people were equal, and deserved to be free, what justified the harsh inequalities of the Racial Contract?

As Anthony Farley has suggested, the original moment of departure from the natural world was also a moment in which the members of the new society who would be ruled were distinguished from those who would rule it.⁶⁸ If an answer was needed to justify the Racial Contract, in other words, if the human mind desired a rationale for just why it was that all human beings were not “full persons” after all, then the *mark* was the answer. Those who were marked could not be parties to the Contract, members of the new society. “The masters come together as one through the mark. . . . After the mark, we are white-over-black.”⁶⁹ The mark would soon be named: *race*.

Between the late seventeenth century and the middle of the twentieth, the task of justifying the terms of the Racial Contract from the newly-minted perspective of the scientific method fell to the

⁶⁵ *Id.* at 18–19.

⁶⁶ WINANT, *supra* note 3, at 38–50.

⁶⁷ See, e.g., MANENT, *supra* note 42; ALISDAIR MACINTYRE, AFTER VIRTUE (1981). Though science became a predominant means for “racing” European domination, it would be a mistake to think that religion was out of the picture entirely. See, e.g., COLIN KIDD, THE FORGING OF RACES (2006) (discussing the relationship between race and scripture in Protestant Europe).

⁶⁸ *Colorline*, *supra* note 60, at 953.

⁶⁹ *Id.*

emerging disciplines of anthropology, ethnology, and later biology.⁷⁰ The solution was the creation of “Human Races.” With this novel concept of human races in hand, an incredibly powerful and apparently *objective* justification for the conflict between the Social Contract and Racial Contract emerged: domination was legitimate, because certain “races” were superior to other “races.” The slaveholder, the capitalist, the colonialist, the classic liberal—they no longer needed to look for precarious support in religious texts or raw self-interest for discrimination. It could now be justified on a scientific basis, even in the midst of an emerging theory of human rights.⁷¹

The claim here is therefore that the idea of race was invented to satisfy a critical social need on the part of the oppressor class.⁷² As Farley states, “The mark shows who is to own and who is to be owned.”⁷³ Europeans were increasingly violating liberal principles even as these principles were gaining acceptance, and the idea of race made that paradox not only palatable, but a prescription for better living. As Fields suggested, “Racial ideology supplied the means of explaining slavery to people whose terrain was a republic founded on radical doctrines of liberty and natural rights . . . Race explained why some people could rightly be denied what others took for granted: namely, liberty, supposedly a self-evident gift of nature’s God.”⁷⁴ Sociologically, the oppressor class required a decent explanation for slaughter, and the scientific invention of the human races worked really well.⁷⁵ It worked until the twentieth century, anyway.

III. THE FUNCTION OF THE HUMAN RACES: AN ABRIDGED INTELLECTUAL HISTORY IN THE SCIENCE OF RACE

This Part introduces a “functionalist” orientation for thinking about the concept of race, and relies on a very general view of functionalism as a perspective that seeks to give meaning to a particular

⁷⁰ The account in this Article is drawn primarily from MILES & BROWN, *supra* note 20, at 39–50; NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE* (1982); IVAN HANNAFORD, *RACE: THE HISTORY OF AN IDEA IN THE WEST* (1996); PETER BAUM, *THE RISE AND FALL OF THE CAUCASIAN RACE* (2006); NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010); GEORGE FREDRICKSON, *RACISM: A SHORT HISTORY* (2002); Brendan O’Flaherty & Jill S. Shapiro, *Apes, Essences, and Races: What Natural Scientists Believed About Human Variation, 1700–1900*, in *RACE, LIBERALISM, AND ECONOMICS* 21 (David Colander, Robert E. Prasch & Falguni A. Sheth eds., 2009); AUDREY SMEDLEY, *RACE IN NORTH AMERICA* (3d ed. 2007).

⁷¹ See FREDERICKSON, *supra* note 70, at 56 (“The scientific thought of the Enlightenment was a precondition for the growth of a modern racism based on physical typology.”). See also MILES & BROWN, *supra* note 20, at 39–44.

⁷² e. christi cunningham defines race “as a system that was designed to define and enforce artificial differences in order to justify the unequal distribution of societal energy, resources, spirit, and entitlement.” *Exit Strategy for the Race Paradigm*, 50 *HOW. L.J.* 755, 760 (2007). See also DENISE DA SILVA, *TOWARD A GLOBAL IDEA OF RACE* 94 (2007). For discussion of the active use of “racing,” see John A. Powell, *The Racing of American Society: Race Functioning as a Verb Before Signifying a Noun*, 15 *LAW & INEQUALITY* 99 (1997).

⁷³ *Colorline*, *supra* note 60, at 954.

⁷⁴ Fields, *supra* note 47, at 114. Though Fields understood that the scientific construction of race was entirely wrong, as elaborated *infra*, she maintained that through “the ritual repetition of social behavior,” racial ideology was entirely “real.” *Id.* at 113.

⁷⁵ For a discussion of concepts of race that precede this period, see *THE ORIGINS OF RACE IN THE WEST* (Miriam Eliav-Feldon et al. eds., 2009).

concept through an analysis of the social and political needs served by that concept.⁷⁶ In contrast, one might consider a “formalist” perspective, which instructs one to understand a concept’s meaning in terms of what the concept actually is, in the abstract, rather than in light of the purposes that it might serve. Thus, a functionalist perspective on race attempts to understand what social needs the invention of race was intended to satisfy. As outlined in the discussion below, the answer was bitter: the idea of race was invented as a way of easing the psychological burden of an oppressor class.

One purpose for situating race in a functionalist perspective is to prepare the way for the legal discussion in Parts IV and V. As will be argued, the biological concept of race advanced by the sciences has turned out to be a fiction. A formalistic jurisprudence wedded to such a biological concept is in trouble, since there is no immutable, genetically determinable thing as “race” to analyze formally. While constitutional law often suffers from precisely this sort of defect,⁷⁷ other fields of law have been comfortable with functionalist approaches for close to a century. As is explained in Part V, Conflict of Laws is among them.

A. Monogenism, 1680–1850

Thirty years after the arrival of Hobbes’ *Leviathan* and just five years before Locke wrote his *Second Treatise*, Francois Bernier published in 1684 the first of many attempts to classify people in terms of their physical differences.⁷⁸ Of course, thinkers since Aristotle had suggested ways to typologize human beings. What distinguished Bernier’s set of classifications was its focus on physically observable characteristics, rather than a concentration on function and social purpose—of the dichotomies of vice and virtue, Christian and Heathen.⁷⁹ Bernier initially suggested that there were four basic *varieties* of

⁷⁶ My use of “functionalist” is of a very generic sort. By the term I mean to reference those juridical techniques that emerged in the late nineteenth and early twentieth centuries, wherein jurists sought to interpret statutes and resolve gaps in legal materials through a purposive, instrumental, and “functional” perspective on social needs. Conventionally, we think of functionalist techniques as representing the efforts of those that had been persuaded by the critiques of legal realism, and sought to build out of those critiques a program for moving forward. For a description of functionalism in the context of legal consciousness, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 44–45 (David M. Trubek & Alvaro Santos eds., 2005). For a discussion of formalism, see Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195 (2010).

⁷⁷ Goodwin Liu has discussed the connection between formalism and civil rights jurisprudence in “*History Will Be Heard*”: *An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL’Y REV. 53, 53–54 (2008) (“[O]ur history teaches that legal formalism (eventually) loses its authority when it strays too far from social reality. [Parents Involved] comes close to taking us down that troubled path again.”).

⁷⁸ HANNAFORD, *supra* note 70, at 191.

⁷⁹ This article does not mean to imply, however, that this new style of human classification was either necessitated by classic liberalism or its cause. Instead, notably, in the second half of the seventeenth century, at exactly the same time that classic liberalism was in its infancy, science became preoccupied with human diversity and physical explanations for cultural phenomena. The projects of liberalism and what would later be called “race science” were conducted in tandem—of that we can be certain. As for questions of causation and correlation, these may be left for elsewhere. See generally ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS* (1991); *THE RACIAL CONTRACT*, *supra* note 48; *FROM CLASS TO RACE*, *supra* note 48; MILES & BROWN, *supra* note 20; Theodore Koditschek, *Capitalism, Race, and Evolution in Imperial Britain, 1850–1900*, in *RACE STRUGGLES* 48 (Theodore Koditschek, Sundiata Keita Cha-Jua & Helen A. Neville eds., 2009); *RACIAL LIBERALISM*, *supra* note 50; Maria Grahn-Farley, *Race and Class: More than a Liberal Paradox*, 56 BUFF. L. REV. 935 (2008); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

human being (the term “race” had yet to arrive), and that these varieties were distinguished on the basis of geography and physical appearance.⁸⁰

More influential in this first phase of classification writing was the Comte de Buffon.⁸¹ Buffon, writing in 1749, suggested that the classifications of humans could be explained by the theory that at a point far in the past, one original human species spread over the globe and was gradually exposed to climactic differences, foods, and diseases. As this process continued, humans took on various complexions, sizes, and temperaments. The critical feature of his theory was that these varieties of people were subject to change—they were not fixed—and that the fact of a single variety did not necessarily mean anything other than that a single class of people had been subjected to a particular set of external conditions. Buffon still made value judgments about these varieties, specifically, European varieties were the best and the African ones were the worst. However, with time, Buffon believed that these effects would be modified, and even reversed.

It was with writers like these in mind that Johann Friedrich Blumenbach, later known as the father of anthropology,⁸² published a series of editions of his immensely influential *On the Natural Variety of Man* in the midst of the American and French Revolutions. Coining the term “Caucasian,”⁸³ Blumenbach believed that these types were hierarchically arranged with Caucasians positioned as the most beautiful and intelligent. The least desirable types of human were the Ethiopians and Mongolians; those people living in the Americas occupied the middle range of development.⁸⁴

Blumenbach followed his predecessors in arguing that the physical differences between humans were mostly a matter of environmental pressures. In his view, all human beings fundamentally were of one single species. This view was known as monogenism, which in Latin means “one species” or “one people.”⁸⁵ Blumenbach also denied that humans belonged to the animal kingdom, rejecting the notion that all natural creatures existed on a natural scale of transitional differentiations. In this posture Blumenbach left behind the old notion of the Great Chain of Being, reminiscent of Aristotle’s natural scale. Blumenbach’s thinking was that human beings consisted of one single species, and that it was a mistake to view the wide variety of human beings as alien to one another. The theory of the Great Chain

⁸⁰ These groups were: (1) Europeans, South Asians, North Africans, and Americans, all of which shared in similar climates and complexions; (2) Africans (central and south); (3) Asians (central and north); and (4) Lapps, “people who were ugly, squat, small, and animal-like.” About fifty years later, Carolus Linnaeus offered a fifth group: (1) *homo ferus* (savage); (2) *europaeus albus* (light-skinned, intelligent, law-abiding); (3) *americanus rubescens* (tanned, happy-go-lucky, custom-abiding); (4) *asiaticus luridus* (yellow-skinned and sad); (5) *afēr niger* (dark-skinned, lazy, “governed by the arbitrary will of the master”). HANNAFORD, *supra* note 70, at 204.

⁸¹ HANNAFORD, *supra* note 70, at 203–14.

⁸² HANNAFORD, *supra* note 70, at 206. Blumenbach explained that human beings were of several types: Caucasians, Mongolians, Ethiopians, Americans, and Malays.

⁸³ PAINTER, *supra* note 70, at 79. Blumenbach offered a helpful explanation as to why this variety of human being would be identified with the Caucasus: “I have taken the name of this variety from Mount Caucasus, both because of its neighborhood, and especially its southern slope, produces the most beautiful race of men, I mean the Georgian.” *Id.* at 81.

⁸⁴ *Id.* at 88 (“The Tartar-Caucasian was first and foremost the beautiful race. The Mongolian was the ugly race, ‘weak in body and spirit, bad, and lacking in virtue’ . . .”).

⁸⁵ HANNAFORD, *supra* note 70, at 211 (“For Blumenbach all varieties and differences overlapped and merged into one another and had to be viewed according to the species, which was one and the same—a unity.”).

supported the view that there were several species of humans, linked in a hierarchically arranged system with monsters on one end and European men on the other, followed by primates and other creatures.⁸⁶ Despite Blumenbach's belief in the common brotherhood of all mankind, and thus the existence of one single human species, his typology of human classifications nevertheless set the stage for the use of a racial idea to assist in making sense of the apparent fact that some people were a lot better than other people.⁸⁷

The monogenist ideas of Blumenbach and others like Johann Gottfried von Herder dominated race science until the 1850's, but their power diminished well before then.⁸⁸ Vying for consideration were the minority positions of scientists like Charles White and Peter Camper, who argued respectively for the notion that Africans were the link between Europeans and apes, and that this theory could be proven through the statistical display of facial angle measurements and skull shapes.⁸⁹ In early nineteenth-century Britain, the argument that Africans comprised a distinct species, linking "real" humans to apes, was rejected as quackery.⁹⁰ Writers like Thomas Winterbottom, James Prichard, and William Lawrence believed that the evidence overwhelmingly placed humans outside of the animal kingdom, obviating the need to provide any "link" at all. To be sure, practically all writers agreed that Africans were the least "developed" of the human varieties, and physically were the least fortunate, but these differences were not natural but merely the result of environmental factors. As Lawrence argued:

That the Negro is more like a monkey than the European cannot be denied as a general observation. But why is the Negro always selected for this comparison? The New Hollander, the Calmuck, the native American, are not superior to the Africans, and are as much like monkeys. Why then is the Negro alone to be depressed to a level with the brute?⁹¹

To be clear, the unity of the human species was defended by the likes of Blumenbach, Herder, Prichard, and Lawrence. The equality of the variety of human beings was not. The step from here to a more muscular "racism" would not be a difficult one to take.

⁸⁶ This was Linnaeus' view. *Id.* at 203–08.

⁸⁷ As Ivan Hannaford explained: "During the last forty years of [Blumenbach's] long life controversy raged over items he had put squarely on the agenda: degeneration, . . . the significance of language and milieu (geography, climate, relief, soil, land), and perhaps most important of all, the capacity of peoples for progressive physical, moral, and political development." *Id.* at 213.

⁸⁸ STEPAN, *supra* note 70, at 10. In a similarly holistic view of the human species, Herder published an account in the last decades of the eighteenth century suggesting that a new idea—*culture*—was the real organizing principle for the different manifestations of human society. For Herder, these cultures were equal in the sense that they were technically all *human* cultures, produced through a combination of different linguistic, religious, musical, educational, and ritualistic practices. Again, equality was a driver in Herder's thinking, but the very maneuver of classifying difference enabled much of the race science that would develop in the nineteenth century. Another important connection anticipated here is the relationship that would develop between race and culture—if culture was the shaping force of society, race would come to shape culture.

⁸⁹ *Id.* at 9–10.

⁹⁰ These arguments were made in France as well, for example by Georges Cuvier.

⁹¹ STEPAN, *supra* note 70, at 11 (quoting WILLIAM LAWRENCE, LECTURES ON PHYSIOLOGY, ZOOLOGY, AND THE NATIONAL HISTORY OF MAN (1822)).

B. Polygenism, 1815–1860

The shift that occurred in race science around the middle of the nineteenth century involved a series of moves, all revolving around the rebuttal of environmentalism as a coherent explanation for the superiority of certain races over others. More and more, anthropologists and ethnologists turned to ever-advancing methods of quantifying the many dimensions of the human body, with special emphasis on the brain and skull. The emerging consensus was that “races” of human beings could be identified on the basis of skull measurements, and that these differences generated vast gaps in the moral, intellectual, and cultural capacities of these groups. Critically, these differences were subject to value judgments as they had always been—the intellect and culture generated by the European skull was of a different order of magnitude than those found in “other” skulls. Regardless of environmental factors, these intellectual, moral, and cultural capabilities were seen as being inflexible—innate and woven into the very structure of race. Whereas early monogenists viewed race, and to be more precise with regard to Blumenbach’s preferred term of “variety,” as hardly determinative of anything, *race* transformed from an incidental factor into a source of explanation. Thus, a scientific rationale for the Racial Contract was coming into focus.

In the United States, where polygenism was more popular, the anatomist Samuel George Morton was a leading advocate of the view that human races were distinct species with innate differences.⁹² Writing in the decades preceding the American Civil War, Morton accepted Blumenbach’s classification of five races (Morton swapped the term “race” for “variety”), but argued that instead of these races having been produced by their environments, every race had particular qualities that were independent of context and especially adapted to peculiar locations.⁹³ These qualities were innate and immutable, and were correlated with the average cranial capacity of each race.⁹⁴ Fortuitously for Morton, his measured averages tracked exactly the cultural and aesthetic rankings of Blumenbach. Each of these five fundamental races were also broken up into families, anticipating the increasingly dangerous work which was to come in separating out the superior Caucasian families from the degenerate ones.

Though other race scientists were more influential at the time,⁹⁵ Count Arthur de Gobineau’s 1853 publication of *The Inequality of Races* is more well known today as one of the key motivators for what would become Nazism.⁹⁶ Due to this impact, and to give more of a flavor to the argument, it is worth

⁹² BAUM, *supra* note 70, at 106.

⁹³ *Id.*

⁹⁴ According to Morton’s measurements, the Caucasian cranial capacity averaged eighty-seven cubic inches, Mongolians averaged eighty-three inches, Malays averaged eighty-one inches, American Indians averaged eighty inches, and Ethiopians averaged seventy-eight inches. *Id.* at 107. In 1840, Anders Retzius introduced the “cranial index,” which was notated by the maximum breadth of the head expressed as a percentage of maximum length. He was also the author of the terms “dolichocephalic” (long-headed skull) and “brachycephalic” (broad-headed skull). BAUM, *supra* note 70, at 130–31.

⁹⁵ Back in Britain, the anatomist Robert Knox published *The Races of Men* in 1850. Knox began with an attack on Prichard, arguing that there was no evidence for believing in an original human species that had spread throughout the world, and that the species must be studied with anatomical methods—*biologically*, as the term now appeared consistently in the literature. *Id.* at 5–32. In tandem with this biological conception of race, Knox pushed forward the disaggregation of the Caucasian race, emphasizing the purity of the Saxons, and the destiny of that people to conquer the world. *Id.* at 32–54. Importantly, this structural purity of racial stock was immune to degradation, just as the Jewish people could never hope to improve their own. These differences were biological, and therefore unchangeable. The Revolutions of 1848 were the backdrop here.

⁹⁶ HANNAFORD, *supra* note 70, at 265.

spending a bit longer on Gobineau, the French “Father of Racism.”⁹⁷ Gobineau divided the human races into three: white, black, and yellow. As he explained, “I understand by *white* men the members of those races which are also called Caucasian, Semetic or Japhetic. By *black* men I mean the Hamites; by *yellow* the Altaic, Mongol, Finnish and Tartar branches. These are the three primitive elements of mankind.”⁹⁸

Though skin color and the Bible are doing a lot of work here, Gobineau also agreed that bone structure was highly relevant as well. Gobineau also ranked the races, as well as a shift from bone to blood: “the peoples who are not of white blood approach beauty, but do not attain it.”⁹⁹ Gobineau went on to write, “As the [non-white] races recede from the white type, their features and limbs become incorrect in form; they acquire defects of proportion which, in the races that are completely foreign to us, end by producing an extreme ugliness.”¹⁰⁰ Just what is this white beauty so elusive to the rest of humanity? Gobineau claims that it can be found in the most obvious of places: in the “...tall and nobly proportioned figure of Charlemagne, the intelligent regularity of the features of Napoleon, and the imposing majesty . . . of Louis XIV”¹⁰¹ Gobineau was not suggesting that all whites were equally attractive—Italians were more beautiful than the Germans, Swiss, French, or Spanish.¹⁰² And, just as no race was as physically strong as the whites, “[i]n strength of fist, the English are superior to all other European races; while the French and Spanish have a greater power of resisting fatigue and privation, as well as the inclemency of extreme climates.”¹⁰³

If skin, bone, and scripture told us a story about the human races, Gobineau explained that racial differences were far from skin-deep. The black race is stamped at birth with a pelvis of animal character, a character that “foreshadows his destiny.”¹⁰⁴ The “Negro” is not an animal, but not much more—“his mental faculties are dull or even non-existent”—though he does possess senses that are more animal-like than human. The Negro will eat anything, have sex with anything, kill anything, and do whatever it takes to satisfy his primal needs. “To these qualities may be added an instability and capriciousness of feeling, that cannot be tied to any single object, and which, so far as he is concerned, do away with all distinctions of good and evil.”¹⁰⁵ As for the yellow race, these people trend towards obesity, have little physical energy, and lack the “strange excesses so common among negroes.”¹⁰⁶ According to Gobineau, a person of the yellow race is mediocre in everything, utilitarian, never dreams of greatness, and has as his “whole desire . . . to live in the easiest and most comfortable way possible.”¹⁰⁷ It is probably a waste

⁹⁷ ARTHUR DE GOBINEAU, *THE INEQUALITY OF HUMAN RACES* (Adrian Collins trans., 1967).

⁹⁸ *Id.* at 146.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² GOBINEAU, *supra* note 97, at 152.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 205.

¹⁰⁵ *Id.* at 206.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

of time to summarize Gobineau's summary of white people—needless to say, he thought they were amazing.¹⁰⁸

In the following decade, arguments for the innate, anatomical basis of distinct human races, and the moral, cultural, and intellectual consequences that followed, increasingly dominated Europe. As Nancy Stepan has argued,

The new racial biology appealed to the general public because it appeared to agree with the Europeans' sense of themselves in the world, and to be based on a wider set of data, more sophisticated measurements, and a deeper knowledge of biological processes and functions than previous work on human races. In short, by the middle of the century, a new racial science had come into being in which races were indeed, as [Robert] Knox claimed, 'everything.'¹⁰⁹

C. Evolution and Eugenics, 1860–1945

If writers like Gobineau represented the apogee of polygenist thinking in the first half of the nineteenth century, the use of race as an explanation for European superiority shifted gears in the second half. After 1859, no examination of human genesis and variety could proceed without taking note of Charles Darwin's *On the Origin of the Species*—a game-changer if there ever was one.¹¹⁰ From this point forward, polygenism was no longer a valid belief, as it became universally accepted in the natural sciences that the human species was not a fixed, unchanging, perfect creation, but one that had been undergoing constant and continuous change since its beginning.¹¹¹ Darwin's insight into the idea of natural selection—that competition for survival favored those attributes most advantageous to keeping an organism alive—seemed to push race science back in the direction of environmentalism. What marked this new phase of race science was not, however, a return to Blumenbach, and in fact it was something like the opposite. Despite the initially apparent arguments that evolutionary theory posed *against* race science, the idea of evolution turned out to be a far sleeker and more powerful weapon for racist thinking than anything seen before.

¹⁰⁸ Gobineau rejected the fairly common view of the time that, though these descriptions are accurate enough, they are subject to the civilizing mission, and that the lower races can be bettered. Gobineau explained that this is not so, and that just as humanity at large has failed to progress since ancient time, it is similarly the case that non-whites are precluded *by their race* from acquiring any of the positive traits of the whites. As one of many examples, here is Gobineau's articulation of the situation of the American Indian: "They know that the strength of their [white] masters is irresistible. They have no hope whatever of seeing their native land one day delivered from the conqueror; their whole continent is henceforth, as they all know, the inheritance of the European . . . From their purchases of brandy, guns, and blankets, they know that even their own coarse tastes would be more easily satisfied in the midst of such a society, which is always inviting them to come in . . . It is always refused. They prefer to flee from one lonely spot to another . . . They will die out, as they know well; but they are kept, by a mysterious feeling of horror, under the yoke of their unconquerable repulsion from the white race, and although they admire its strength and general superiority, *their conscience and their whole nature, in a word, their blood, revolts from the mere thought of having anything in common with it.*" GOBINEAU, *supra* note 97, at 170–71 (emphasis added). Because this revulsion is in the blood, in the *race*, it is impossible for whites to civilize non-whites, and due to this unchanging feature of race relations, Gobineau concludes that it is an understatement to bar the races from mixing—the true condition is one in which the mixing of races eventually will lead to the extinction of humanity. *Id.* at 210–11.

¹⁰⁹ STEPAN, *supra* note 70, at 46.

¹¹⁰ BAUM, *supra* note 70, at 129–30.

¹¹¹ *Id.*

The articulation of a new science was not the only relevant occurrence. Just as the explanatory power of the idea of race gained ground in Europe after the Revolutions of 1848, and in the United States in the run-up to the Civil War, so did it once again build steam in the last several decades of the nineteenth century.¹¹² Europe was jarred by the Franco-Prussian war of 1871 and the ensuing Depression, and the United States limped through Reconstruction, which was noted by some scholars as the nadir of race relations. In these political contexts, the two new conceptions of social evolution and eugenics flourished in a sort of perfect storm of political and scientific turbulence.

As far as social evolution goes, probably no other name comes as readily to mind as Herbert Spencer's.¹¹³ The philosophy of *laissez-faire*,¹¹⁴ which attracted Spencer's fierce support, instructed social planners to abide by a theory of natural selection. To the extent government tried to control the more extreme effects of this competitive process, the government was effectively ensuring the survival of backward and deviant vestiges. By analogy, Spencer argued for society to be understood as a social organism, which was subject to the laws of natural selection in exactly the same way as were species. The conclusion drawn with regard to the human races was apparent. Just as the backward and deviant attributes of the human species were ultimately extinguished over periods of competitive struggle, so too would those unworthy elements of society languish and disappear. They would disappear, that is, so long as competition was allowed to proceed without governmental interference.

How did race science square the view that races were fixed and innate with the notion of continuous, evolutionary change? Anthropologists agreed that though it may have been the case that in some primordial past human beings may have had a common, shared identity, racial formation occurred at a similarly distant point. Instead of the human races evolving, however, the evolution of race had stopped. The rationale for the idea that there was a pre-human period in which races were formed through evolutionary processes, only to be followed by stasis, was that once human beings had become more intelligent, they were able to subvert and deny the forces of natural selection. As a result, evolutionary struggle would continue to affect humanity, but not individual human beings. The struggle was from the dawn of modern man a struggle between the races of men, and not between men themselves.¹¹⁵

The job of the race scientist was consequently the study of these primordial races and the identification of their truly natural essences. The trouble, of course, was that scientists were finding that they couldn't identify racial essences from the study of particular individuals. Individuals were simply too varied to ever be representative of what were believed to be the standard traits of a race. Thus, individual people were studied not to help generate a picture of racial identity, since this appeared to be impossible. Instead, individual differences between people who were apparently meant to belong to a single race were chalked up as environmentally produced, or mutations from the racial standard. The obvious

¹¹² *Id.* at 120–26.

¹¹³ See, e.g., MIKE HAWKINS, SOCIAL DARWINISM IN EUROPEAN AND AMERICAN THOUGHT 1860–1945, at 82–103 (1997).

¹¹⁴ The idea here is that just as a species becomes more and more adapted to its environment through the selection of those attributes that are most competitive, so society also evolves in an identical way. Through the fire of competition, society is naturally molded towards more and more progressive ends. Though the competitive process will surely wreak havoc on the weak, it ensures the survival of the fittest, and even more, the success and bettering of the fittest. For a history of *laissez-faire*, see JACOB VINER, ESSAYS ON THE INTELLECTUAL HISTORY OF ECONOMICS (Douglas A. Irwin, ed. 1991 [1960]).

¹¹⁵ See generally HAWKINS, *supra* note 113; STEPAN, *supra* note 70; BAUM, *supra* note 70.

problem here was that if racial identity could not be constructed from the study of individual human beings, where was it coming from?¹¹⁶ The notion of race was increasingly looking more and more like an article of faith, and not of empiricism.

From here it is but a short hop to the new field of eugenics, which did not become fashionable until the early twentieth century.¹¹⁷ Around that time, several popular works on race science were lending more support for the view that there were biologically fixed racial identities and, more specifically, that the so-called white or Caucasian race was not a unity. Among such works was the American economist William Z. Ripley's 1899 publication of *The Races of Europe*, a turning point in U.S. race science.¹¹⁸ While Blumenbach's idea of the Caucasian race had gained popularity in the United States, most scientific study of the idea of a Caucasian race did not get under way until after Ripley.¹¹⁹ In part, as Bruce Baum explains, Ripley's work was filling a social need—a need to provide persuasive evidence that mid-nineteenth-century European-Americans were superior to the new Europeans immigrating in that century's last decades.¹²⁰

Stepping into this space was Ripley's view that the idea of whiteness was a misnomer,¹²¹ and that there were actually three primary European races.¹²² Each racial group was characterized by a single

¹¹⁶ Both Gobineau and Ripley were of apiece on this point:

“It is not essential to our position, that we should actually be able to isolate any considerable number, nor even a single one, of our *perfect* racial types in the life. It matters not to us that never more than a small majority of any given population possesses even two physical characteristics in their proper association; that relatively few of these are able to add a third to the combination; and that almost no individuals show a perfect union of all traits under one head, so to speak, while contradictions and mixed types are everywhere present.”

WILLIAM Z. RIPLEY, *THE RACES OF EUROPE* 108 (1899) (emphasis added).

¹¹⁷ In short, its advocates believed that human beings had short-circuited the evolutionary process through cunning; if, like other animals, humans had selectively produced in a way that would have maximized adaptive advantages, the non-white races would have extinguished long ago. But the human mind broke the laws of nature, choosing instead to keep on procreating, despite the competitive disadvantages of belonging to a non-white race. The field of eugenics was meant to solve this problem, informing how social policy, in the words of Francis Galton, “may improve or impair the racial qualities of future generations either physically or mentally.” As Nancy Stepan has explained, Galton's 1869 publication of *Hereditary Genius* embodied several of the key assumptions of the eugenics movement. First was the belief that intelligence was discrete and quantifiable, and that intelligence was a matter of inheritance. A second and related view was that the amount of inherited intelligence was easily identifiable and measurable through “objective” intelligence tests. Third, intelligence was believed to be entirely a matter of racial inheritance—in the debate between nature and nurture, nature was all. Fourth, it was critical to turn this science into policy, and that in order to extinguish the specter of degenerate generations in the future, government had to regulate the process of selective breeding. The impetus for this was the belief whereas nature eliminated the sick and the stupid in the rest of the animal kingdom, humanity protected its imbeciles from early death. Man's tinkering with the natural order, so Galton believed, had to be stopped. See STEPAN, *supra* note 70.

¹¹⁸ BAUM, *supra* note 70, at 144; see also RIPLEY, *supra* note 116.

¹¹⁹ BAUM, *supra* note 70, at 144.

¹²⁰ *Id.*

¹²¹ RIPLEY, *supra* note 116, at 103.

¹²² These were: (1) the Teutons from northwestern Europe, with long heads and faces, light hair and eyes, tall, prominent and thin noses, (2) the Alpines spread through France, Spain, Italy, Germany, and Albania, with round heads

range of cranial shape,¹²³ but Ripley made it clear that there were very few, if any, actual living individuals that possessed all the racial traits characteristic of a particular racial group. Despite the apparent fact that races did not exist in the world of 1900, the idea of race was so crucial that it “exists for us nevertheless.”¹²⁴

If statements like these are bewildering, writers like Houston Stewart Chamberlain, writing at the same time as Ripley, provide some insight into the feverish need to believe in the existence of a thing called “race.” There was no doubt, Chamberlain conceded, that scientific method was struggling to establish a firm footing for the idea of race.¹²⁵ However, this kind of struggle was necessary and expected, given the constant state of intermingling and cross-breeding that has occurred over the ages.¹²⁶ The true fact was that scientific confusion should never be mistaken for suspicion over whether or not race is a real thing. To question the existence of race was to question the existence of life itself. Here is how Chamberlain presents the experience of a pure-blooded member of the Teutonic or Germanic race:

Nothing is so convincing as the consciousness of the possession of Race. The man who belongs to a distinct, pure race, never loses the sense of it Weak and erring like all that is human, a man of this stamp recognizes himself, as others recognize him, by the sureness of his character, and by the fact that his actions are marked by a certain simple and peculiar greatness, which finds its explanation in his distinctly typical and super-personal qualities. Race lifts a man above himself: it endows him with extraordinary—I might almost say supernatural—powers, so entirely does it distinguish him from the individual who springs from the chaotic jumble of peoples drawn from all parts of the world: and should this man of pure origin be perchance gifted above his fellows, then the fact of Race strengthens and elevates him on every hand, and he becomes a genius towering over the rest of mankind, not because he has been thrown upon the earth like a flaming meteor by a freak of nature, but because he soars heavenward like some strong and stately tree, nourished by thousands and thousands of roots—no solitary individual, but the living sum of untold souls striving for the same goal.¹²⁷

For Chamberlain, the idea of race was hardly ever in jeopardy of falling into desuetude: it was simply a matter of science catching up with the natural world, with the facts catching up with the theory.¹²⁸

and broad faces, chestnut colored hair and hazel eyes, broad noses, and medium and stocky builds, and (3) the Mediterraneans come from everywhere south of the Pyrenees, with long heads and faces, dark hair and eyes, very broad noses, and medium and slender builds. Each racial group was also characterized by a single range of cranial shape. *Id.* at 37–45.

¹²³ *Id.*

¹²⁴ *Id.* at 112.

¹²⁵ 1 HOUSTON STEWART CHAMBERLAIN, FOUNDATIONS OF THE NINETEENTH CENTURY (John Lees trans., 1994).

¹²⁶ *Id.* at 271.

¹²⁷ *Id.* at 269.

¹²⁸ *Id.* at 317 (“[R]ace, and nationality which renders possible the formation of race, possess a significance which is not only physical and intellectual but also moral. Here there is before us something which we can characterise as sacred law, the sacred law in accordance with which we enter upon the rights and duties of manhood”). As for how to move forward, Chamberlain believed he had found several rules for race-formation. The origin of a pure race necessitated the presence of a strong stock—a material with which to begin to build. Then, the stock needed to be

Chamberlain suggested that it was clear to a member of the Germanic race, just as it was clear to an adversary member of the Jewish race. For non-members, however, the trick of identifying the superior human was really not all that tricky. Too many misconceptions floated around—Germanic peoples were not required to have light hair, but in fact, “the most genuine sons of this race may be black-haired.”¹²⁹ It was correct to believe, however, that members of the German race possess long skulls. The fact that many, and in some cases the majority of these peoples have round skulls should not be a bother: “That in these phenomena we see the effects of the infiltration of an un-Germanic race, a race that does not belong at all to the Indo-European circle, but to the race-less chaos, can scarcely be doubted.”¹³⁰ Again, Smith concedes the scientific challenges while re-asserting the apparent obviousness of it all:

It frequently happens that children who have no conception of what ‘Jew’ means, or that there is any such thing in the world, begin to cry as soon as genuine Jew or Jewess comes near them! The learned cannot frequently tell a Jew from a non-Jew; the child that scarcely knows how to speak notices the difference. Is not that something?¹³¹

Besides, if we discard the physical distinctions of race, the decisive greatness of the Germanic race distinguishes itself in its moral and intellectual legacies—which is literally everything that is good.¹³²

D. Ethnicity vs. Race, 1935–1980

While the eugenics movement steadily accelerated in the United States, it reached a fever pitch in Germany. After World War II, eugenics took a fall, associated as it was with the Holocaust. But the return of a more “rational” race science at the mid-twentieth century was not solely a product of the Nazi defeat, as a minority stream of writers beginning with the likes of Lancelot Hogben and Franz Boas criticized the alliance between evolutionary theory and eugenics.¹³³

In the wake of World War I, the lawyers and politicians behind the League of Nations and a treaty system meant to deal with the European “minorities problem” found themselves grappling with an emerging international right of “self-determination.” If this was a right that ultimately entitled a particular entity to a degree of political autonomy, if not outright independence, the question was sure to turn on just what kinds of group would hold the nascent right. Peoples or nationalities? Races? Simultaneously, the interwar years were also marked with the rise of Nazism and the peak of the

purified over time through the artificial (in contrast to “natural”) process of sexual selection and inbreeding. In order to strengthen the racial stock, it then needed to be cross-bred, but only in small doses and in the right quarters. Finally, a great race will be heated in the fires of nationalism, as it is only in the house of the nation that racial greatness can be achieved. *Id.* at 317–20. Smith explained that in the articulation of these pre-conditions he had touched “upon a deep scientific fact.” *Id.* at 317.

¹²⁹ Chamberlain, *supra* note 125, at 526.

¹³⁰ *Id.* at 527.

¹³¹ *Id.* at 537.

¹³² *Id.* at 542–50.

¹³³ For a general review of this literature, see BAUM, *supra* note 70, at 162–92; and STEPAN, *supra* note 70, at 140–96.

eugenics movement. It is in this context that a new wave of race science struck against the popular idea that the superiority of European peoples could be defended on “racial” grounds.¹³⁴

Illustrative is the work of Ashley Montagu’s attack on “race” and his preference for “ethnicity” in writings such as the first 1942 publication of *Man’s Most Dangerous Myth: The Fallacy of Race*, his work on UNESCO’s 1951 “Statement on Race,” and *The Concept of Race* published in 1964. Montagu challenged the whole notion of race science as an enormous amount of talking in circles and question-begging:

For nearly two centuries anthropologists have been directing their attention principally toward the task of establishing criteria by whose means races of mankind might be defined. All have taken completely for granted the one thing which required to be proven, namely, that the concept of race corresponded with a reality which could actually be measured and verified and descriptively set out so that it could be seen to be a fact The process of averaging the characters of a given group, knocking the individuals together, giving them a good stirring, and the serving the resulting omelet as a “race” is essentially the anthropological process of race-making. It may be good cooking but it is not science, since it serves to confuse rather than clarify The omelet called “race” has no existence outside the statistical frying-pan in which it has been reduced by the heat of the anthropological imagination.¹³⁵

Like Julian Huxley and A.C. Haddon in their 1936 publication of *We Europeans*, however, Montagu admitted that innate differences existed between populations, but that the better way of capturing these differences was with the label “ethnic group.”¹³⁶ The basic reasoning is that while it is true that populations differ in terms of the frequency of certain genes, to then call this difference “racial” is to inject into the facts a set of varying beliefs about the cultural and intellectual baggage that must or may

¹³⁴ A major intervention was made when Julian Huxley and A.C. Haddon published *We Europeans* in 1936. JULIAN HUXLEY & ALFRED C. HADDON, *WE EUROPEANS* (1936). Attacking the “pseudo-science” of writers like Gobineau and Smith, Huxley and Haddon argued that the bulk of race science had been established to support the political, social, cultural, and economic superiority of some populations over others, and that as real science, the biology of race was complete nonsense. *Id.* at 144–64. To be sure, they were not arguing that various populations could not be separated by innate genetic differences with regard to both physical and psychological traits—this would present an argument against race that would eventually come later in the century. But, where Huxley and Haddon admitted the existence of innate genetic differences between groups, they first challenged the non-sequitur that one could deduce psychological conditions from physical conditions. *Id.* at 144. That is, there was no real evidence whatsoever that black skin or a certain cranial capacity could tell a scientist anything at all about “racial” intelligence. Second, they criticized the idea that one could find average degrees of intelligence based on physiognomy—“there will be in every social class or ethnic group a great quantitative range and a great qualitative diversity of mental characters, and different groups will very largely overlap with each other.” *Id.* at 70. Third, Huxley and Haddon suggested that whereas race science had previously concluded that “race is everything” in the question of nature versus nurture, this was surely wrong. Climate and culture played an enormous role in the differentiation of human capabilities, and as yet, they concluded, there was simply no way of quantifying how explanatory nurture or nature might be in any given situation. While Huxley and Haddon agreed that there were innate differences between populations, and therefore kept within the discourse of a biological idea about the separation of groups of human beings, they believed that “nothing in the nature of ‘pure race’ in the biological sense has any real existence.” *Id.* at 14. Looking to Herodotus’ use of the term *ethnos*, Huxley and Haddon suggested “ethnic group” to provide a superior way of labeling political, cultural, social, and economic differences between human populations. *Id.* at 30–31.

¹³⁵ Ashley Montagu, *The Concept of Race in the Human Species in the Light of Genetics*, in *THE CONCEPT OF RACE* 5–6 (Ashley Montagu ed., 1964).

¹³⁶ Ashley Montagu, *The Concept of Race*, in *THE CONCEPT OF RACE*, *supra*, at 15–27.

follow from these genetic differences.¹³⁷ Thus, while the term “race” is conclusory, suggesting for the user an established connection between mental and physical characters, Montagu believed that the term “ethnic group” was open and vague enough to force the user to understand “ethnic group” as a “problem to be solved.”¹³⁸ In contrast, the use of “race” suggests that the problem of human classification has already been solved. In other words, once the anthropologist identifies differences of gene frequencies in particular populations as racial, he has answered the question of whether there is a thing called race.¹³⁹ In contrast, the anthropologist using the term “ethnic group” does not presume to have identified anything at all about human variation other than that certain populations appear to have diverging gene frequencies.

We may not be persuaded that the use of ethnicity does work of a very different kind than the use of race. Despite the heavy skepticism of this period regarding the existence of race as a scientific concept, classifications did continue. Huxley, Haddon, and Montagu all backed the idea that there were three major groups: mongoloids, negroids, and caucasoids.¹⁴⁰ What is certain of this period, however, is that there was a concentrated attempt to take the racism out of race, if not to eliminate the idea of race all together. If human classifications were real, then whatever they were, they could no longer be connected up with intellectual differences.

Science was therefore in the business of emptying race of its cultural content.¹⁴¹ As a result, science was also in the business of excusing itself as a rationale for the Racial Contract. Recall that the idea of race was constructed as an answer to a particular question: how could the superiority of Europeans over non-Europeans be justified? If science was divorced from the idea that something called race had biological connections with cultural and intellectual capacities, the Racial Contract would lose its scientific rationale.

E. The Biological Foundation of Race is Fiction

In the last decades of the twentieth century and in the beginnings of the twenty-first, advances in genetics closed the door on the old idea of race as a biological concept. There is evidence, however, that clusters of gene frequencies exist in discrete populations—populations that track the major geographical regions of the world: Africa, East Asia, Melanesia, the Americas, and Eurasia.¹⁴² So what does this mean? Is this actually an argument for the biological existence of race, after all? In the context of how race has traditionally been used as a means of classifying human beings, the answer is definitely no. The bottom line is the oft-quoted conclusion that gene variations occur with far more frequency *within* subpopulations than *between* them. This simply means that if one has an interest in isolating genotypes, the resulting classification will be one that necessarily spans Africa, the Americas, and the rest of the globe. To be sure, due to sexual selection among certain groups, there is a higher frequency of certain

¹³⁷ *Id.* at 18–22.

¹³⁸ *Id.* at 25.

¹³⁹ *Id.* at 26–27.

¹⁴⁰ Ashley Montagu, *On Coon's The Origin of Races*, in CONCEPT OF RACE, *supra* note 135, at 236–38; HUXLEY & HADDON, *supra* note 134, at 136–137; UNESCO, THE RACE QUESTION (1950), *available at* <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf>.

¹⁴¹ Probably the best-known example is CARLETON S. COON, RACIAL ADAPTATIONS (1982).

¹⁴² *See, e.g.*, MILES & BROWN, *supra* note 20, at 44–50; RACISM IN THE 21ST CENTURY (Ronald E. Hall ed., 2008); JANIS FAYE HUTCHINSON, THE COEXISTENCE OF RACE AND RACISM (2005).

genes among the members of those groups. But the frequency of those genes is not connected with any other genetic phenomena. As geneticist Keith Cheng has explained, “such traits [as the African American susceptibility to heart disease] would be expected, most of the time, to be inherited independently from skin-color genes, making skin color, and therefore race, an unreliable substitute for knowing the real gene variations that correlate with drug responsiveness.”¹⁴³

A way to illuminate this is by way of the contemporary consensus regarding the susceptibility of particular subpopulations to specific diseases. Common examples include African-Americans with heart failure and European-Americans associated with Ashkenazi Jewish families and Tay-Sachs disease.¹⁴⁴ Scientists generally agree that these subpopulations carry gene frequencies amenable to specific kinds of treatment, and are less responsive to others. What is key, however, is that these particular gene variations are completely independent from the gene variations responsible for such things as hair, skin, blood, and bone type. Some might be tempted to call these gene frequencies the stuff of “racial classification,” but Montagu’s question remains just as alive today as it did seventy years ago: what is the basis for calling such differences *racial* differences? They are genetic differences, we know that much. To make any greater claim is to beg the essential question.

IV. NEOLIBERALISM AND POST-RACIAL COLORBLINDNESS

The story described above outlined an intellectual history of the idea of race in science. The argument characterized this history as a series of attempts to use scientifically objective rationales to justify the Racial Contract. The story ended, however, in the present-day renunciation of a scientific basis for the idea of race, leaving us with some nagging questions: if “race” began as an idea about how to justify the superiority of European peoples over other peoples, and the scientific basis for that idea has finally been proven illusory, what does that mean for law? Does this undermine the validity of race as a legal concept? As for the first question, it is a history that highlights the impossibility of “colorblindness,” which involves the belief that an ultimate theory of racial justice is predicated on the elimination of race as a factor in political discourse.¹⁴⁵ Regarding the second question, an important point to remember is that legal concepts are analytically distinct from natural or social concepts. To be sure, there may be a temptation to eradicate a legal concept if we have determined that the concept’s natural analogues are myths—and in some cases, it may be worth our while to eliminate the concept at once. The immediate point, however, is this: nothing logically follows from a recognition that human races are imaginaries, not scientific fact. What we do with this recognition is up to us.

¹⁴³ Keith Cheng, *Demystifying Skin Color and “Race”*, in RACISM IN THE 21ST CENTURY, *supra* note 142, at 15. As Michael Bamshad (geneticist) and Steve Olson (science writer) have recently explained: “Given that people can be sorted broadly into groups using genetic data, do common notions of race correspond to underlying genetic differences among populations? . . . Because traits such as skin color have been strongly affected by natural selection, they do not necessarily reflect the population processes that have shaped the distribution [of real genetic differences]. Therefore, traits or polymorphisms affected by natural selection may be poor predictors of group membership and may imply genetic relatedness where, in fact, little exists.” Michael Bamshad & Steve Olson, *Does Race Exist?* SCIENTIFIC AMERICAN, Dec. 2003, at 78, 83. *See also* Masatoshi Nei & Arun Roychoudhury, *Genetic Relationship and Evolution of Human Races*, EVOLUTIONARY BIOLOGY 14 (1983) (reassessing magnitude of genetic differences among three major human races).

¹⁴⁴ BAUM, *supra* note 70, at 215.

¹⁴⁵ As Justice Kennedy wrote in a concurrence to *Parents Involved*, “The enduring hope is that race should not matter.” 551 U.S. 701 at 787.

In this Part, the basic argument is that the biological concept of race invented in the sciences steadily migrated into legal discourse, providing the background or constitutive rules of race as a legal concept. At various times in U.S. history, these background rules have had more or less purchase on civil rights disputes and the surface appearance of equal protection jurisprudence. These shifts track the changes in race science surveyed above—though at all times a biological conception of race has continued to serve as the background rule of race as a legal concept.¹⁴⁶ In keeping with Duncan Kennedy's description of various phases of legal consciousness in American Legal Thought, it is useful to characterize these shifts in terms of "liberal legalism."¹⁴⁷

For example, in a classic liberal approach to race, background rules are central, which means that a great deal of the work in a legal decision will be performed by a characterization of racial identity.¹⁴⁸ The reason for this is that once the natural character of race is properly identified, there is apparently little else for the judge to do, since races are considered unequal and objectively deserving of different sorts of treatment. In this old and now discredited style, an identification of racial identity was sufficient for producing a legal decision since racial identity came ready-made with a set of answers about how human beings were meant to interact with one another. Another way of putting this is to say that a characterization of race as a legal concept in the classic liberal style is to reject colorblindness. In this approach, it would be a terrible mistake to avoid race-consciousness, since the races are naturally unequal, and as a consequence, deserving of very different legal treatment.

In a modern liberal approach, background rules regarding the biological nature of racial identity recede out of view, though they remain constitutive of race as a legal concept: this is the beginning of the colorblind approach. That is, the modern liberal is very skeptical about the background rules (*i.e.* the biological concept of racial identity), since advancements in the sciences had by this time shown that there was very little that could be deduced about the cultural or intellectual content of racial identity. Nevertheless, the modern liberal always retained those background rules as the baseline for her own attempts at regulation.¹⁴⁹ Thus, what becomes important for the modern liberal is the establishment of

¹⁴⁶ Neil Gotanda, *Race as Reification* (manuscript on file with the author).

¹⁴⁷ Kennedy's early work is all framed in terms of a critique of legal liberalism. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979). However, his most recent sketch of a periodization of legal consciousness avoids the terms and instead roots itself in a sequence from Classical Legal Thought to Social Legal Thought to Contemporary. Kennedy, *supra* note 34, at 19. As Kennedy suggested both then and now, there is nothing that can necessarily be derived from liberal political theory in terms of legal structure. That is, liberalism does not itself come ready-made with particular constellations of legal arguments. I agree completely with this, and do not mean to suggest in the present analysis that there is anything about, say, the modern liberal style that determined the course of mid-twentieth century civil rights law. Nevertheless, we can see that strain of civil rights law as performing in the modern liberal style, even while there was nothing about the style itself that necessitated the legal particulars. In the language of *Three Globalizations*, we might say that a focus on liberalism helps us understand why one generation speaks a particular *langue*. Liberalism itself tells us nothing about *parole*.

¹⁴⁸ For a general discussion of the philosophy of race, see PHILOSOPHERS ON RACE (Julie K. Ward & Tommy Lott eds., 2002); RACIAL LIBERALISM AND THE POLITICS OF URBAN AMERICA (Curtis Stokes & Theresa Melendez eds., 2003).

¹⁴⁹ Contemporary anti-discrimination law takes as a given that standing for a claim presupposes the right kind of identity. That is, if you are going to have standing in a claim based on racial classifications, you need to be a member of the race that has been discriminated against—you need to show a cognizable injury. See, e.g., e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, *supra* note 27, at 451–52 (difference between protected class and racial minority).

foreground rules, which involve attempts to *protect* an already existing, pre-legal racial identity through legislation.¹⁵⁰

In a neoliberal approach to race, background rules remain receded, but foreground rules are disfavored at the same time, which has the curious effect of making the background rules feel more pronounced.¹⁵¹ The result is a jurisprudence that takes a biological view of racial identity as a legal baseline first established in the classic liberal style, but like in modern liberalism, believes there to be little that can be gleaned in terms of a guide for legal decision-making from these background rules. Therefore, neoliberals seek “colorblindness” as modern liberals do. The neoliberal approach is also like classic liberalism, however, in that it suggests a jurisprudence that is wary of the need for any regulative framework at all. Justice will be found in the play of the background rules, and not in a sphere of government regulation that is more often than not subject to the arbitrary capture of political interest.¹⁵² These three conceptions are summarized in the following chart.

¹⁵⁰ This is basically a description of the major set of moves that emerged after World War II regarding the scope and matter of civil rights law. See generally WINANT, *supra* note 3 (comparing post World War II racial dynamics in four countries); GRAHAM, *supra* note 11 (providing a comprehensive legal history of civil rights).

¹⁵¹ This description of a neoliberal style is a little different from what one might expect. Typically, neoliberals are very strong on background rules—take Hernando de Soto as an example. After extensive research throughout the developing world, de Soto was convinced that the problem of development was centered precisely in the issue of background rules, specifically in this case, property rights. It wasn’t that people in the developing world didn’t own enough property, but rather that they did not have their property recorded in legal system. If one’s house is not properly recorded, de Soto explained, that house could not then take on its critical function as a capital asset. And without capital, development would remain a dream. As de Soto suggested, “In the West, this formal property system begins to process assets into capital by describing and organizing the most economically and socially useful aspects about assets, preserving this information in a recording system—as insertions in a written ledger or a blip on a computer disk—and then embodying them in a title. A set of detailed and precise legal rules governs this entire process. . . . They capture and organize the potential value of an asset and so allow us to control it. Property is the realm where we identify and explore assets, combine them, and link them to other assets. The formal property system is capital’s hydroelectric plant. This is the place where capital is born.” HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 47 (2000).

¹⁵² See, e.g., 2 FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* (1998). Hayek firmly believed that liberal law led to the most just kind of society men could feasibly attain, and this justice flowed from the background rules of property and contract law. Finally abandoning the feudal road, Hayek argued that the “decisive step” in humanity’s progressive evolution was the discovery of the bargain. But the ability to consistently determine what belonged to whom, and how to trade one thing for another, depended on the development of property and contract rules. If this never were to happen, ideas like “ownership” and “bargain” would never had had any real meaning. Hayek argued that these new rules of conduct were the mechanisms of co-existence, were definitively non-coercive, and had as their central function the creation of a society in which people with different outlooks on life, with different values for different products, could live together in peace. What was required was a law that told no man what he ought to do, but could “tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of options open to him.” *Id.* at 37. Though Hayek imagined the private law as non-coercive and pre-political in a very strong sense, he nevertheless did, like Locke before him, believe that the market brought with it more than a sustainable peace (essential as that was), but a just society as well. It was not that either of them thought that the moral content of property and contract would generate any particular constellation of social outcomes, but rather that it was the *process* of the private law that was just. “In this respect what has been correctly said of John Locke’s view on the justice of competition, namely, that ‘it is the way in which competition is carried on, not its results, that count,’ is generally true of the liberal conception of justice, and of what justice can achieve in a spontaneous order.” *Id.* at 38.

TABLE 1—THREE LEGAL CONCEPTIONS OF RACE

	BACKGROUND RULES	FOREGROUND RULES
CLASSIC LIBERALISM	<p>Very Strong</p> <p>The biological nature of the background rules are self-evident and come ready-made with answers about how to arrange society.</p>	<p>Non-existent</p>
MODERN LIBERALISM	<p>Weak</p> <p>The biological nature of background rules are retained, but the judge is instructed to treat racial identity as having little if anything to say about the intellectual, cultural, or moral differences between the races. This is a view in favor of colorblindness and cultural pluralism.</p>	<p>Very Strong</p> <p>Racial discrimination is believed to be pervasive and powerful, and the antidote lies in heavy state regulation, i.e. court-enforced desegregation, civil rights statutes, constitutional rights, etc.</p>
NEOLIBERALISM	<p>Moderate</p> <p>The biological nature of background rules are retained, but the judge is instructed to treat racial identity as having little if anything to say about intellectual, cultural, or moral differences between the races. This is a view in favor of colorblindness and cultural pluralism. The background rules take on a more prominent aspect in this style due to the style's heavy skepticism about foreground rules.</p>	<p>Weak</p> <p>The use of state regulation of race, or the use of racial classifications, is presumptively invalid. It doesn't matter if the racial classifications are intended to benefit or harm a minority group. This is a view in favor of post-racialism.</p>

In the discussion that follows, the major argument is that in each stage of the development of race law in the United States, biology has always been there as a background and constitutive rule of race as a legal concept. It was there in the law of slavery, and it is there in the most recent decisions of the Supreme Court. To be sure, these background rules are doing very different work now, but they are doing work all the same. Thus, it is critical to keep vigilant and avoid distraction from the emergence of an admittedly fundamental and truly important set of foreground rules: civil rights law, or, in other words, the shift from classic liberalism to modern liberalism. It is impossible to deny that race as a legal concept dramatically changed after *Brown* and the Civil Rights Act, but that is not the point. The point is

to focus on what has remained the same, the persistent hold that a biological understanding of race continues to have on the very manner in which race is legalized in the first place.

In Section A, the discussion explores how courts were first inclined to borrow the notion of “human races” from the sciences and use it as a conceptual means for justifying the enslavement of Africans. It then skips ahead past the Civil War and the Fourteenth Amendment, looking again to how legal discourse was tracking race science. At this stage, background rules were still doing a great deal of heavy lifting—judges could simply *deduce* the appropriate scope of legal relations from an identification of a person’s “race.” In Section B, the discussion moves past the beginnings of modern liberalism and *Brown* and into the formation of the affirmative action debate. In this context, the Supreme Court demonstrates its commitment to a more progressive understanding of the background rules of racial identity (biology), but also signals some concerns about being overwhelmed by interventionist foreground rules (civil rights law). In Section C, the analysis brings the focus to *Parents Involved* as an example of a neoliberal style of framing race as a legal concept.¹⁵³ This style is identifiable for its retention of an allegedly colorblind set of background rules and a quasi-rejection of the continued relevance of foreground rules.

A. The Classic Liberal Style: From Slave Law to Jim Crow

Slave law is as good a place as any to begin an analysis of race as a legal concept. Slave law is that body of property and contract rules governing the transfer and control of certain people in the possession of others.¹⁵⁴ More particularly, slave law depended on the work of Blumenbach and others, requiring racial classifications in order to trigger particular sorts of property and contract rules. As Derrick Bell explained, “[I]n virtually all of the cases, blacks were the subjects and not the parties in the litigation. They were property subject to ownership.”¹⁵⁵ For example, writing just before the American

¹⁵³ According to Sumi Cho,

The recent Supreme Court decision in the *Parents Involved* case reveals the newest judicial mechanisms created to preserve racial hierarchy while rearticulating subordination as equality, and deploying failure-of-proof rationales . . . In *Parents Involved*, the Court revealed the inherent contradiction between compelling interest and narrow tailoring. In order for the state to engage such a strategy, it must show that student racial diversity and race-conscious student assignment are compelling state interests. However, once a racial classification passes this compelling-interest test, it must then be narrowly tailored. Here lies the catch-22 of the Court's framework for affirmative action: if a plan survives the compelling-interest test, then it must also be narrowly tailored—it must be only sparingly used, when absolutely necessary, as one factor among many—or as the *Parents Involved* Court put it, “the way in which [the district has] employed individual racial classifications is necessary to achieve [its] stated ends.” But in *Parents Involved*, Justice Roberts responded to the Seattle school district's use of race-determinative student assignments, with the “gotcha” in his plurality opinion. Roberts said, “[t]he minimal effect these classifications have on student assignments. . . suggests that other means would be effective.”

Cho, *supra* note 16, at 1616–18 (citations omitted).

¹⁵⁴ For a collection of slave cases, see HELEN T. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (1936); RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 120–36 (Juan Perea et al. eds., 2007). See generally DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION (1999); MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981); Adrienne Davis, *The ‘Sexual Economy’ of American Slavery*, in STILL BRAVE: THE EVOLUTION OF BLACK WOMEN'S STUDIES (reprint) (S.M. James, F.S. Foster & B. Guy-Sheftall eds., 2009) .

¹⁵⁵ BELL, *supra* note 25, at 27.

Civil War, Thomas Cobb, widely regarded at the time as a luminary in slave law, crystallized the main idea in his *An Inquiry into the Law of Negro Slavery in the United States of America*: only “Negros” could be slaves.¹⁵⁶ As Cobb explained, courts presumed that the human variety known as “Negro” first promulgated by the early monegenists, and then furiously degraded by polygenists like Gobineau (writing in 1853), really existed as a “race,” and that it was possible to identify them in a way consistent with the rule of law. It is in this way that slave law was predicated on the idea of race science—without ostensibly objective classifications of human varieties, slave law would have been unable to function. To put it another way, if only members of the Negro race could be enslaved, how might the law have been different if the idea of racial varieties had never been invented in the first place?¹⁵⁷

¹⁵⁶ THOMAS COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858). In the first chapter Cobb enunciates what might be called a cardinal rule of American slave law, though it stands in contrast to popular opinion: (1) slaves were considered first as persons and second as property, (2) were Negro, and (3) were subject to a virtually unlimited amount of control by their masters. This rule thus has three main parts, the first and third of which are largely beyond the scope of this paper. Though many have argued that slaves were perceived in absolute terms of property, writers like Cobb and jurists like Judge Ruffin of the North Carolina Supreme Court emphasized that the enslaved were people, and as such, must have been subject to the strictest of disciplines. Suffice it to say that the law of slavery, while not crystal clear on the extent to which the enslaved were viewed as simply property or things liminally placed between the worlds of humans and objects, explicitly barred the enslaved from the legal rights enjoyed by white men.

¹⁵⁷ For scholars like Gross, the answer may be negligible. As she argues, race was often recognized for its performative elements, *i.e.* you knew a white person not necessarily by what he or she looked like, but by the performances that white men and women were expected to play out. Discussing *Bryan v. Walton*, a Georgia Supreme Court case looking at whether certain freed men were black or not, Gross explains, “Race was not only something Joseph and James *were*, it was something they *did*.” GROSS, *supra* note 26, at 53. “To be white was to act white: to associate with whites, to dance gracefully, to vote.” Blood may have been the signified, but the signifiers were social acts. More than that, the signifiers of race were not only social and political but also prescriptive and legal. What did it mean to be a white man? It meant to be a citizen, a civic being, someone who could do certain kinds of things. In addition to the *Walton* case, Gross provides a number of courtroom examples highlighting the baseline for racial identity in performative terms. Men who looked white and indulged the gestures and gesticulations of “white culture” like refined and honorable gentlemanly activity would not, in the end, receive the legal imprimatur of whiteness if they did not have a reputation for exercising white *citizenship*: the legal stuff of rights and privileges that actually constituted whiteness. The legal determination of race, in sum, was a combination of stereotypical ideas about physical characteristics, reliance on high-brow quackery, far-reaching perspectives on the transfer of “black blood,” and searches for approval of the racial identity by the community. Notably, analysis of this fourth factor reveals an interesting circle between perceptions of citizenship and perceptions of race: if the physical manifestation of race was in doubt, whiteness was to be found in the performance of citizenship rights and the rites of citizenship. The infamous *Dred Scott* decision helped close the circle, by tautologically concluding that blacks could not be citizens because they had never performed these rites, *i.e.* the rites of white manhood. The question before the Court, and articulated by Justice Taney, was whether the descendant of an African slave was a citizen of the United States, and thus capable of enjoying the rights and privileges associated with this legal status. In making its determination, the Court looked to the laws passed both by federal and state governments (including the Naturalization Act of 1790 which explicitly stated that only whites could be naturalized as citizens of the United States) and found that nothing in the intent of the framers or their descendants ever established that the “negro race” was meant to be a part of the political community in the United States. The upshot of the rationale was that “Negros” could not become citizens because they had never been allowed the rights of citizenship in the past, rights which had been considered the exclusive domain of the American political community. The status of whiteness required a capacity for citizenship, and the legal status of citizenship required whiteness. *Id.* See also Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Sally Ackerman, *How the American Legal System Perpetuates Racism as Seen Through the Lens of Property Law*, 21 HAMLINE J. PUB. L. POL’Y 137 (1999); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. CR.-C.L. L. REV. 1 (1994).

An early nineteenth century example is *Hudgins v. Wright*, decided by the Virginia Supreme Court in 1806.¹⁵⁸ *Hudgins* involved a claim by a girl seeking her freedom on the basis that she was descended from an American Indian woman, and according to Virginia law, should presumptively be understood to have been born free. If the claimant could successfully show that she was of American Indian heritage, or “white,” the burden of proof would have shifted to the slaveholder to show that the grandmother had been American Indian, and enslaved during a brief window when the United States had been in the business of legally enslaving Indians. As Judge Tucker explained, “All *white persons* are and have ever been FREE in this country. If one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.”¹⁵⁹

Subsequently, the thrust of the trial turned on the girl’s racial classification—Indian or white—and in the course of figuring out this determinative question the Court substantially relied on the “distinguishing characteristics of the different species of the human race. . . .”¹⁶⁰ Keeping in mind we are in 1806, when Europe was beginning to see a polygenist theory gaining ground, the Court followed what was becoming a standard way of thinking about the varieties of human groupings. The question of the girl’s freedom therefore turned on the texture of her hair, width of her nose, and shape of her calf muscles. Since Hannah had long straight hair, she was deemed Indian, and presumptively free. Bloodlines were also increasingly important in figuring out the racial identity of a potential slave.¹⁶¹ The important point to keep in mind here, however, is that before the work of race science, this kind of physiological evaluation would have made no sense.

Jumping ahead several decades, and just before the American Civil War and the emergence of evolutionary theory, the Supreme Court decided *Dred Scott v. Sandford*.¹⁶² In this famous case Scott, a

¹⁵⁸ *Hudgins v. Wright*, 11 Va. 134 (1806).

¹⁵⁹ *Id.* at 139.

¹⁶⁰ *Id.* at 141.

¹⁶¹ Though the *Hudgins* Court did not get into it, other factors typically used in determining racial status included scientific evidence, documentary evidence, and “reputation” evidence. Of course, in a society in which white masters regularly impregnated their slaves, the “obvious” distinctions used in *Hudgins* were, at best, difficult. In the case that the eyeball test proved unsatisfactory, the court would look to documentary evidence of relatives who may have had more “easily understandable” racial histories. To this end, courts used the infamous “one-drop rule” or rule of hypodescent. If a person had a black relative, no matter how remote, the staining power of the black blood made you black as well. Another factor regarded the extent to which the relevant community, black or white, perceived the person in question as belonging to their racial group. It may have been especially damning, for example, for a group of people, clearly of the negro race, to claim that the person in question had always been regarded as one of their own. For discussion, see Norman Redlich, *Out, Damned Spot; Out, I Say. The Persistence of Race in American Law*, 25 VT. L. REV. 475 (2001); Christine Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997).

¹⁶² 60 U.S. 393 (1856). It has often been pointed out how odd was the relationship that developed between “race” and “citizenship” in the antebellum period. Though racial classifications had a scientific and biological gloss, judicial opinions in the face of the physically ambiguous invariably turned on social performance. This collapse brought with it a circularity as illustrated with the *Dred Scott* decision where whiteness was defined as citizenship and citizenship identified for its whiteness. Unfortunately, the Civil War failed to fully clarify this problem, despite the language on citizenship provided in the Fourteenth Amendment. This primarily came through with the fact that while all people born or naturalized in the United States would be deemed citizens, the language failed to provide insight as to who could be naturalized. Again, the key issue on this front turned on whether the applicant could make a legitimate claim to being white. For a discussion on the legal mechanics of whiteness, see VALERIE BABB, *WHITENESS VISIBLE: THE MEANING OF WHITENESS IN AMERICAN LITERATURE* (1998); López, *supra* note 4; RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL WHITE STUDIES* (1997).

slave taken by his owner from Missouri to Illinois for a time and brought back to Missouri for sale, claimed to be a citizen of Missouri and whose residency in a free state nullified his status as a slave. In a striking defense of the Racial Contract, the Court explained that the basic issue was whether “persons only whose ancestors were negroes of the African race, and imported into this country . . .” could ever be “citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.” Did racial identity preclude certain groups from enjoying the basic rights afforded by the Constitution? The answer was yes. “We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution. . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race. . . .”¹⁶³ The answer was deducible directly from the fact of racial identity. It is hard to imagine a cleaner use of a scientific rationale, embodied here in a set of background rules, for the Racial Contract.

After the Civil War and the end of slavery, the Reconstruction Amendments set the stage for a new round of legal thinking about racial classifications,¹⁶⁴ but a round of thinking just as committed to a biologized set of background rules of race. To be sure, the arguments would differ from the likes found in *Hudgins* and *Dred Scott*, but the important issue here is the common biological ground between pre- and post-Civil war thinking about race law. In relevant part, Section 1 of the Fourteenth Amendment provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁶⁵

The Amendment does not mention the word “race,” and taken at face value, could even be interpreted as doing away with the whole idea of race altogether. If you are a “person,” then you have certain rights.¹⁶⁶ Instead of a race-less law of human rights,¹⁶⁷ the next phase was the Jim Crow era in which a scientific idea of race played a hugely important part. After the brief experiments in reconstruction were brought to a close, American race law hit its separate-but-equal stride, in step with the increasingly

¹⁶³ *Dred Scott*, 60 U.S. 393, 404–05.

¹⁶⁴ See generally ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION (1988). Some instances of the judiciary’s early encounter with post Civil War legislation include *The Slaughterhouse Cases*, 83 U.S. 36 (1873); *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Derrick Bell has reported that “in the first seventy years of the Amendment, the Court struck down 232 state laws pursuant to its commands; 179 of these cases were decided in favor of corporations—including 55 cases in favor of the burgeoning railroad industry. BELL, *supra* note 25, at 47.

¹⁶⁵ U.S. CONST. AMEND. XIV.

¹⁶⁶ For discussion of the Fourteenth Amendment in historical context, see KENNETH STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877 (1965); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1964); LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1969); Derrick Bell, *The Racial Imperative in American Law*, in THE AGE OF SEGREGATION: RACE RELATIONS IN THE SOUTH, 1890–1945 (Robert Haws ed., 1978).

¹⁶⁷ Human Rights Law, of course, would go on to have its own problems, and really could hardly be “raceless.” For critical discussion, see MAKAU MATUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002).

popular work in eugenics discussed above, which also had as its aim the separation of the races. In 1896, the Supreme Court decided *Plessy v. Ferguson*,¹⁶⁸ which assessed the constitutionality of a state law providing for the separation of blacks and whites in their use of the rail system. The Court found no problem with the law, because it merely recognized a fact of human nature: “A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.”¹⁶⁹

Consequently, for some time questions about the natural differences of racial classifications were built into the underbelly of the citizenship and equal protection clauses.¹⁷⁰ Given the period in which the Courts were making these decisions, where race science was developing some of its most caustic views about the hierarchy of the races, this attitude seems pretty sensible for the time. This sense in which social evolutionary and eugenicist styles of thinking about racial classifications played into judicial elaborations of the Fourteenth Amendment shifted, however, along with the same shift happening at the same time as the concept of race started coming under attack in the first half of the twentieth century. In other terms, this can be described as a shift from a classic liberal focus on strong background rules to a modern liberal style that would de-emphasize the importance of background rules and assert a need for government to protect racial identity from arbitrary discrimination.

B. The Modern Liberal Style: From *Brown* to Affirmative Action

Recall from above that even before WWII, scientists were mounting increasingly aggressive attacks on the scientific basis of race, and that after the War and the exposure of Nazi treatment of the Jews, eugenics fell out of favor altogether. Scholars like Huxley, Haddon, and Montagu argued that the concept of race had been constructed and abused, and that much of the baggage associated with so-

¹⁶⁸ 163 U.S. 537 (1896). Like *Dred Scott*, *Plessy* has generated an enormous amount of commentary. One well-known example is Cheryl Harris’ article *Whiteness as Property*. HARRIS, *supra* note 157, at 1750. (“*Plessy* demonstrated the Court’s chronic refusal to dismantle the structure of white supremacy, which is maintained through the institutional protection of relative benefits for whites at the expense of Blacks. In denying that any inferiority existed by reason of de jure segregation, and in denying white status to *Plessy*, ‘whiteness’ was protected from intrusion and appropriate boundaries around the property were maintained.”).

¹⁶⁹ 163 U.S. at 543.

¹⁷⁰ Another way in which the Racial Contract appeared to continue its performance, however, was in the context of just how it was exactly that naturalization really worked. Ian Haney Lopez has chronicled the evolution of this question through what he calls the “prerequisite cases” spanning from 1878 to 1952, when the requirement only “whites” could be U.S. citizens was finally expunged from U.S. naturalization law. *In re Ah Yup*, for example, was a case decided in 1878 by a federal court wrangling with the question of whether a Chinese residing in the United States was white. 1 F. Cas. 223 (C.C.D. Cal. 1878). After a great deal of thinking about the state of race science, the Court finally concluded that Chinese were not white, and consequently barred from citizenship. Like most of these decisions, the Court came to the incoherent conclusion that Yup was not white. This is not to say that Yup should have been found to be white, but that the court was unable to offer any meaningful standard for its decision. Interestingly, courts were apparently unable to use the arguments against Asians that they had used against blacks: Asians could not be American citizens because they had never exercised the rights and rites of American citizenship. Presumably the logic of an earlier moment, illuminated in the context of immigration, became too ridiculous even for federal judges. This determination resembled the sorts of judicial analysis found in *Hudgins*, including physical determinations, and the identification of certain kinds of documentary and scientific evidence as probative of racial status. For discussion on relevant aspects of the Asian experience in American law, see *Asian Americans in RACE AND RACES* (Juan Perea & Richard Delgado eds., 2000).

called racial physiology was a sham. The critical point here, however, is that while race science was fast becoming more progressive, the natural conception of race—background rules—was never abandoned, but merely “cleaned up.” Race was real and natural enough, it was simply that it had been wrong to make too many assumptions about just what race really meant in social, economic, cultural, and intellectual terms.

It is in the climate of this phase of race science that we can situate Chief Justice Stone’s famous footnote 4 in *United States v. Carolene Products*.¹⁷¹ Decided two years after Huxley and Haddon’s *We Europeans*, but still in the dense thicket of Jim Crow, the opinion set the stage for heightened judicial scrutiny over legislation attempting to regulate on the basis of “suspect classifications.” Interestingly, the footnote’s text did two things at once. On the one hand, it reinforced the idea that race was a natural, human fact, just as much of progressive race science was doing. Stone’s footnote suggested that statutes seeking to regulate “discrete and insular minorities,” including “racial minorities,” should be analyzed by the judiciary with strict scrutiny.¹⁷² Stone’s reasoning was based on the unfairness of arbitrarily discriminating against racial groups since racial identity was a fact of one’s humanity outside of their control. Blackness, a minority racial status, was discrete, immutable, and most definitely natural and pre-political, and discrimination on such bases seemed fundamentally unfair. On the other hand was whiteness—soon to be vanquished in naturalization law by congressional action—which was not a minority status, not intuitively susceptible to the strict scrutiny analysis, and largely transparent—legally, racially, biologically, and socially. In short, whiteness was an abstract mess of a concept, as evidenced by the prerequisite cases, while blackness had emerged as something not necessarily determined by the absence of white privilege and citizenship, but inherently natural and real.¹⁷³

¹⁷¹ 304 U.S. 144, 152 (1938). I do not mean to suggest here that *Carolene Products* is necessarily the place to begin in an elaboration of race in the modern liberal style. The use of the opinion lies in its embrace of an attempt to depoliticize but retain a natural idea of racial identity—an attempt that would soon be consolidated after *Brown*. For discussion of *Carolene Products*, see, e.g., Daniel A. Fricker & Philip P. Farber, *Is Carolene Products Dead?: Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686 (1991). In the main, my analysis follows the kind of periodizing found in works like Howard Winant’s *The World is a Ghetto*. WINANT, *supra* note 3. There, Winant suggests that before World War II “the social fact of racial inequality and thoroughgoing racial difference was taken for granted . . . In the ruling circles—the metropolises, the world’s capitals both imperial and peripheral—it was taken for granted as natural, ineluctable, an objective reality, that to be white (however that is defined) conferred a *deserved* advantage on those so identified, while a dark skin *properly* signified inferiority. The name for this set of beliefs, this racial ideology, is white supremacy.” *Id.* at 1. In the context of law, I have been suggesting that white supremacy has been traditionally performed in the style of classic liberalism. According to Winant, it was in the period after World War II that the “ironic view emerged that we are now in a post-racial, color-blind world . . . Race-talk today presents itself as egalitarian, respectful of ‘cultural difference,’ and, above all, humane. The appearance and consolidation of such post-racial sentiments is a recent phenomenon; it has reshaped contemporary understanding and debates over race.” *Id.* at 1–2. In the context of law, I argue here that in the postwar period there are two dominant paradigms at work—modern liberalism and neoliberalism. Both of these approaches reject the classic view of white supremacy, namely, that there racial inequality is inherent in racial identity. Where modern liberalism and neoliberalism part ways is in their differing approaches to foreground rules, *i.e.* regulation.

¹⁷² As Neil Gotanda has explained, strict scrutiny analysis developed in different directions. In the context of “historical-race,” strict scrutiny was used as a tool of anti-subordination, striking down the use of racial classifications when they were in the classic liberal style. In the context of “formal-race,” strict scrutiny isn’t necessarily focused on historical subordination, but is rather directed to the use of any racial classifications whatsoever. Gotanda suggests that *Brown* and its immediate progeny are illustrations of strict scrutiny in the context of historical-race, and *Metro Broadcasting* and *Crosby* are examples of strict scrutiny in the context of formal-race. Gotanda, *supra* note 13, at 46–50.

¹⁷³ For discussion, see LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006). As Adrienne Davis has explained, the mystification of white identity has resulted in a deep incongruity between the conceptual utility

As is well known, American anti-discrimination law as it emerged in the middle decades of the twentieth century embraced this background view of race as a natural and scientifically verifiable concept, but hoped to clean it out of its obviously pejorative connotations.¹⁷⁴ No other case stands as much of a representative as *Brown v. Board of Education*.¹⁷⁵ The issue of whether “separate but equal” was tenable under the equal protection clause was handled by the Warren Court in splendid consistency with the race science of the time.¹⁷⁶ Yes, the Court understood well enough that racial varieties did exist in the

of the terms “black” and “white.” I routinely ask the students to define “Black culture.” A variety of attributions pour out: emotion and soul, instinct and intuition, violence and passion, drive and pride, spirituality and strength. Yet when I ask for the cultural attributes or meaning of “white culture” the students are stumped, sometimes disturbed. I have yet to have a student attach a meaning that is not a stand-in for a more specific class-based or ethnic culture rather than a more broad-ranging racial culture of whiteness. After six seminars, whiteness (unmodified) has remained devoid of content in my classroom.

¹⁷⁴ As critical race theorists have long argued, this has been a challenging task. In a seminal account, Allan Freeman discussed how anti-discrimination law included two perspectives about racial justice, the victim perspective and perpetrator perspective.

The perpetrator perspective sees racial discrimination not as conditions but as actions, or series of actions, inflicted on the victim by the perpetrator. . . . In its core concept of the “violation”, anti-discrimination law is hopelessly embedded in the perpetrator perspective. Its central tenet, the “anti-discrimination principle”, is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects. Antidiscrimination law has thus been ultimately indifferent to the condition of the victim

Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978). The literature that has followed is large. See, e.g., J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Reva Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000); Ian F. Haney Lopez, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

¹⁷⁵ 347 U.S. 483 (1954). Among the first, if not the first, critical reviews of *Brown* from the left was Derek Bell’s *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Instead of affirming the conventional wisdom about a change in consciousness, Bell argued for a more systemic view of what *Brown* signaled in the light of racial hierarchy. “I contend that the decision in *Brown* to break with the Court’s long-held position on these issues cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policy-making positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.” *Id.* at 524. More recently, as part of a symposium on *Brown* fifty years on, Richard Ford argued how a focus on *Brown* has often misled those seeking progressive social change and directed them away from where the action really is—the focus on *Brown* has often perpetuated a false distinction between official segregationist policy and natural preference:

What confronts us, then, is not an inevitability but a choice. If the defenders of neighborhood schools and of multiculturalist policies wish to justify a decision to promote segregation, either as a good thing in its own right or as an acceptable means to some other good end, let them do so. But let them not claim a false necessity. Let them take responsibility for their preference rather than insist that it is ordained by human nature or by the nature of our inherited social institutions and social divisions.

Richard Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1308–09 (2004).

¹⁷⁶ As is well known, the Court in *Brown* relied in part on the psychology studies of Kenneth and Mamie Clark. The Clarks testified in *Brown* and prior cases regarding the psychological impact of segregation on children, with a particular focus on how segregated education instilled a sense of inferiority in black children. Citing Clark’s work, Chief Justice Warren stated:

natural world—the old classifications supporting the Racial Contract were valid enough. But what had changed was a recognition that there was very little if anything that should be deduced about the intellectual, cultural, or moral standing of a person on account of their racial identity. The doctrine of separate but equal in the context of public education, the Court concluded, was inconsistent with this recognition, now to be understood as embodied in the Fourteenth Amendment.¹⁷⁷

After *Brown*, a great deal changed as the civil rights era hit its stride. Courts were instructed to dismantle segregation with all deliberate speed, Congress adopted the Civil Rights Act of 1964 and its attendant stash of new statutory rights, and the old idea that racial classifications could be used to explicitly disadvantage racial minorities was entirely discredited.¹⁷⁸ This was the coming into high fashion of a modern liberal style of race. For far too long had the relations between races been allowed to persist on the idea that humans could be judged on the basis of their racial identity. In contrast, politicians and judges agreed about the need to regulate race, disallowing preferential treatment that disadvantaged certain people on the basis of biology. There was nothing about race, it turned out, that could actually tell us anything about how to arrange social relationships. Thus, while the biological nature of race was retained, it was simply that instead of understanding biology to be a warrant of hierarchy, the modern liberal style understood biology to mean that racial discrimination was unjust. The creation of new rules would therefore be necessary to ensure that discrimination would be punished, and these were foreground rules—rules understood to regulate a pre-legal concept of race, and not rules that actually constituted race as a legal concept.

C. The Neoliberal Style: The Road to *Parents Involved*

As one might guess, the fashionable sense of *Brown* in the modern liberal style was sure to wane. The famous case of *Regents of University of California v. Bakke*¹⁷⁹ is illustrative of a new trend that would

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

347 U.S. at 494–95.

¹⁷⁷ For a discussion of the debate over *Brown* in *Parents Involved*, see Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008).

¹⁷⁸ *Id.*

¹⁷⁹ 435 U.S. 265 (1978). Cheryl Harris has said of the *Bakke* decision:

[c]ontemporary understandings of equality owe a great deal to Justice Powell's opinion in *Bakke*—an opinion remarkable for its enduring presence, prescience and at least for some decades, its influence. It is also remarkable for its schizophrenic treatment of group identity—for both seeing and not seeing race. While Powell recognized and affirmed the significance and importance of considering race in admitting a diverse class, the remainder of his opinion functioned to repudiate the legitimacy and efficacy of substantive interventions by the state to remedy the unequal distribution of power under the current racial status quo because of the incoherence of racial identity.

Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1768 (2001). See also Bridgette Baldwin, *Colorblind Diversity: The Changing Significance of Race in the Post-Bakke Era*, 72 ALB. L. REV. 863 (2009).

sow the seeds for the Supreme Court's current post-racialism—the turn away from a distinct political interest in protecting racial minorities and towards a neutral equal protection concerned with the use of racial classifications.¹⁸⁰ The case involved a special admissions program initiated at the University of California at Davis medical school, wherein applicants with particular “disadvantages”—in relevant part applicants belonging to racial minorities—were given preferences in the admissions process. Bakke was a white male who sued the University after it had twice rejected him, claiming that he had been rejected on the basis of his racial identity in violation of Title VI of the Civil Rights Act and the Fourteenth Amendment's Equal Protection Clause.

Writing for a plurality of the Justices, Justice Powell made two pivotal moves setting in motion the Court's current post-racial project. First, Powell treated the concept of race as a natural mark of human identity, and not as a social or political force. This is evident in his decision to view the prohibitions of the Civil Rights Act as applicable to all human beings living in the United States, and not as regulations meant to undermine the terms of the Racial Contract—terms that were highly relevant in the subordination of one class of people at the expense of another. “The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.”¹⁸¹

What is important to keep in mind here is that if race was not understood biologically (and therefore neutrally), but rather politically, Powell's argument wouldn't make any sense. Creating a special admissions program to help undermine racial disparities, in light of the Racial Contract and an understanding of the history of the term “race,” *does not* draw a line on the basis of race. In fact it does something like the opposite. To think that racial classifications *necessarily* have something to do with individuals being regulated on the basis of biological characteristics is also to think that racial identity can function as a neutral, natural descriptor of social life.

When Powell stated, “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color,” he was right only if race is understood in its biological sense. If it is understood in its political sense, meaning, “race” is not a facet of human ancestry but is rather a political term referencing a deeply embedded scheme of domination-subordination, Powell was wrong: the guarantee of equal protection would in this sense actually require an affirmative action law that treated the races differently. If we think of race as a verb—a tool with which to justify the superiority of Whites over non-Whites—then Powell's vision of equal protection jurisprudence was incoherent. When race is seen as a kind of political action, and not as a kind of natural description of human beings, the notion of “reverse discrimination” becomes a logical impossibility.¹⁸²

The second important move was to eliminate attempts by state actors to redress general trends in racial oppression through the sorts of special programs U.C. Davis had implemented. The only form

¹⁸⁰ RICHARD FORD, *RACIAL CULTURE* (2006).

¹⁸¹ *Bakke*, 435 U.S. at 289.

¹⁸² *Id.* at 289–90. For an overall treatment of the affirmative action debate, see generally CHARLES LAWRENCE III & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997). For an argument regarding the plausibility of reverse racial discrimination, see John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

of discrimination that could warrant such action was an explicit instance of constitutional violation.¹⁸³ The only justification for using racial preferences, Justice Powell explained, was the interest an institution had in maintaining a diverse student body. The Court's preference for a paradigm of racial diversity over racial justice would prove critical to the future of this jurisprudence. What was lost was the view supporting the concurring opinion of Justices Brennan, White, Marshall, and Blackmun:

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.¹⁸⁴

In one of the most anticipated decisions in the recent history of American race law, *Grutter v. Bollinger*¹⁸⁵ brought the Supreme Court in 2003 to the edge of abolishing affirmative action. The issue in that case involved the admissions policy at the University of Michigan Law School, and the claim by a "white" Michigan resident (3.8 GPA, 161 LSAT) who had applied to the school and had been rejected. Her claim was that she had been rejected on the basis of her race, in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act, and Section 1981.¹⁸⁶ Following its established precedent, the Court asked whether the Law School's interest in promoting "diversity" was a compelling interest that could justify a narrowly tailored policy of using racial identity as a factor in its admissions

¹⁸³ *Bakke*, 435 U.S. at 301.

¹⁸⁴ *Id.* at 327. A great deal happened in the interim between *Bakke* and *Grutter*, including decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (holding that a school board's policy of extending preferential protection against layoffs to some employees because of their minority race violated the Fourteenth Amendment); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (holding a city's plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" was violation of the Fourteenth Amendment because the city failed to demonstrate a compelling governmental interest justifying the plan and the plan was not narrowly tailored to remedy effects of prior discrimination); *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990) (holding FCC order awarding enhancement for minority ownership in proceedings for new licenses and a minority "distress sale" program permitting certain existing radio and television stations to be transferred only to minority controlled firms was not violation of Fifth Amendment because the policies did not violate equal protection principles, were substantially related to achievement of legitimate government interest in broadcasting diversity; and did not impose impermissible burdens on nonminorities); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny, overruling *Metro Broadcasting*; in this case a subcontractor who was awarded guardrail portion of federal highway project under federal program designed to provide highway contracts to disadvantaged business enterprises had standing to seek forward-looking declaratory and injunctive relief and case remanded to determine whether program satisfied strict scrutiny).

¹⁸⁵ 539 U.S. 306 (2003). For sample discussions of the case, see generally Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221 (2004); Bryan Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843 (2004); Andre Douglas Pond Cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER L.J. 1 (2005); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 583 (2007).

¹⁸⁶ 539 U.S. at 322.

decisions.¹⁸⁷

With Justice O'Connor writing the majority opinion, the answer was yes. Despite a trend in Supreme Court decisions since *Bakke* implying that the only compelling interest a state actor might have in using racial classifications for affirmative action was to combat explicit instances of past discrimination, O'Connor argued for the compelling interest in achieving diversity in public higher education.¹⁸⁸ The appropriate sort of diversity, however, was not the racial kind. If the Law School's admissions policy had intended to guarantee that a specific portion of the student body was non-white, this "would amount to outright racial balancing, which is patently unconstitutional."¹⁸⁹ "Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."¹⁹⁰ And not *racial* diversity, but a kind of cultural diversity much more broadly conceived.¹⁹¹ Further, Justice O'Connor determined that the policy had been narrowly tailored since it used race only as a "plus" in a very "flexible" decisional matrix—the policy avoided mechanical racial quotas.¹⁹²

There is no doubt that the Court continued to abide by a background rule instructing the jurist to see racial identity as a natural and immutable characteristic of human beings. After all the class certified by the District Court included those that had applied in the relevant period, and "were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably..."¹⁹³ If the Court did not have a fixed and predictable concept of race in mind, there would have been a question about whether the claimant was actually white. If the law school had decided to challenge her standing, for example, and argue that she had not been injured by the policy because she had failed to prove she was "Caucasian," what forms of proof would have satisfied the Court? "Cultural performance"? As long as these sorts of standing questions are left in abeyance, decisions like *Grutter* are able to proceed.

Despite the valorization of diversity here, it wasn't at all clear that *Grutter* was a victory for affirmative action advocates. The opinion was not intended as an intervention in race relations at all. To the contrary, the Court's allowance of a broadly conceived idea of "diversity" as a justifiable ground for Michigan's admissions policy was seriously hedged. "We are mindful, however, that 'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'"¹⁹⁴

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 328.

¹⁸⁹ *Id.* at 330.

¹⁹⁰ *Id.*

¹⁹¹ For a more optimistic view of the *Grutter* Court's view of racial diversity, see Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937 (2008). Adams suggested, however, that much of *Grutter's* "expansive and unfettered possibility" was stifled, though not destroyed, by *Parents Involved*. *Id.* at 940–41.

¹⁹² 539 U.S. 306, 335 (2003).

¹⁹³ *Id.* at 316.

¹⁹⁴ *Id.* at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Constitutional jurisprudence is distinctly individualistic in its orientation, as Justice O'Connor made clear in *Grutter*: "Because the Fourteenth Amendment 'protect[s] persons, not groups,' all 'government action based on race—a group classification long recognized as in most

Consequently, the Court believed, all forms of race-conscious affirmative action “are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.”¹⁹⁵ “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹⁹⁶

If the portents were ominous in *Grutter*, we can see the wheels beginning to come off the bus in the Supreme Court’s 2007 voluntary integration decision,¹⁹⁷ *Parents Involved in Community Schools*¹⁹⁸—a case in which, as Derrick Bell has charged, “[T]he Supreme Court declared unconstitutional race-conscious admission and transfer plans that for the past five decades had been vital to eradicating segregation, facilitating integration, and preventing resegregation.”¹⁹⁹ Similarly, Charles Lawrence, III has said of the case:

circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection has not been infringed.” *Id.* at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). *See also* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 *UCLA L. Rev.* 99 (2007).

¹⁹⁵ 539 U.S. at 342.

¹⁹⁶ *Id.* at 343.

¹⁹⁷ Erwin Chemerinsky has argued that *Parents Involved* might actually signal a coming overruling of *Grutter*’s more permissive tone:

More generally, the Court’s decision signals that it may only be a matter of a short time before the Court reconsiders and overrules *Grutter v. Bollinger*. In that decision, four years ago, the Supreme Court held that colleges and universities have a compelling interest in having a diverse student body and may use race as one factor in admissions decisions to achieve diversity. *Grutter* was a 5–4 decision, with Justice O’Connor writing a majority opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts’ plurality opinion in *Parents Involved* emphatically espouses the view that the government must be colorblind in its decisions. The opinion leaves no doubt where he and Justice Alito will be when *Grutter* is reconsidered. Moreover, from a doctrinal perspective, Justice O’Connor’s majority opinion in *Grutter* said that the government did not have to prove that no race neutral alternative could achieve diversity, whereas all five Justices in the majority in *Parents Involved* said that this is the government’s burden.

Erwin Chemerinsky, *Turning Sharply to the Right*, 10 *GREEN BAG 2D* 423, 428–29 (2007).

¹⁹⁸ 551 U.S. 701 (2007). The most recent case pushing the ball forward in this terrain is *Ricci v. DeStefano*, 557 U.S. 557 (2009) (holding that the city’s refusal to certify results of a promotional examination for firefighters, based on belief that its use of results could have disparate impact on minority firefighters, was a violation of Title VII’s disparate-treatment prohibition absent some valid defense; before an employer can engage in intentional discrimination for asserted purpose of avoiding unintentional disparate impact, the employer must have strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious action. In this case city officials lacked strong basis in evidence to believe that examinations were not job-related and consistent with business necessity or that there existed equally valid, less-discriminatory alternative to use of examinations that served city’s needs but that city refused to adopt).

¹⁹⁹ BELL, *supra* note 25, at 73. From a different angle, James Ryan suggested that the problem with *Parents Involved* was more symbolic than anything else.

On the one hand, this decision does not change much on the ground. The truth is that racial integration is not on the agenda of most school districts and has not been for over twenty years. Modern education reform efforts might still share the goal of equalizing educational opportunities for

I'd sat in my office and listened to the oral argument. I could hear the Court majority's commitment to white supremacy, as much in their voices as in the content of their questions. I could have written Chief Justice Roberts's opinion that very day—the rape of *Brown v. Board of Education* and the claim that she had consented, the assault on her already badly beaten body, and the defamation of her principles and of those who had labored for her birth. I could see it coming like a tidal wave, like the torches of the Klan riding in the night.²⁰⁰

In this much-maligned case, the Court adjudicated the constitutionality of plans regarding racial diversity in the assignment of slots of various high schools in particular school districts in Seattle, Washington, and Louisville, Kentucky.²⁰¹ Writing for the majority, Chief Justice Roberts repeated the constitutional mantra: whenever a public actor administers a racial classification, it will be viewed with strict scrutiny,

minority students, which the Court in *Brown* embraced. But integration is not generally the means of choice to achieve that goal, nor is the Supreme Court the key arena. Advocates and reformers have turned their attention elsewhere, and today battles are waged in legislatures and in state courts over school funding, school choice, standards and testing, and access to preschool. The dominant question, moreover, is which of these reforms will improve academic achievement as measured primarily, if not exclusively, by standardized test scores. The idea that schools should also teach students from diverse backgrounds how to cooperate in preparation for citizenship, like the idea of integration, has been pushed into the background.

James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007). Ryan then shifted gears:

Yet many who believe in the goal of integration, including myself, cannot help but feel a sense of loss and betrayal. In part this is a reaction to the plurality's astonishing attempt to rewrite the history of desegregation and to use *Brown* as a justification for blocking efforts to integrate schools. But it goes deeper than that. The Court certainly has not done all it could to encourage integration in practice, but in the past it seemed to support the goal of integration. At the very least, it was not hostile. In *Parents Involved*, however, the Court seems to have changed its mind. Instead of encouraging the pursuit of a worthwhile goal, four Justices make the goal itself seem dastardly, while Justice Kennedy accepts the goal but voices intense distaste over the most straightforward means of achieving it.

Id. at 133. In a subsequent commentary, J. Harvie Wilkinson III provided a far more approving view:

In an important sense, the holding in *Parents Involved* is in fact liberating. While the ruling restricts the use of race in public decisions, it ironically frees Americans to think about people and their problems in less rancorous ways. We are freer now to look at education, job training, health care, and the rest as human needs to be addressed wherever any child of any race is receiving substandard schooling, and wherever any elderly American of any ethnic background is without the shelter, nourishment, or medical attention necessary to live in basic dignity. Race and religion are the great potential dividers in America—just as the Establishment Clause inhibits governmental preferences based on religion, the Fourteenth Amendment inhibits governmental preferences based on race. *Parents Involved* helps in a small way to fortify the basic social compact: that the suffering of each is a challenge for all, and that the walls and fences often built by governmental actions based on race must yield, however haltingly, to a nation of shared purpose and ecumenical heart.

J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 164 (2007).

²⁰⁰ Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 934–35 (2008).

²⁰¹ For background on desegregation in schools, see generally Jonathan Fischbach, Will Rhee & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491 (2008).

and survive constitutional review only when it serves a strong social need and it has been articulated in the narrowest of ways.²⁰² More particularly, the conclusion that Justice Kennedy and the four justices in the Roberts plurality (Roberts, Scalia, Thomas, Alito) agreed upon was that governmental action must be reviewed with strict scrutiny, even when the purpose is to achieve school desegregation—a conclusion that Roberts claimed was supported by the decision in *Brown* itself.²⁰³ The rationale behind what Justice Thomas coined the equivalence doctrine is as follows: all government acts that take race into account should be regarded with heavy suspicion, regardless of whether they are meant to help or harm minority groups, because racial identity is an immoral basis upon which to make a judgment about the worth of a person.²⁰⁴ Or as the Court put it in *Rice v. Cayetano*, “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”²⁰⁵ As Sumi Cho has stated with regard to this new breed of post-racial colorblindness, “The Supreme Court’s racial jurisprudence would lead one to believe that racial classifications are so toxic that, like chemotherapy, they should be utilized only when

²⁰² Justice Kennedy provided the fifth, swing vote, lending some ambiguity to the forcefulness of the Roberts opinion. A sample of Justice Kennedy’s thinking is here:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

Parents Involved, 551 U.S. 701, 789 (2007). For Kennedy, the key factor is less a matter of governmental “race consciousness” or racial classifications, but more about whether a governmental intent to achieve some kind of integration or affirmative action actually harms white people. Skeptical about the likelihood of a happy ending here, Derrick Bell wrote, “Schools attempting to follow the nebulous standards set by the Kennedy concurrence face a daunting challenge. They must tread a tightrope of achieving integration without appearing conscious of the race of their students. Instead, schools will look to proxies for race, even where such proxies have proved impractical or ineffective in the past.” BELL, *supra* note 25, at 81. For more discussion of Kennedy’s concurrence, see Siegel, *supra* note 21; Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007). In their dissent, Justices Breyer, Stevens, Souter, and Ginsberg argued that strict scrutiny only made sense when government action was directed at the separation of the races, and not at their integration.

²⁰³ Pamela Karlan has suggested that Roberts’ use of *Brown* is mistaken at best. Discussing an early critique of *Brown*, Herbert Wechsler’s *Toward Neutral Principles*, Karlan argues that Roberts appears to be invoking a rather bizarre defense of *Brown* in light of Wechsler’s original critique of *Brown*. The problem here is not only that Wechsler’s critique has long been completely discredited—the effort by the Court doesn’t make any sense. See Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009); Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1385–91 (2008).

²⁰⁴ 528 U.S. 495, 517 (2000). See also Chemerinsky, *supra* note 197, at 429. (“There is an irony in seeing the conservative majority interpret the equal protection clause as requiring colorblind government decision-making. These are the Justices who profess the need to follow the original intent behind constitutional provisions. But if anything is clear about the Congress that ratified the Fourteenth Amendment it is that it did not believe in colorblindness as a constitutional principle. It created numerous programs, such as the Freedmen’s Bureau, to provide benefits based on race and it voted to segregate the District of Columbia public schools.”).

²⁰⁵ 528 U.S. at 517.

absolutely necessary and, even then, must be used as sparingly as possible.”²⁰⁶

Despite the “pernicious” character of using racial identity as a regulatory device, Roberts explained that racial categories are still legitimate when they serve particular social interests.²⁰⁷ Following *Grutter*, there are two that pass muster: the interest in remedying the effects of past intentional discrimination, and the interest in supporting diversity in higher education. As for the former, Roberts explained that there are no instances of intentional discrimination in either context to justify regulations cognizant of racial identity. Seattle never had a segregated system that it now had a duty to fix, and while Louisville had been segregated in the past, this was a problem that had already been solved. The allotment plans could therefore not be understood as remedying a very specific instance of prior discrimination.

As for racial diversity, Roberts relied heavily on Justice O’Connor’s discussion in *Grutter*, arguing that racial diversity is appreciated only as one part of the broad array of considerations that go into what may be determined to be a diverse student body. As Roberts explained, the *Grutter* Court emphasized that a university’s use of racial classifications would be “patently unconstitutional” if its purpose was merely to achieve “racial balance.”²⁰⁸ Instead, racial classifications are legitimate only to the extent they are part of a much broader scheme that seeks to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints.”²⁰⁹ With regard to the two plans at bar, there had been no attempt whatsoever to embed racial diversity in a larger scheme of diverse interests. Instead, there was a simple desire for a more equal number of white and non-white students at each of the high schools. Since racial balancing is “illegitimate,” Roberts concluded that there was nothing to save the validity of the programs. His rationale for denying the use of racial balancing (or racial diversity) was straight-forward: “Allowing racial balancing as a compelling end in itself would ‘effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”²¹⁰

²⁰⁶ Cho, *supra* note 16, at 1616.

²⁰⁷ See also Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 282 (2007) (discussing the two types of social interest on the table: “Broadly speaking, there are two goals that potentially support voluntary policies to integrate public schools. The first goal, interracial socialization, focuses on reducing racial prejudice and stereotypes, fostering cooperation and mutual respect, and strengthening the social fabric of our diverse nation. The second goal, educational equity, focuses on enhancing opportunities afforded to minority children too long relegated to racially isolated and inferior schools.”).

²⁰⁸ Michelle Adams has discussed the Court’s analysis of “racial balancing” and what appears an attempt to conflate it with the concept of integration. “More globally, the plurality’s approach can be seen as an attempt to “rebrand” integration. Conflating integration with racial balance downgrades its status as a societal ideal and sows definitional confusion, which discourages government actors from attempting to integrate at all. Finally, the plurality’s approach lends credence to the idea that integration itself may be a discriminatory purpose. After all, if integration is synonymous with “racial balance,” and racial balance is “an objective th[e] Court has repeatedly condemned as illegitimate,” then perhaps integration is too. The Parents Involved plurality raises profound doubts that integration is an objective the government should pursue. It is a significant step toward destabilizing the concept of ‘discrimination.’” Adams, *supra* note 25 at 853.

²⁰⁹ For a discussion of the “white interest” in integration from the perspective of Derrick Bell’s interest-convergence theory, see generally Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 629 (2011).

²¹⁰ *Parents Involved*, 551 U.S. 701, 730 (2007) (quoting *City of Richmond v. Croson*, 488 U.S. 469, 495 (1989)).

Like *Grutter*, *Parents Involved* operates on a biological conception that decenters the political content of race in such a way that discourse about cultural diversity becomes possible.²¹¹ There is no reference in the opinion, nor has there been in any Supreme Court opinion,²¹² to the sort of language found in *Ortiz v. Bank of America*: “I begin with the fact most widely agreed upon by modern biologists, anthropologists, and other students of human diversity. The notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind not as a division in the objective universe.”²¹³ Though Roberts hardly is explicit about the racial question (as very few court decisions are), the *Parents* analytical framework clearly presumes that the kind of thinking about race in *Ortiz* was wrong-headed. School boards in Seattle and Louisville sought to better integrate certain high schools, presumably on the belief that there is something valuable about the idea of racially integrated schools. That value might consist in all sorts of things, ranging from anti-racist attacks on the Racial Contract, to utilitarian arguments in favor of everyone being better off when more kinds of people are in contact with one another, to the desires to do justice with regard to a social system that systematically privileges certain people at the expense of others, to the desire of more powerful actors to neutralize potential threats through the use of relatively benign political strategies. Whatever value might have been in the minds of the regulators, however, Roberts very clearly believed that “racial balance” had nothing to do with power and domination, but was instead a question about the allocation of seats based on ancestry and heredity.

Following *Grutter*, Roberts was able to easily condemn the plan, suggesting that a willingness to find a desire to engage in racial balancing would assure the continued relevance of race in our minds—a relevance that we should all be determined to eliminate. Cheerfully looking to a post-racial moment where race might be legally irrelevant, the perspective in *Parents* is distinguished from Justice O’Conner’s hope in *Grutter* that the law of affirmative action would have run its course in twenty-five years.²¹⁴

This racial project’s bottom line is that we are already at or on the way towards a post-racial state of race relations, and that in this post-racial state there will be little place for a law of affirmative action that uses the natural ancestry of particular varieties of human beings as a regulatory device. Post-racialism in the Court’s sense therefore trades heavily on the continued salience of race as a biological concept, though it is a post-racial framework that ultimately has little need for a legal regime specifically tailored to the problem of racism. This is a view of the world from the egalitarianism of the Social Contract, where racial identity is real enough but does not actually have any place. The problem, of

²¹¹ See, e.g., HOWARD WINANT, RACIAL CONDITION (1994) (discussing the contemporary racial project “decenter[ing]” race).

²¹² 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 homogeneous 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.

Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 614 n.4 (1987).

²¹³ 547 F. Supp. 550, 565 (1982).

²¹⁴ *Grutter*, 539 U.S. 306, 343 (2003).

course, is whether it is the Social Contract, or the Racial one, that actually better describes our world. As should hopefully be very clear from the discussion above regarding the origins of race science, it is the Racial Contract that provides the decisive answer.

D. Neoliberalism and Neoracism

As should be obvious, the Supreme Court's post-racial project is not post-racial because it has positioned itself as a reaction to the demise of race science. There has not been any widespread realization that race was a giant hoax, and that as a consequence we now should all get along with the business of social progress. Instead, it is a project that constructs its vision of race in light of particular social trends that seek to transform, for different reasons, the *Brown*-era civil rights explosion. This is a post-racialism (1) predicated on a biological conception of race (background rules), (2) motivated by a belief that racism is, or already has, transformed into a social phenomenon no longer warranting legal regulation (foreground rules), and (3) that it is cultural diversity, and not race, that should be given legal attention, if need be. That is, beyond the egalitarian measures of equal protection, American law should see itself as on the way towards being entirely free of racial classifications.

In contrast is a different kind of post-racial project.²¹⁵ It goes by different names, but for ease of use I will follow Etienne Balibar,²¹⁶ and more recently Thomas McCarthy,²¹⁷ in their descriptions of a contemporary phase of "neoracism." In the classic sense, racism entailed the domination of Europeans over non-Europeans on the basis of identity *via* arguments about ancestry and physiognomy.²¹⁸ This is the racism of the nineteenth and early twentieth centuries, until the end of Jim Crow and the postwar "break." This is also the racism that the Supreme Court's post-racialism has in mind.

So what is it that is new, demanding a call for a "neoracism"? It is clear enough that the old rationales coming from science have been discredited, and we no longer tolerate laws that are facially discriminatory. Perhaps instead of a neoracist phase, American society has instead simply progressed from harsher to more mild times?

In 1988, Balibar argued that racism had actually taken on "a *new* and lasting articulation of social practices and collective representations, academic doctrines and political movements."²¹⁹ This was a racism anchored no longer in biological heredity but in the supposed insurmountability of cultural differences, a racism which, at first sight, does not postulate the superiority of certain groups or peoples in relation to others but 'only' the harmfulness of abolishing frontiers, the incompatibility of life-styles and traditions."²²⁰ One consequence of this shift from biology to culture was a weakening of the conventional modes of anti-racist strategy. From the outset, the new racism disarmed the critic who argued for the unfairness of discrimination on the basis of one's ancestry—this was already acknowledged in the neoracist position.²²¹ Similarly, the new racism understood that it was unacceptable

²¹⁵ I call a project oriented against neoracism a post-racial project only insofar as it is predicated on the understanding that race is not a real thing in the natural world.

²¹⁶ Balibar, *supra* note 20, at 17.

²¹⁷ MCCARTHY, *supra* note 45, at 4–13.

²¹⁸ *Id.*

²¹⁹ Balibar, *supra* note 20, at 20.

²²⁰ *Id.* at 21.

²²¹ *Id.* at 21.

to make judgments about individuals, in terms of their intellectual capacity, on the basis of genetics. Genetics had nothing to do with it.

Where the *racist* part came in was with the notion that it *is* appropriate to make discriminatory judgments on the basis of *cultural difference*.²²² This was also a reversal of the conventional approach of the classic anti-racist, who had always attacked scientific racism from a multicultural perspective, arguing for the plurality and equality of cultures. Through assertions about the ineluctable and unavoidable differences in culture, however, what became immediately clear was how biology had not been the only way to naturalize human proclivities: in the effort to essentialize culture, the neoracist mimicked the classic effort to naturalize race.

The deployment of a cultural racism had another novel effect. Since it began with a presumption about the unavoidability of cultural difference, the neoracist position was able to rationally advocate for the isolation of cultural entities—to insist on mixing them was to insist on fomenting ethnic conflict, balkanization, and the threat of civil war. As Balibar cleverly put it, “by an astonishing volte-face, we here see [neo-racist] doctrines themselves proposing to explain racism.”²²³ It therefore turns out that among the most formidable proponents of neoracism are social scientists themselves, arguing for the necessity of respecting “the psychological and sociological laws of population movements; you have to respect the ‘tolerance thresholds,’ maintain cultural distances’ or, in other words, in accordance with the postulate that individuals are the exclusive heirs and bearers of a single culture, segregate collectivities.”²²⁴ Neoracists are not the mystical Gobineaus of the past, but the Huntingtons of the present.²²⁵

Balibar was writing more than twenty years ago. Today, the sociological construction of race, and the shift from biology-based racisms to culture-based racisms are a commonplace in critical race theory. In fact, as Michael Omi and Howard Winant have suggested,

The social construction of race, which we have labeled the *racial formation* process, is widely recognized today, so much so that it is often now conservatives who argue that race is an illusion. The main task facing racial theory today, in fact, is no longer to critique the seemingly ‘natural’ or ‘common sense’ concept of race—although that effort has not been completed by any means. Rather the central task is to...argue against the recent discovery of the illusory nature of race; against the supposed contemporary transcendence of race; against the widely reported death of the concept of race²²⁶

²²² *Id.* at 22. See also WINANT, GHETTO, *supra* note 3, at 2; STEINBERG, *supra* note 18, at 265 (“The discrediting of scientific racism is unquestionably one of the great triumphs of liberal social science. However, subsequent theorists developed a social-scientific variant of scientific racism that essentially substituted culture for genes. Now it was held that groups that occupy the lowest strata of society are saddled by cultural systems that prevent them from climbing the social ladder. As before, failure is explained not in terms of social structures, but in terms endemic to the groups themselves.”).

²²³ Balibar, *supra* note 20, at 22.

²²⁴ *Id.* at 22–23.

²²⁵ See, e.g., SAMUEL HUNTINGTON, WHO ARE WE: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004).

²²⁶ Michael Omi & Howard Winant, *The Theoretical Status of the Concept of Race*, in SOCIAL THEORY: ROOTS AND BRANCHES 365 (Peter Kivisto ed., 2003).

In a neoracist context, and following Omi and Winant's call, a legally situated racial project should focus on two things at once. First, it must grapple with the fact that race is a social fact, and that it has never been a biological one. As we have seen, this is a demanding task of the jurist who has been under a biological spell for centuries. It also continues to be a meaningful task, since the biologism of race seems incredibly difficult to dispel.²²⁷ Second, it must translate the social reality of race into a jurisprudence that resists the urge to abolish race as a legal concept altogether. This post-racial project set on resisting neoracism must therefore push "race" away from its biological foundations without at the same time leaving a court in the lurch where it has no choice but to abandon the concept of race as impossibly incoherent. The emphasis on race as lacking biological foundations serves a purpose—it highlights the social character of race.²²⁸ It should not go further and be taken to argue that race actually has no existence at all. e. christi cunningham's work is a good example of this, where she powerfully argues for the elimination of race as a mark of individual identity, but advocates for the use of race as an anti-racist legal strategy.²²⁹ Paul Gilroy's attack on race sounds a similar tune: "to renounce race for analytical purposes is not to judge all appeals to it in the profane world of political cultures as formally equivalent."²³⁰

One approach that has accompanied the "end of race" story has been to follow the likes of Huxley and Haddon, and substitute "ethnicity" or "culture" for race.²³¹ Alex M. Johnson, Jr., for example, has argued for years regarding the fictitious nature of race and the need to destabilize racial categories. With an aim of using multiracial categories in an effort to create a sort of "shade confusion" that will "eventually destroy the black/white dichotomy that currently exists, ultimately reducing race to a meaningless category, as it should be,"²³² Johnson's argument is that racial classifications should eventually give way to the term "ethnicity." Unlike race, Johnson sees ethnicity as "a positive category which offers empowering benefits to the classified group with little or no corresponding costs."²³³ For Johnson, ethnicity includes the cultural values of a particular community, and unlike the ostensibly immutable character of race, "ethnic identification can be shed and transformed when necessary. Ethnic identification is learned and not visual."²³⁴ Initially, however, "one is born into an ethnic group and can

²²⁷ *Id.*

²²⁸ See, e.g., Reginald Leamon L. Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 232–33 (2000); Sharon Hoffman, *Is There A Place for "Race" As A Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1094 (2004).

²²⁹ See, e.g., cunningham, *supra* note 70 (discussing a socio-cultural context of race as an identity marker). *But see* KWAME A. APPIAH & AMY GUTMANN, *COLOR CONSCIOUS* (1996) (advocating for the value of using race as an identity).

²³⁰ GILROY, *supra* note 2, at 52.

²³¹ In terms of looking for a substitution, Robert Miles and Malcolm Brown ask, "Even though cultural factors are embedded in the concept of ethnicity, there is still a boundary problem. Where does one culture begin and another end? How many cultures are there? For these reasons, the concept of ethnicity, qua an inherent human attribute, while having the virtue of connoting socio-cultural norms rather than putatively biological characteristics, is as problematic as the concept of 'race.'" MILES & BROWN, *supra* note 20, at 95. Thus, like Alex Johnson, Miles and Brown do see life in a concept of ethnicity.

²³² Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 891 (1996).

²³³ *Id.* at 933.

²³⁴ *Id.* at 943.

only change that membership with difficulty.”²³⁵ Consequently, “the use of ethnicity, rather than race, has the potential to destabilize fixed racial classifications with the goal of ultimately eliminating racial classifications in American society.”²³⁶ Johnson’s effort to use ethnicity as a more socially robust legal category is hoped to undo the “reification of race in American society and the resultant costs of that reification—the continued existence of racialism.”²³⁷

This seems attractive so long as it avoids mimicking the biological essentialism that we have hopefully left behind,²³⁸ and which is what was described above as one of the basic moves in the neoracist position. As Charles Mills has argued, this is dangerous territory. Shifting towards ethnicity or cultural diversity and away from race threatens to undermine anti-racist strategies by eliminating the proper orientation towards racial oppression. “The defining feature of racism, at least in its classic form, is not just the failure to recognize the equal worth of the culture of the racialized group but, more ominously, the failure to recognize their very humanity.”²³⁹

Richard Ford has made this point in *Racial Culture*, emphasizing how problematic the substitution of culture for race can really be. In his discussion of *Bakke*, Ford put his finger on how Justice Powell’s identification of diversity as the primary justification for affirmative action helped to crystallize the legal system’s fatigue in fighting racism. Powell explained how the use of racial classifications were only legitimate when a state actor was combating specific instances of racial discrimination, not general social trends, and when those classifications were intended to further ethnic diversity. As we have seen, this dramatic shift in the jurisprudence away from a focus on racism and towards a focus on ethnic or cultural diversity was picked up and hammered home in *Grutter* and *Parents Involved*.²⁴⁰ The problem has been that where we still have urgent needs in repairing the social effects of

²³⁵ Johnson, *supra* note 23, at 1582.

²³⁶ *Id.*

²³⁷ *Id.* See also Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993).

²³⁸ Mills, *supra* note 45, at 94.

²³⁹ *Id.*

²⁴⁰ See also López, *supra* note 4. For López, the race into ethnicity problem rests on five premises:

I have argued that the rise of race-as-ethnicity rested on the following suppositions: First, race as such amounted to nothing more than superficial physical differences. Second, ethnic groups nevertheless possessed distinctive cultures. Third, racial domination lay defeated in the past, and no permanent dominant or subordinate groups remained. Fourth, conflicts over interests and cultures produced and explained relative group success. Fifth, antidiscrimination law dispreferred and even victimized “white” ethnic minorities.

Id. at 1028. López points out how in *Bakke*, Powell relied on an idea of the United States as a “nation of minorities” under the protection of the Fourteenth Amendment—an idea that had fallen out of favor until *Carolene Products*. *Id.* at 1036.

Powell used ethnicity to rewrite the American history of race in the twentieth century. He disaggregated the white ‘majority’ into ‘various minority groups’ who ‘struggle’ against ‘prejudice,’ while converting racial minorities into groups that shared an identical American experience with white ethnics. The color-line erased, the United States now progressed harmoniously as a ‘Nation filled with the stock of many lands,’ and the Constitution gave equal concern to ‘all ethnic groups seeking protection from official discrimination.’ ‘Ethnic groups’ in Powell’s usage constituted no casual

neoracism, courts have taught themselves to gaze elsewhere: into the hazy shade of a diverse and politically safe multicultural landscape. As Ford has said, by describing racial subordination as in fact a problem of cultural difference, anti-racist strategies are transformed by multiculturalism from “what should be an indictment of social practices of exclusion and subordination into a plea for ‘tolerance’ of a ‘diversity.’”²⁴¹ He adds, “In this light it would appear that a central function of ‘diversity’ is to finesse, if not obscure the salience of contemporary racism.”²⁴²

From Ford’s critique of cultural diversity as a proxy for racial justice we are but a short step away from a different but equally as important critique: even if it were possible to see multiculturalism as an anti-racist strategy, we are still assuming that racial cultures actually have determinate content. After all, if the claim is that the Seattle School Board needed to have a greater interest in promoting diversity instead of fighting racism, there is obviously an assumption there about what essentially constitutes these different cultural groups. A long-standing view from cultural anthropology has it, as one would expect, that this assumption is fraught. Annelise Riles has commented that just as it is typical to think of conflicts between cultures, conflicts within the cultures themselves are just as common: “Cultures are hybrid, overlapping, and creole: forces from trade to education to migration to popular culture and transnational law ensure that all persons participate in multiple cultures at once. Cultural elements circulate globally, and they are always changing. From this point of view, ‘culture’ is more of a constant act of translation and re-creation or representation than it is a fixed and common thing.”²⁴³

The upshot of all this appears grim. Anti-racist litigation strategies seem hemmed in from all sides. First, the jurist needs to understand that the biological foundation of race law is fictitious. This is important to emphasize not only because American race law appears to be continually under the spell of science, but because the biological argument is intrinsically connected to the use of race as a rationale for racial oppression. This is apparent in the way that the biological gloss on race enables the Supreme Court to consistently de-center its discussions of racial justice: since race is a natural mark, it should not be regulated. Second, the jurist needs to understand how calls for racial diversity have persistently obscured calls for racial justice. The shift from race to culture or ethnicity more often than not yields a shift away from the concerns about the Racial Contract and towards the desires for pluralism. Third, the jurist

synonym for race, but instead a heavily laden term signifying a conception of group dynamics in the United States in which racial hierarchy had ceased to operate.

Id. This argument led Powell to the crucial move which would ultimately supply later Courts with a resort to “reactionary colorblindness”:

Powell deployed ethnicity to locate all groups in the same position, that of temporary minorities similarly engaged in pluralist politics and facing the same levels of societal hostility—and all deserving an identical level of judicial protection. Because the United States contained not dominant and subordinate races but a welter of “ethnically fungible” groups, to paraphrase Alan Freeman’s critique, the Constitution could make no distinction among the beneficiaries or victims of racial classification.

Id. at 1037.

²⁴¹ Ford, *supra* note 180, at 53.

²⁴² *Id.* at 52.

²⁴³ Annelise Riles, *Cultural Conflicts*, 71 L. & CONTEMP. PROBS. 273, 285 (2008).

needs to understand that while cultures are certainly real in the sociological sense, just as races are real, they are incredibly complex and impossible to analyze as a “totalizing explanatory device.”²⁴⁴

Obviously, this seems like seriously tricky business. So where to go from here? The next Part offers some suggestions.

V. TOWARDS A CRITIQUE OF RACE AS A LEGAL CONCEPT: TWO IDEAS FROM CONFLICT OF LAWS

In looking for a way beyond the Court’s preoccupation with a neoliberal post-racialism, this Part reimagines the Court’s plurality decision in *Parents Involved*. In order to do so, we need to know how the present approach not only contrasts with Justice Roberts’ decision, but the dissenting opinions as well. As opposed to the neoliberalism animating the plurality opinion, Justices Breyer, Stevens, Souter, and Ginsberg dissented in a clear articulation of the modern liberal style.

Did the Constitution prohibit school boards in Seattle and Louisville from adopting race-conscious criteria to better integrate their school systems? Of course not.²⁴⁵ Writing for the dissenting Justices, Breyer found it easy to sustain the principle that the governmental use of racial classifications is permissible when it is intended to improve race relations, even when a municipality is under no obligation to do so. “That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself. Thus, Congress has enacted numerous race-conscious statutes that illustrate that principle or rely upon its validity. . . . [This] view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery.”²⁴⁶

As should be clear at this point, however, modern liberalism is just as committed to the use of a biological background rule as is neoliberalism. In moving from a welcoming posture towards regulation to the application of the standard, Justice Breyer noted the importance of being skeptical about the use of racial classifications. Racial classifications still exist in relation to a natural idea about race, wherein the appropriateness of racial regulation is necessarily juxtaposed against the importance of allowing racial groups to be free of such regulations. Thus, Breyer’s choice for a more lenient form of scrutiny of the programs “would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria’s tailoring in light of the need. . . . In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that Justice Thomas and Justice Kennedy mention.”²⁴⁷

And what are these dangers? According to Thomas, “Most of the dissent’s criticisms of today’s result can be traced to its rejection of the color blind Constitution”²⁴⁸—a rejection that Thomas suggests was pivotal in *Brown* itself. As for Justice Kennedy, his concerns are telling. In describing one approach

²⁴⁴ *Id.*

²⁴⁵ *Parents Involved*, 551 U.S. 701, 823–24 (2007). See also Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 13 (2008) (discussing the Breyer dissent).

²⁴⁶ *Parents Involved*, 551 U.S. at 828–29.

²⁴⁷ *Id.* at 836.

²⁴⁸ *Id.* at 772.

to the problem of segregated schooling, Kennedy described the view that sought the selection of race-conscious criteria as the direct solution to the problem of racial stratification. The problem with the race-conscious approach, Kennedy explained, is that it presents dangers that can be avoided when segregation is dealt with “more indirect means.”²⁴⁹ And why can’t a school board approach the problem directly? What are the dangers?

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree. . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.²⁵⁰

This passage is at once deeply puzzling and wonderfully indicative of a neoliberal conception of race. It is puzzling because Kennedy seemed to be suggesting that “race-conscious measures” that do not rely on race are much better than “race-conscious measures” that do. What this means is a mystery, but the reason for making the distinction is not. In Kennedy’s vision, individuals have a race that is naturally given, but they have the sovereign choice to define their own persona, “without state intervention that classifies on the basis of his race or the color of her skin.”²⁵¹ Kennedy clearly believes that people have racial identities, but it is up to the people themselves, and not the state, to make of those identities what they will—the last thing we need, Kennedy counsels, is for the state to get into the business of saying who is white or nonwhite. The best thing is to go beyond race altogether, to go post-racial. Kennedy therefore believes that there are races out there, but that racial classifications should be as limited as possible so as not to degrade the dignity of individual human beings.

Coming back to Breyer, he clearly believed the ambit of race-conscious regulation to be broader than what was articulated in the opinions of Roberts, Thomas or Kennedy. Yet in keeping with the modern liberal style, he still characterized the appropriateness of such regulations in relation to the operative background rules—rules that tell us that our legal conceptions of race are always founded on a natural presumption of biological differentiation. Thus, for different reasons and in different ways, the plurality, dissenting, and concurring opinions all understood the question of whether the Constitution permitted the use of state-sanctioned race-conscious criteria in a voluntary integration plan as existing against a naturalized background of legal assumptions about human ancestry.

In the subsequent discussion, I seek to draw a distinction between the background rules of race that are shared in the classic, modern, and neoliberal conceptions. Why is this distinction so important? The background rules of race as a legal concept, present in each of the liberal styles, provide an incredibly powerful obstacle in the way of serious efforts at social change. The reason, as has been

²⁴⁹ *Id.* at 734.

²⁵⁰ *Id.* at 797.

²⁵¹ *Id.*

explained above, is that these background rules present race as a natural characteristic of human identity that exists independently of legal regulation—race precedes law. It is only with this assumption about the naturalness of race that we are able to understand Roberts and Kennedy as making any kind of sense, and once that assumption is removed, colorblindness becomes a completely incoherent concept. Color—race—is legally constructed.

Pushing the argument further, once we establish that race is a legal concept, we can shift into the familiar territory of asking what social purpose that concept is expected to serve. Historically, race had the purpose of justifying the domination of certain human populations as a natural inevitability. While that purpose is no longer as prevalent, there is no logical reason to forestall a recovery of that approach. Rather, it can be joined with a more progressive interest in social change and racial justice.

The discussion below provides two very different suggestions about how to go about doing so, both of which offer a re-thinking of *Parents Involved* in light of Conflict of Laws. In Section A, race is maintained as an operative term where the hypothetical judge asks what function race is meant to serve in the context of the dispute, and consequently interprets relevant regulations in light of that function. That is, just as a term like “jurisdiction” was transformed in the encounter with early twentieth-century Legal Realism, this Section contemplates a similar encounter in the context of “race” as a legal concept. In Section B, the discussion looks at the facts of *Parents Involved* as literally a Conflict of Laws problem, and not analogously as it does in Section A. While the result is largely indeterminate, it is simultaneously quite useful.²⁵²

A. A Functionalist Rendering of *Parents Involved*

1. The Realist Critique of Formalism and the Rise of Functionalism

One legal strategy for attacking a neoracist Racial Contract might be hiding in a place we'd be unlikely to look: the standard history of American legal thought itself. As is well known, American jurists went through a bit of an existential crisis in the early years of the twentieth century.²⁵³ In field after field, academics and judges united in critiques over the natural foundations of categories of private law.²⁵⁴ Despite the breadth of the attack, a basic insight was consistently applied: it was no longer acceptable to believe in the veracity of so-called “natural” principles of law that might be discovered solely through the use of reason.²⁵⁵ There was no natural law of contract, property, tort, and so on. As it turned out, the manner in which a judge might decide a dispute with reference to a natural or objectively correct conception of law was soon believed to have just been a big mistake. There was no concept of property

²⁵² I do not mean to suggest that I am in favor of one of these approaches over another. While there is something more politically satisfying about the former, at least in the way that I have portrayed a functional view of race in the present discussion, there can be no doubt about the overwhelming amount of valid critique that functionalist jurisprudence has suffered over the last third of the 20th century. For discussion, see, e.g., Duncan Kennedy, *Three Globalizations in Law and Legal Thought*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 (Alvaro Santos ed., 2006).

²⁵³ See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* (1992) (discussing a classic account of the existential crisis). Cf. ROBERTO M. UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996); see also BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009).

²⁵⁴ See, e.g., HORWITZ, *supra* note 253 (critiquing the natural foundations of torts, contract, and property law); see also Kennedy, *supra* note 252, at 44–45.

²⁵⁵ See, e.g., Oliver Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

or contract “out there” that “legal science”²⁵⁶ might rigorously apply to the world of human conflict. The objective conception of legal analysis was, and had always been, a mirage.

A common example of this shift from a kind of formalism to functionalism is the field of conflict of laws.²⁵⁷ Chief among the jurists who launched the critique of formalism in this area was Walter Wheeler Cook, taking aim at statements like this one from A.C. Dicey: “fundamental principles of private international law can be ascertained by study and reflection, and that the soundness of the rules maintained, say in England, as to the extraterritorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles.”²⁵⁸ Cook elaborated, “It follows that ‘the object of a writer on the conflict of laws is to discover the principles’ of the subject, and ‘starting with some one principle . . . to show how in accordance with the fundamental principle assumed by the writer as the basis of his system, the specific rules for the decision of concrete cases are or should be reached by all countries.’”²⁵⁹ More specifically, Cook understood leaders in the field like Joseph Beale to have articulated a way of thinking about conflicts law that presupposed a series of beliefs in the nature of jurisdiction.

At its base, the field of conflicts is hoped to provide answers to the question of what to do when a dispute has material connections to multiple sites of authority—which authority should hear the case (this is the “jurisdiction” question), and what law should govern the dispute (this is the “choice of law” question).²⁶⁰ For Beale, the problem of conflicting sources of authority could always be solved with a single, correct answer. Starting from a positivist position, Beale believed that laws never preexisted the sovereign—that all law could only be law once it had been delivered by a properly constituted political authority.²⁶¹ Once a law had been articulated by the sovereign, however, something like a legal physics would begin. When a particular instance would take place, trigger the creation of a right under a sovereign’s law, that right became a fact for the entire world. The right was a fact like a chair is a fact; it demanded recognition as a natural thing in the world. Consequently, because that right had “vested” there, there was no choice but for other jurisdiction to respect that right; a decision that failed to do so would be wrong.²⁶²

A famous example of this view is *Alabama Great Southern R.R. Co. v. Carroll*,²⁶³ in which the employee of a railroad company, Carroll, was injured in the course of his work. Carroll was a resident of Alabama, as was the employer. The negligence, which was on the part of Carroll’s fellow laborers, who were responsible for Carroll’s injury, took place while the train was in Alabama, but the injury itself

²⁵⁶ 1 JOSEPH BEALE, SELECTIONS FROM BEALE’S TREATISE ON THE CONFLICT OF LAWS 2–4 (1935) (providing a well-known example of “legal science”). The seminal account is found in Friedrich Savigny.

²⁵⁷ FRIEDRICH JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (2005) (describing the history of the shift from formalism to functionalism).

²⁵⁸ Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 458 (1923).

²⁵⁹ *Id.*

²⁶⁰ See, e.g., SYMEON C. SYMEONIDES, ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS: AMERICAN, COMPARATIVE AND INTERNATIONAL (2d ed. 2003).

²⁶¹ BEALE, *supra* note 256, at 2–18.

²⁶² *Id.* at 18.

²⁶³ 97 Ala. 126 (Ala. 1892).

happened in Mississippi. Mississippi law exempted the railroad company from any liability when the harm was the result of a fellow worker and not management, but in Alabama the company would have been liable for damages. Following Beale's logic, the state high court had no problem finding that Carroll's right to compensation had vested in Mississippi—the location where the injury had occurred—and as a consequence, the Alabama Supreme Court was compelled to apply Mississippi law. That was the end of the story; there was literally nothing the Alabama Supreme Court could have done.²⁶⁴

For critics like Cook, this whole scenario was plain crazy. If decisions like the one in *Carroll* were intended to mean that the Alabama court was obligated to apply Mississippi law because it followed what it believed were the advantages of vested rights theory, Cook had no quarrel.²⁶⁵ But, to the extent courts actually meant to say that choice of law or jurisdictional questions are *a priori* answered, and that the state of Alabama could not principally apply its own law because the right vested in another jurisdiction, was simply ridiculous.²⁶⁶ The actual state of affairs, Cook argued, was one in which courts applied their own laws to situations in which rights had supposedly vested elsewhere, all the time.²⁶⁷ If one looked at the reality of judicial decision making it would quickly become apparent that these sorts of “fundamental principles” were subject to all kinds of varying interpretations. In *Carroll*, why was it that the injury itself had vested the right? What about the negligence? And was this even a tort case? Perhaps it was actually a contract case, in which the law of the place where the employment contract had been made would have controlled, in that case, Alabama. Or instead, might this dispute not be better seen as a matter of procedural rules, given that the field of conflicts is usually understood as procedural law? In that case, Alabama law would apply. But maybe the best answer would be to really apply the whole of Mississippi law, including its own conflicts rules, since that decided whether the right apparently vested. What then if Mississippi conflicts law punted back to Alabama, only to get caught up in Alabama's conflicts law that would send it right back again?²⁶⁸

The courts that frequently used these “escape” devices were familiar with their application. However, Cook raised the bar. Even in the ordinary case of a court “following” vested rights theory—like the Alabama Supreme Court in *Carroll*—the fundamental principles were still not in play in the way that legal science would have instructed. When a court attempts to apply “foreign law,” like the Alabama court tried to apply Mississippi law, it never actually applies “foreign law” at all. In fact, applying foreign law is impossible.²⁶⁹ Even if the foreign law really existed as a unitary and coherent thing in the foreign place, the local court can never do anything but recreate the “foreign” in the context of its own articulation. To be clear, Cook was not exactly postmodern; his argument was simply that vested rights theory was impossible on its own terms. Alabama applied what it understood to be the law of Mississippi, in that a Mississippi court would have applied it to a dispute between two Mississippi residents. But in fact, the Alabama Supreme Court was dealing with a dispute between two Alabama residents, and this collision of jurisdictional competence is the whole point of conflicts jurisprudence—trying to figure out what to do when competing authorities are implicated in a legal dispute. By pretending that Carroll and his employer were Mississippi residents, the court at once missed the whole

²⁶⁴ See SYMEONIDES, *supra* note 260, at 19–26 (discussing the *Carroll* case from several different angles).

²⁶⁵ Cook, *supra* note 258, at 459–60.

²⁶⁶ *Id.* at 462–63.

²⁶⁷ *Id.*

²⁶⁸ See Cook, *supra* note 258, at 468–69 (explaining this point as “renvoi”).

²⁶⁹ *Id.* at 469.

point of conflicts law and ultimately rendered a decision on the basis of an imaginary dispute between Mississippi residents who never existed.

So what happened to conflict of laws after the decline of vested rights theory and the natural conception of jurisdictional relations? After some decades of turmoil, courts across the country encountered what came to be known as the “judicial revolution.”²⁷⁰ Judges and academics agreed there were no natural rules that could guide us in the attempt to reconcile competing claims from equal sovereigns regarding which law should apply.²⁷¹ The conventional move forward involved an “interest” analysis, in which a court would ask what purposes choosing the law of one jurisdiction over another would serve.²⁷² Adjudicating a conflicts question became much as it is today: an approach that expressly recognized the political and contestable aspects of its project, while simultaneously embracing highly technical legal strategies to generate an outcome to the dispute.²⁷³

2. What is the Function of Race as a Legal Concept?

As we might think of what is happening to race as a legal concept today, a century ago, fields like conflict of laws transitioned from a moment in which foundational concepts were believed to be natural, objective, and the proper subjects of a “legal science,” to another moment in which they were instead understood to be best interpreted in light of the shifting grounds of contemporary social needs.²⁷⁴ That is, the “discovery” that property, contract, corporations, or jurisdiction lacked objective foundations in the natural world did not usher in a call for the abolition of property and contract. We might also say that the “discovery” that race lacks scientifically objective foundations need not usher in a call for the end of race. Instead, conflict of laws jurists at the time asked: What purposes do these concepts serve? How should they be interpreted in light of those purposes? What is their function?

Is there any life to the possible analogy between the denaturalization of private law in the early twentieth century and the potential denaturalization of race law in the present?²⁷⁵ One obvious problem

²⁷⁰ The case most famously associated with the revolution is *Babcock v. Johnson*, 191 N.E.2d 279 (N.Y. 1963).

²⁷¹ The *Babcock* court mentioned the widespread “dissatisfaction with the mechanical formulae of the conflicts of law,” and how “the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations The vice of the vested rights theory . . . is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved.” *Id.* at 281–82.

²⁷² See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

²⁷³ Knop, *supra* note 41. To be clear here, I do not mean to conflate the sort of generic “functionalism” to which I am referring, with the more specific use of the term as a theory of conflicts. My use of functionalism incorporates most styles of conflicts jurisprudence that emerged after Currie. For discussion of the different models, including a more specified form of functionalism, see Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, in *MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW* 19 (Tomer Broude & Yuval Shany eds., 2010). For treatments of this more specific kind, see ARTHUR T. VON MEHREN & DONALD TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

²⁷⁴ For a discussion of this approach, see Duncan Kennedy’s description of “the social.” Kennedy, *supra* note 34, at 37.

²⁷⁵ The following discussion is in the spirit of Terrance MacMullen’s discussion of a Deweyan reconstruction of race. TERRANCE MACMULLEN, *HABITS OF WHITENESS: A PRAGMATIST RECONSTRUCTION* (2009).

with the analogy is the legal system's long-time friend, the public-private distinction.²⁷⁶ The enforcement of civil rights claims and the use of racial classifications are matters of public law, though since the establishment of the Civil Rights Act and the allowance of claims against private parties, courts and Congress expanded the scope beyond state action. But the judicial act of reconceiving concepts like jurisdiction seems quite different than the judicial reconception of race. Whereas the former strikes us now as obviously artificial, the latter still feels organic, and as a consequence, less susceptible to this kind of reconception. But this is the whole point: *there is nothing organic about race at all.*

Interestingly, a kind of interest-oriented functionalism is already built into constitutional law.²⁷⁷ After all, the Court's standard approach is to evaluate the use of racial classifications in light of particular social interests, and in the present, those interests have been essentially limited to our desires for cultural diversity in higher education. While this functionalism is built-in, it is also different than the functionalism in private law that followed legal realism. Private law functionalism formally did away with the notion of natural reason and rule, whereas our contemporary constitutionalism balances its commitment to a natural conception of race against its allowance of certain state acts that regulate that natural conception.

(i) Step One: Choose an Interpretive Method

The first step in the analysis would emphasize the wholesale absence of any formal or literal constitutional limitations on the school districts' allotment plans. Of course, one does not require a leap of faith to highlight this—as has already been pointed out, the Court has never interpreted the Fourteenth Amendment as completely prohibiting racial classifications. It only prohibits such classifications that are without the appropriate sort of justification. Whether the plans are valid will turn entirely on the Court's interpretive methods. In this case, the Court will choose what could be called a 1930's style functionalism.²⁷⁸

(ii) Step Two: Foreground Neoracism and the Racial Contract

The second step would involve a historical examination of the global process of racial oppression. The opinion would highlight how, over the course of several centuries, experts from various disciplines had helped elaborate a racial ideology that rationalized the Racial Contract. The Court would explain that, while racial oppression had suffered a major blow in the middle of the twentieth century, racism continued to flourish in other subtle ways. The need for a comprehensive assault on racism is no less necessary today than it was a hundred years ago. The effects of racial discrimination are rampant and systemic, and every bit of the legal system's power must be leveraged in service of dismantling that system.

²⁷⁶ For discussions of the public-private distinction, see Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

²⁷⁷ At least, to the extent that one adopts a view of the constitution that it should be interpreted in light of shifting social conditions, this involves a kind of functionalism.

²⁷⁸ For representative examples of 1930's functionalism, see Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 591 (1911); Cohen, *supra* note 38; Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940).

(iii) Step Three: Identify the Function of Race

The third step would handle the term “race” in the following way. It is time to eliminate the old-fashioned and archaic idea that there are human races born into the world, and to embrace the view that races are nevertheless real as a matter of our social reality. Consequently, the thrust must involve a functionalist interpretation of race that asks not what race *is*, but rather, what purpose does the articulation of race serve? What is the interest in using the idea of race as legal category? What is its function? The Court would then clearly reiterate what its purpose has been in the past: the purpose of race had been to justify a state of oppression. Following this, the Court would announce a reversal: the function of race today should be to do exactly the opposite, undermining that state of oppression. Whether we are in the context of constitutional law, the Civil Rights Act, or any other legal regime, any relevant texts will be interpreted in light of this function.

(iv) Step Four: Decide

The fourth and final step would ask whether the school allotment plans are using the social concept of race as a tool for undermining the Racial Contract, instead of supporting it. Keep in mind here, this question would focus on whether the schools’ use of race was in tension with the Racial Contract, and not the egalitarianism of the classic liberal Social Contract that the current Supreme Court believes to be endangered by the schools’ plans. Also keep in mind that this step may hardly feel “legal” in the sense that a particular rule is applied to a set of facts in a consistent, uniform, and general fashion. But functionalist conceptions of law are never any of these things anyway, and if one buys into the realist critiques that paved the way for functionalism in the first place, then one also knows that rules are rarely applied consistently or uniformly, regardless of our selected interpretive method.

B. Conflict of Laws as “Cultural Conflict”

Despite the fact that the Supreme Court’s jurisprudence here actually *does* employ a kind of functionalism, though admittedly not of the private law variety that this Article has described, this rendering of a functionalist interpretation of race might feel like it is just too much. If we have done away with biology, then who has standing to bring these claims? How will arguments over standing be resolved? What is the legal definition of “racial oppression”? What counts as “properly” redressing that kind of oppression? Is it legitimate for Michigan Law School to decide in a given year that no “White” people will be admitted? These are obviously hard questions, and many more would be asked. Of course, our contemporary situation is also subject to a host of really hard questions. It is far from clear why the one set is accepted as just part of how the world works, and the other set of questions is taken as damning evidence.

In any case, the aim of the Article is not to argue for what I have brazenly termed a functionalist perspective on race law. Instead, it is to highlight the connection between the invention of a natural idea about humanity called “race” and the use of that idea as a justification for oppression, and in tandem, the manner in which the American legal system has relied on that same idea, even at its most progressive moments. In the previous section, the discussion suggested one possibility of how an affirmative action case might have been decided if it was made in light of the Racial Contract and the progressivism of early twentieth-century American legal thought. Despite the radical feel of that hypothetical rendering, there is nothing in it that does violence to the Court’s own canonical tools.

In these final sections, the discussion will set up a second way of rethinking *Parents Involved*, but from a quite different angle, or to borrow language from Professors Karen Knop, Ralf Michaels, and Annelise Riles, it will be imagined “sideways.” Instead of making an analogy between conflict of laws and race law, here race is imagined as a problem of conflict of laws.

1. Why Conflict of Laws?

In their recent article, *After Multiculturalism: Feminism, Culture, and the Surprising Attraction of a Conflict of Laws Approach*,²⁷⁹ Knop, Michaels, and Riles pose a novel approach to the “bogged-down” relation between feminism and culture. They ask: how do we resolve questions about veiling, polygamy, and clitoridectomy—practices understood to be oppressive to women in some cultures but liberating in others—without getting stuck in interminable debates about universalism, relativism, and cultural essentialism?²⁸⁰ Must a commitment to gender equality always be posed in contrast to commitments to cultural diversity? And what do we do about disagreements over what is actually fundamental to a culture in the first place? Can we be sure that polygamy is ever essential in a particular community? Is there anything essential for sure?

These are thorny questions, highlighting how in some ways feminist thinking about law has gotten stuck in the essentialist debates about cultural content. So how could a field like conflicts possibly be of any assistance? “The path we propose draws on what, at first glance, would seem an unpromising legal paradigm—conflict of laws, the highly technical field famously described as a ‘dismal swamp’ . . . more often associated with out-of-state car accidents . . . the field that time forgot.”²⁸¹ At first blush, using conflict of laws to analyze the feminism-culture problem (or race, for that matter) might strike some as a kind of parlor trick.

Despite appearances, however, Knop, Michaels, and Riles seem to be on to something. Conflicts jurisprudence has a style quite different than what we are used to in the typical domain of civil rights law.²⁸² Traditional public law litigation, especially in the enforcement of constitutional rights, begins with an encounter with a huge moral question about personal freedom and a theory of justice.²⁸³ The constitutional tactic is to deal with this moral problem by stripping it of its political dimensions—the question is weighed and balanced and answered in what is pronounced as a decision that is somehow “correct.”²⁸⁴ But conflicts jurisprudence works in something like the reverse. The initial question is usually posed in technical, apolitical terms. This question is then pushed through a series of maneuvers that every judge already knows to be highly indeterminate.²⁸⁵ Perhaps unlike some other fields, jurists

²⁷⁹ Knop, Michaels, & Riles, *supra* note 41. The step-by-step approach articulated in the following sections might be seen as doing violence to the actual approach described by Knop, Michaels, and Riles. In their piece, they don’t set anything out like the kind of mechanical operation I am suggesting in the context of *Parents Involved*, and this appears intentional on their part. Nevertheless, my hope in harnessing their approach and pressing it into the service of race law is to only provide one sort of concrete illustration of how their approach might be applied. It certainly shouldn’t be understood as only being available in the way that I describe it here. Thanks to Ralf Michaels for this helpful clarification.

²⁸⁰ *Id.* Knop, Michaels, and Riles don’t suggest that these are the only or the seminal issues involved in the gridlock between feminists and multiculturalists.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ [W]hereas the debate in constitutional law or international human rights law, that is, public law, starts with liberal values, conflict of laws begins with the acceptance of the other jurisdiction’s potentially illiberal laws. Both processes of analysis get to [a point of ethical decision] . . . [b]ut conflicts gets there through a series of technicalities, and these technicalities bring an immediate

working in conflict of laws typically know their history pretty well (described above), and reconciled themselves to the impossibility of “right” answers some time ago.²⁸⁶

To be sure, conflicts experts often seem rather frustrated that we still haven’t figured out how to make this thing work,²⁸⁷ but one of the key insights in the work of Knop, Michaels, and Riles is that the awareness of this deep-seated indeterminacy is actually what makes conflict of laws such an unusually capable field. Unlike the public law style that faces off with a major question about human rights, and then pretends to channel that question through a balancing mechanism that produces a correct result, the style of conflict of laws understands the mechanism itself—the techniques of reasoning—to be an ethical framework of decision making. It does not separate out the ethical question from a depoliticized judicial test. It does not seek “the perfectly calibrated balance between opposing interests; to split the baby precisely in two; to find the sweet spot at which all sides give up precisely the appropriate amounts in favor of the common good.”²⁸⁸ Conflicts jurisprudence treats the entire process as politically contestable, while at the very same time negotiating that process in highly technical terms. The intellectual style of conflict of laws is therefore at once far more humble and more realistic than the bombastic and “black-letter” feel of decisions like *Parents Involved*.

This idea that the conflicts style is able to take highly political questions and funnel them into apparently apolitical techniques without actually depoliticizing them is illustrated in the manner in which courts gather information on the laws of foreign jurisdictions. In the garden-variety conflicts case, the parties must prove the relevant foreign law, whether that be the law of Alabama or Afghanistan. The judge knows that the “proof” of that law will be highly contingent on the interests of those parties making out their claims about what Alabama or Afghanistan’s laws require in the given context. That is, just as proof of other domestic law doctrines is dependent—whether there actually was an offer or consideration or negligence or whatever will turn on the talents of those making the arguments—actual proof of foreign law is just as impossible. Thus, conflicts judges engage in a tried and true judicial move: while it may be obvious that they are not dealing with an objective assessment of foreign law, if such a thing were even available, they act *as if* it was an objective assessment. The proof of foreign law is *constructive*.²⁸⁹

2. Thinking Sideways about Race and Culture

This takes us to the question of how *Parents Involved* might be re-situated in the style of conflict of laws. Admittedly, the example worked out by Knop, Michaels, and Riles appears to be an easier fit

complexity and detail that constitutional theory or human rights theory must generate from first principles—and seldom arrives at.

Knop, Michaels, & Riles, *supra* note 41.

²⁸⁶ See, e.g., Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Hessel Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953); David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

²⁸⁷ For one exemplary critique of the “forest of metaphors” and “fantasyland” that is Conflict of Laws, see Harold G. Maier, *Finding the Trees in Spite of the Metaphorist: The Problem of State Interests in Choice of Law*, 56 ALB. L. REV. 753 (1993).

²⁸⁸ Knop, Michaels, & Riles, *supra* note 41.

²⁸⁹ The notion of constructive law, or legal fiction, has a long pedigree. For a recent discussion, see Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1 (2010).

than the affirmative action problem here. In their analysis, Knop, Michaels, and Riles looked at a hypothetical corporate law dispute between a father and daughter, where the former was a citizen and resident of Japan, and the daughter was a resident of California. Though the dispute upon which the hypo was based was not a conflicts case, it was easy enough to see how a conflicts analysis could initially develop: there were two cultures in play, with apparently conflicting conceptions about the relevant laws regulating the dispute.²⁹⁰

Nevertheless, there appears to be room to think about racial identity in the conflicts style, as Knop, Michaels, and Riles have imagined it. Though this Article does not attempt the level of detail they produce in their analysis of gender and culture, the discussion should be plentiful enough to suggest clear points of departure for further elaborations of a conflicts style of race law.

(i) Step One: Identify the Jurisdictional (Cultural) Conflict

The first step in reorienting *Parents Involved* in the conflicts style requires the judge to identify the cultural conflict in play. In an earlier piece, Riles argued that a more realistic understanding of jurisdictional conflict suggests that what is really in conflict—in even the most pedestrian of cases, like the *Carroll* case discussed above—are cultural norms.²⁹¹ After all, the whole notion of a conflict of competing jurisdictions is a metaphor—a jurisdiction is not literally in conflict with anything. What is at stake, Riles suggested, is a choice between values. The idea here is that, even though cultures are incredibly complex, the fact is that conflicts cases are at bottom about conflicts of values, “that is, a problem of how to make sense of something foreign to one’s own world, to understand, to accommodate, to empathize with, or to choose to refuse to do so.”²⁹² “The problem at the heart of conflicts, then, is not just what is the source of the authority for our laws and our judicial decisions, but whose rules or values *should* prevail, and what *are* those rules and values anyway?”²⁹³ Though it may be nearly impossible to truly know what those rules and values might be, this does not preclude the necessity of trying to figure out what they are, and ultimately producing “constructive cultures.” Therefore, just as judges are accustomed to using the constructive law of a foreign jurisdiction, so too can judges think constructively about cultural norms. Consequently, just as there would be an initial mapping of the two competing jurisdictions in *Carroll*—Mississippi and Alabama—here the judge would look for the competing cultures or “normative communities.”²⁹⁴

If we arbitrarily choose to focus on Seattle rather than Louisville, the dispute was over the Seattle School Board’s attempt to redress the effects of racially concentrated housing patterns in the Seattle metropolitan area. The Board’s plan allowed any student to select from any of the ten comprehensive high schools in Seattle, regardless of whether the student was applying to a neighborhood school. In the event that particular schools were oversubscribed, the Board used a “racial tiebreaker” in order to undermine the City’s racial disparities.²⁹⁵ Seattle itself is historically segregated. As of a few years ago, sixty-six percent of all white students lived north of downtown Seattle while eighty-

²⁹⁰ Knop, Michaels, & Riles, *supra* note 41.

²⁹¹ Riles, *supra* note 243, at 275.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Parents Involved*, 551 U.S. 701, 702 (2007).

four percent of African-American students, seventy-four percent of Asian students, and sixty-five percent of Hispanic students lived south of downtown. As one school board member testified, “[T]here currently are and have always been invisible lines in Seattle’s residential areas, defining where people of color are welcome.”²⁹⁶ With respect to the high schools themselves, the most prestigious schools were unavailable to students living in southern Seattle, and because of the city’s segregated housing patterns, this meant the prestigious schools were dominated by whites, while the less advanced schools were dominated by “non-Whites.”

With respect to the particular claim in *Parents Involved*, the plaintiff was a nonprofit corporation comprised of parents of students whose children were or were potentially denied placement in the high school of their choice. These claimants were recognized as “White” in the dispute, and individual members of the defendant School Board were comprised of different racial categories.

Insofar as our hypothetical judge needs to determine the “normative communities” with material connections to the dispute, Seattle has several: “White,” “African American,” “Asian American,” and “Hispanic.” Of course, this has a very different feel than having identified Alabama and Mississippi, or California and Japan, as the competing cultural entities. In a judicial context, Alabama, Mississippi, California, and Japan are all “jurisdictions,” and conflicts jurisprudence is a field concerned with jurisdictional questions. “White” is not a jurisdiction, right? But if these are our thoughts, we have already gone off the rails. The very point of this exercise is precisely to think of Alabama, Mississippi, California, and Japan as *cultures* and *not* as abstract “jurisdictions.” And if the judicial task is to use a legal technique which searches out culture, African American or Hispanic or Asian are as good as any other.²⁹⁷

But, what about White culture? What does that involve? Without entering the large literature on Whiteness,²⁹⁸ suffice it to say that Whiteness does not function on the same analytical plane as something like “Hispanic.” By way of example, consider e. christi cunningham’s articulation of “the race paradigm” in American law and its five basic premises.²⁹⁹ These are: (1) all humans are assigned a racial identity, (2) race is the preeminent aspect of an individual’s total identity, (3) races are property interests, where Whiteness in particular is a legally cognizable property interest, (4) racial categories are defined in contrast to Whiteness, and (5) Whiteness is the “supreme” racial identity.³⁰⁰ These emphases on Whiteness in the critical race theory literature are meant to foreground the lopsided quality of “race relations;” to be sure, all races are socially and legally constructed, but the manner in which “non-White” racial categories are understood is always as a matter of juxtaposition against Whiteness. Courts define Whiteness as a set of powers, privileges, and dominance.³⁰¹ Consequently, those people that are born

²⁹⁶ Brief of Appellees at 6, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236 (9th Cir. 2002) (No. 01-35450), 2001 WL 34090888, at *5.

²⁹⁷ But, maybe not: as Stephen Steinberg has pointed out, some research has suggested that few Latinos actually identify with these designations as accurate descriptors of their own cultural identities, preferring instead to associate with particular countries of origin. STEPHEN STEINBERG, *RACE RELATIONS: A CRITIQUE* 126 (2007).

²⁹⁸ For an interesting mapping of various theories of Whiteness, see Vron Ware, *The Parameters of White Critique*, in *A COMPANION TO RACIAL AND ETHNIC STUDIES* 105 (David Theo Goldberg & John Solomos eds., 2002).

²⁹⁹ cunningham, *supra* note 72, at 762–63.

³⁰⁰ *Id.*

³⁰¹ Gallagher, *supra* note 49, at 9.

with the “right” physical attributes that have been socialized as “racial,” such as skin color, hair, and other facial features, automatically partake of those legally bestowed powers, privileges, and interests.³⁰²

Whiteness is a kind of power structure or ideology of domination. Blackness, or Hispanic, or Asian, is not, and hence the categorical mismatch in thinking about “cultural conflicts.” There are Black, Hispanic, and Asian cultures, however disaggregated they might be, in ways that there is not a White culture.³⁰³ Though all races are socio-legal constructions, Whiteness is the controlling, animating structure. In cultural terms, Whiteness is the nadir, if not a negation.

Given our conflict of laws framework, and the judicial task of identifying the relevant cultures to the dispute, Whiteness should be regarded as both a culture and an ideology of racial oppression. Yes, the discussion has now taken us from (1) jurisdiction, down to (2) culture, and now down to (3) ideology, but this string of moves is both justifiable and desirable. It is justifiable because for whatever we know Whiteness to *really* be, it is still true that Whiteness performs as a socially constructed racial and cultural identity. If we are looking for the cultures in play here, Whiteness has to be counted among them, since people generally speak and act as if there was a White culture.³⁰⁴ Further, it is desirable to understand Whiteness in this way because it serves as an antidote to our worries that the move from race to culture brings with it a lack of focus on the real problem of racism. As long as Whiteness is in the mix, and Whiteness is understood both as a culture and an ideology of racial subordination, the conflicts style of cultural analysis is prevented from descending into the post-racial diversity project of the Supreme Court. By definition, a cultural conflict in which Whiteness is a part will force the conflicts judge to squarely face racism.

³⁰² As David Roediger has written, “It is not merely . . . that whiteness is *nothing but* oppressive and false. . . . It is the empty and therefore terrifying attempt to build an identity based on what one isn’t and on whom one can hold back.” *White Without End?*, in RACE STRUGGLES 98, 103 (Theodore Koditschek, Sundiata Keita Cha-Jua & Helen Neville eds., 2009). See generally, WHITE LOGIC, WHITE METHODS (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008); Gallagher, *supra* note 49; IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497, 1593 (2010); Harris, *supra* note 157; BARBARA FLAGG & DAVID ROEDIGER, WAGES OF WHITENESS (1991); Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163, 163 (2009).

³⁰³ In this context, the website devoted to the “stuff white people like” is interesting. STUFF WHITE PEOPLE LIKE, <http://stuffwhitepeoplelike.com/> (last visited Feb. 6, 2012). In contrast to the idea that whiteness has positive content, see Ian Haney Lopez:

In a setting in which White identity exists as the superior opposite to the identity of non-Whites, elaborating a positive White racial identity seems at best redundant, and at worst dangerous. Whiteness is already defined almost exclusively in terms of positive attributes. Whites already exist as innocent, industrious, temperate, judicious, and so on Further, advocating the development of a positive White racial identity disregards the extent to which White attributes rest on the negative traits that supposedly define minorities. . . . Because White identity is a hierarchical fantasy that requires inferior minority identities, Whiteness as it currently exists should be dismantled. The systems of meaning that define races revolve primarily around Whites, not non-Whites.

LOPEZ, *supra* note 302, at 22.

³⁰⁴ *Id.* See also Danielle Dirks & Jennifer Mueller, *Racism and Popular Culture*, in HANDBOOK ON THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS, *supra* note 49, at 115, 116 (“In the United States popular culture has assisted in the maintenance of a white supremacist racial hierarchy since its American inception.”).

(ii) Step Two: Characterization of the Claim

Once the judge has established the identity of the competing (known but undefined) cultures, the next step will be to characterize the dispute. Though the parties typically have the burden of arguing a theory of the case, judges in conflicts cases have long re-characterized a dispute when it seemed worth doing in the judge's view.³⁰⁵ In this respect, one of the oldest critiques of *Carroll* was how the judge might have just as easily regarded Carroll's employment contract as at least as relevant to his claim against the railroad as the tort theory that ultimately persuaded the Alabama Supreme Court.³⁰⁶ Thus, looking at the terrain our hypothetical judge will ask, what is going on here in Seattle? What are the alternative theories of the case?

Even with the very few facts already canvassed, several kinds of claims quickly emerge to the surface. First, this looks like a question of local government law.³⁰⁷ Second, while it has the appearance of a dispute about school assignments, perhaps it is more effectively analyzed as a problem in housing law.³⁰⁸ Third, the suggestion that the School Board owed an affirmative duty to people like Jill Kurfirst of Parents Involved in Community Schools, and that this duty was breached resulting in an injury, positions this as a tort claim.³⁰⁹ Fourth, and following a substantial strain of thinking in critical race theory, claimants like Kurfirst could argue that the Board's decision robbed her of a property right without due compensation.³¹⁰ Fifth, of course, the claim could be situated in the way it was in the actual case. Surely, other claims could be developed as well.

The point here, however, is not that our hypothetical judge might conclude that one of these avenues is "correct" or that the Supreme Court really got it wrong in thinking in constitutional rather than property terms. The point is that in the conflicts style the judge is forced to operate with an awareness about the contingency and elasticity of the whole process of characterization. "The

³⁰⁵ Among the most famous examples of this tactic are found in *W. Union Tel. Co. v. Chilton*, 140 S.W. 26 (Ark. 1911) and *W. Union Tel. Co. v. Flannagan*, 167 S.W. 701 (Ark. 1914).

³⁰⁶ See SYMEONIDES, *supra* note 260, at 42–43.

³⁰⁷ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (Court dismissed suit by an unincorporated town challenging the applicability of local city ordinances despite their lack of participation in the political process); *Milliken v. Bradley*, 418 U.S. 717 (1974) (Court found that a multiple district school desegregation plan was inappropriate where only one district participated in *de jure* discrimination unless there is a finding that the other districts participated in the discrimination or that the districts were created to create discrimination); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Court held no due process violation in a state school financing scheme that based school funding on local property taxes); *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (state supreme court held that a state constitutional right to substantially equal educational opportunities obliged the state to address *de facto* and *de jure* discrimination).

³⁰⁸ See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (Court found plaintiffs did not satisfy their burden to prove that there was racial motivation in zoning); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 718 (N.J. 1975) (holding that zoning laws that rendered it impossible to create low to moderate income housing in a municipality were invalid).

³⁰⁹ See, e.g., *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989) (jury's apportionment of negligence upheld).

³¹⁰ *Wilk v. Wilk*, 795 A.2d 1191 (Vt. 2002) (allowing due compensation for a portion of a parcel of land); *Ragland v. Walter*, 411 So. 106 (Ala. 1982) (allowing public sale of contested property instead of equitable distribution); *Black v. Stimpson*, 602 So.2d 368 (Ala. 1992) (upholding a public sale and proportional distribution of profits to owners). Professor Craig-Taylor also cites *Fike v. Shearer*, 571 P.2d 1252 (Or. 1977) (ordering public sale of contested land instead of private sale).

sedimenting of critiques in the conflicts tradition has meant that when we characterize, we do so knowing in some sense that there is not one single ‘right answer’ to the characterization question.”³¹¹ Or, from another viewpoint, “[C]haracterization is not a truth claim; it is a provisional technique for resolving a very real clash of values.”³¹² Consequently, the cash value of foregrounding the process of claim characterization lies in the judge’s ability to avoid legal conceptions that may have greater tendencies to bog the claim down in questions about the “actual” politics of the judge that are “really” driving the decision. If we are in the process of characterizing in the conflicts style, we *already know* this is simply the judge’s choice, and nothing more, since there is no *a priori* reason to characterize the claim in one way or another.

(iii) Step Three: Identify the Rules

Just as the Alabama Supreme Court asked in *Carroll* how tort rules differed in the jurisdictions of Alabama and Mississippi, so here the third step in the analysis is to ask how the rules differ in the White and non-White cultural communities. This step proceeds in light of a double recognition produced through encounters with legal realism and cultural anthropology: objective assessments of both (1) rules, and (2) culture are always unavailable. Thus, both the cultures themselves and the rules we associate with those cultures will be constructive—they will be constructed *as if* they were objectively attainable. As Knop, Michaels, and Riles explain, “we suggest that the adversarial process can be understood as encoding the post-essentialist idea that the Truth of foreign law is contestable and what is established is a product of competing testimony by foreign law experts and the judge’s perspective on the testimony.”³¹³ Playing the law game tells us that there really is a foreign law “out there,” but the techniques themselves demonstrate “recognition that this is not possible and ultimately it will be a best approximation.”³¹⁴ Consequently, conclusions about the rules derived from the White and non-White communities are simultaneously formalistic and realistic.

With regard to each of the alternative characterizations mentioned above, each of these fields has been subjected over time to racial critique and attendant descriptions of relevant “communities of interest.”³¹⁵ The basic critique in each case is the same: there is a view that a field of law can be divided

³¹¹ Knop, Michaels, & Riles, *supra* note 41, at 46.

³¹² *Id.*

³¹³ *Id.* at 43.

³¹⁴ *Id.*

³¹⁵ For scholarship on raced local government law, see, e.g., Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2352 (2003); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 402 (2010); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1151 (1996); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1994 (2000); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1181 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1843 (1994); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1307 (2004); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495 (2010).

For scholarship on raced housing law, see, e.g., Marisa Bono, *Don't You Be My Neighbor: Restrictive Housing Ordinances As the New Jim Crow*, 3 THE MODERN AM. 29 (2007); Paul Boudreaux, *An Individual Preference Approach to Suburban Racial Desegregation*, 27 FORDHAM URB. L.J. 533, 535 (1999); J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO.

in terms of several competing points of view. One view, which is generally espoused by the court and is the subject of criticism, is accused of reinforcing racial subordination in one way or another. Such a view may therefore be termed a “White” view, precisely because of the manner in which Whiteness is an ideology³¹⁶ of domination, as described above.

In terms of generating the rules associated with non-White normative communities, the conflicts judge would survey those sets of rules suggestive of Black or Hispanic or Asian interests, defined in logical opposition to the White interests. This part of the analysis need not be as treacherous as it might sound: once a particular rule has been determined as rooted in a White cultural norm, such as “cultural diversity” for example, the judge could seek out counter-rules that appeared to have Black, Hispanic, or Asian content. The determination of such content would turn on the peculiar manner in which the

L.J. 2265 (1997); Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217, 1218 (1977); John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: Gentrification and the K.O. of Impoverished Urban Dwellers of Color, 46 HOW. L.J. 433 (2003); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 3 (2001); Lisa Young, *Breaking the Color Line: Zoning and Opportunity in America’s Metropolitan Areas*, 8 J. GENDER RACE & JUST. 667 (2005).

For scholarship on raced tort law, see, e.g., JODY ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 84–89 (1997); FAULT LINES: TORT LAW AS CULTURAL PRACTICE (David Engel & Michael McCann eds., 2009); Taunya Lovell Banks, *Teaching Law with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443 (1992); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1437 (2005); Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006); Amy Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996); Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263, 264 (2010); Jennifer Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99 (2005).

For scholarship on raced property law, see, e.g., Sally Ackerman, *The White Supremacist Status Quo: How the American Legal System Perpetuates Racism As Seen Through the Lens of Property Law*, 21 HAMLIN J. PUB. L. & POLY 137 (1999); Alfred Brophy, *Integrating Spaces: New perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319 (2005); Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1289 (1996); Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991);

For scholarship on White constitutional law, see, e.g., Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Neil Gotanda, *A Critique of ‘Our Constitution is Color-Blind’*, 44 STAN. L. REV. 1 (1991).

³¹⁶ Barbara Fields highlighted the ideological nature of race. The underpinning here was ideological. “When virtually the whole of society . . . commits itself to belief in propositions that collapse into absurdity upon the slightest examination, the reason is not hallucination or delusion or even simple hypocrisy; rather it is ideology.” Fields, *supra* note 47, at 100. And what is “ideology”? Fields defined it as the working vernacular oppressors used in their day-to-day lives as a way of making sense of experience. The use of an ideology therefore smoothes over the rough spots, the moments of the day that might seem insane if it weren’t for a background sense of how the world works. Ideology is the “interpretation in thought of the social relations through which they constantly create and re-create their collective being, . . . [such as] family, clan, tribe, nation, class, party, business, enterprise, church . . .” *Id.* at 110. More recently, Miles and Brown have emphasized the ideological aspect of race: “We therefore retain tenaciously the conception of racism as an ideology because it represents human beings, and social relations, in a distorted manner while never denying that, qua ideology, racism can be simultaneously deeply embedded in the contemporary *Weltanschauung* and the focus of struggle on the part of those who challenge its hegemony.” MILES & BROWN, *supra* note 20, at 9.

counter-rule disposed of the White rule. Once again, the purpose here is not to choose between the various sets of rules that the exercise would uncover, but only to uncover them.

(iv) Step Four: Identify the Interests

The fourth step is what is commonly known as interest analysis, though of a quite different sort than what was on display in *Parents Involved*. In the actual opinion, Justice Roberts followed the conventional line of balancing the School Board's allotment plan against the weight of the Board's interest in its implementation. Roberts explained that only if the Board had very particular interests in mind, and only if those interests were articulated in a very particular way, could the plan survive.³¹⁷ Interest analysis in the conflicts style works differently. Here, our judge would attempt to trace the social interests underlying the conflicting rules in question, and at least at this stage, make no attempt to favor or impugn any them. The purpose instead is to just get the interests out there, and then determine how precisely these interests actually conflict.

In many cases, judges will find "false conflicts" in conflict of laws disputes, where it is determined that what had at first appeared to be a conflict turned out to be a misnomer. For example, one could imagine the *Carroll* case as representing a false conflict. On the one side was the decision of Alabama's legislature to put employers on the hook for tort damages through the adoption of an employer liability statute. This statute could therefore be imagined as representing Alabama's interest in giving Carroll a remedy, since both he and the Railroad company were Alabama residents. On the other hand, Mississippi had no statute of this kind, and relied instead on an old common law rule. For some, this might be understood as Mississippi simply not having an interest in regulating a conflict between two Alabamans, where the negligence happened in Alabama, and the Alabama legislature has explicitly regulated the issue where Mississippi had not. Thus, this was not really a "conflict" at all, and Alabama's law should have prevailed.

Thus, instead of framing one or two interests as "compelling" in light of the judge's own moral compass, the conflicts judge makes no assumptions about the moral value of the interests and first looks to relate them before evaluating them. There is not adequate space here to outline the sorts of varying interests we might impute to particular cultures in the contexts of local government, housing, tort, property, and constitutional law disputes. What is clear enough, however, is that in certain cases cultural interests would likely align in surprising ways, while in others the interests would clash. This differentiation would serve as one gauge for the judge's orientation towards the case: the choice to characterize a dispute in a given way, and the attendant likelihood of attaching particular conflicts or confluences of interests to those characterizations, would provide a powerful signal with regard to how the judge might be prepared to decide.

(v) Step Five: Decide

The fifth step involves the judge's decision. This could be framed as a conclusion that logically follows from the preceding arguments, but the better decision will refrain from doing so, instead highlighting the various avenues that the question may have taken. At the moment of decision, the conflicts style offers a final escape hatch known as the public policy exception.³¹⁸ Here, the judge may find it necessary to make a claim about the cultural norms of a particular party as somehow beyond the pale. The judge's own morality enters the decision, but it enters in a brutally explicit way. Thus, even if

³¹⁷ *Parents Involved*, 551 U.S. 701, 702 (2007).

³¹⁸ *Loucks v. Standard Oil*, 224 N.Y. 99 (N.Y. 1918).

the prior arguments had been constructed to lead to one solution, the conflicts style might reverse at the very end in the name of an overriding morality.

Bearing witness to this degree of flexibility, some might doubt whether this is really a better way of dealing with such dramatic problems with race and culture. Consider how Knop, Michaels, and Riles ultimately defend their position. In their view, the conflicts style of decision has several advantages over conventional public law litigation, chief among them that a concrete dispute can be resolved without getting blocked by meta-ethical questions at the outset.³¹⁹ Beyond this is another set of strengths largely understood as advances beyond the multiculturalism framework. That is, where the Supreme Court's racial project of cultural diversity is loosely predicated on cross-cultural dialogue, tolerance of others, and compromises between competing norms, a racial project articulated in the conflicts style is predicated on none of these.³²⁰

Another way to see this difference lies in a comparison between the manner in which "interest analysis" is conducted in *Parents Involved*, and the way in which it would have been done in the conflicts style. Following *Bakke* and *Grutter*, Justice Roberts pulled a White interest out of the sky—cultural diversity—and held that particular norms could only be applied if they were in the service of that one, single, paramount interest. In other words, the dispute was decided solely in terms of that single interest in the desirability of achieving tolerance and compromise in a world of intractable difference. In the conflicts situation, the Court doesn't apply a pre-existing interest in tolerance or diversity to a cultural dispute. As Knop, Michaels, and Riles put it, the conflicts style does not see itself as being authorized to define a middle ground.³²¹ Instead, the Court seeks out the interests immanent in the cultures themselves, and then decides in favor of one set of norms over another without compromising anything. Perhaps we will see the judge as having decided in favor of the wrong norms, but at the least the conflicts judge cannot be accused of hiding the ball.

In this case, it is hard to imagine how the decision might go given the many alternate routes the judge may have taken along the way. After having identified the cultural conflict at the root of the dispute between the parents of a White high school student and the Seattle School Board, the judge would have chosen one of many different characterizations of the claim. Characterization is a huge multi-pronged fork in the road in which the claim might look quite differently depending on whether it is analyzed as a housing, education, or tort law dispute. Then, upon each of these five or more splits in the road we could see the judge taking each of those routes and splitting them again into two or more paths. Thus, there could be fifteen or twenty different ways of reaching the next step of the analysis: identifying the actual interests of the relevant cultures in having their "own" rules applied to the particular dispute between the parents and the Board. After asking whether these interests line up or collide, the judge might finally insert herself into the foreground of the analysis, and suggest that something about the public policy of the state of Washington, or the nation, dismisses one group of norms from consideration.

³¹⁹ Knop, Michaels, & Riles, *supra* note 41.

³²⁰ *Id.*

³²¹ *Id.* at 76.

VI. CONCLUSION

Thinking about race in the style of Conflict of Laws is a helpful way of reiterating the dual-purpose of this Article, which is to (1) emphasize the *legal* character of racial identity, and (2) launch an emancipatory manipulation of civil rights law that only becomes available after we have confronted the full meaning of race as a legal concept. To sum up, I will restate both the nature of this sort of emancipation, as well as its connection to the legal conception of race.

The first thing, when contemplating the prerequisites of an effective anti-racist strategy situated in a neoliberal/neoracist situation, is a recognition that race is itself a dirty word. It was invented as a way of rationalizing a Racial Contract that set the terms of domination and exploitation between various populations. In particular, it was invented in the language of objectivity and naturalness—an arena of science in which the creation of human races could justify the exploitation of human beings. In order for racism to happen, humans had to be raced.

Second, jurists in the United States then created race as a legal concept in light of race as a biological concept. This understanding of race was pivotal not only in the elaboration of slave law and segregation, but in the post-*Brown* era of civil rights law as well. Though the biological foundations of race are now understood to be illusory, it nevertheless continues as a background rule for contemporary anti-discrimination law, including recent cases like *Parents Involved*.

Third, *Parents Involved* indicates a neoliberal trajectory in civil rights law that is both bizarre and disturbing. A neoliberal conception of race is weird because it at once borrows the whitewashed biology of modern liberalism (it accepts as a background rule that race is biological, but forbids any assumptions about human value to be drawn out of biology), but also rejects the modern affiliation with foreground rules (i.e. anti-discrimination law). The neoliberal conception is disturbing because it fails to inhabit the neoracist world—our actual world—and instead aspires to a colorblind world, a fantasyland in which human beings are naturally raced and in which the role of law should be to leave races, like markets, free to regulate themselves.

If an anti-racist jurist is to effectively grapple with a post-racial, neoliberal concept of race, she will have to be crafty. She will have to fight racism without a biological concept of race, which means thinking about how to characterize claims that are cognizable even when the plaintiff's identity is understood as socially constructed and not naturally immutable. She will have to fight racism without collapsing race into culture in such a way that her efforts avoid being sucked into a whirlpool of competing cultural pluralisms that are totally blind to the Racial Contract. She will have to fight racism without making the mistake of thinking that while the social reality of race and culture is real enough, that these realities will give her a handle on being able to prove before a judge what a given culture actually is and what it actually desires. In sum, she has to cancel the terms of the Racial Contract through the use of a concept of race that isn't actually there (i.e., biology), or through a concept of race that really is there (sociology), but is admittedly so fragmented and shifting (cultural anthropology) that the only way to talk about it is in constructive (legal) terms.

So just what is emancipatory about any of this? The basic claim of the Article, and the claim of so much critical legal theory over the past several decades, is that law is constitutive of society, even while society simultaneously constitutes law. What that means here is that racial identity is composed of legal rules, *and* that those rules have deeply political stakes. The upshot is that the legal structure that generates the idea of race is not a matter of biology—it is a matter of law—and that the legal structure is not neutral or natural—it is a matter of contingency and history. Thus, when we confront the full meaning of race as a legal concept, we encounter a critical relation between the legal and the political.

The encounter can and should be deeply empowering. Race is not a naturally occurring force in the world over which we have no control, but is instead a constellation of legal rules over which we have total control. Further, these rules are the crystallization of particular political desires that wax and wane over time. Consequently, when we think about race as a legal concept—a legal concept that retains and rejects certain elements as various political agents emerge and recede—race emerges as a *de-reified legal argument*. If race can be de-reified and seen as a kind of argument, instead of seen as a thing, one has attained a tremendous amount of power over the concept of race. This seems like a good thing, so long as it is either we that have received the power, or those with which we agree.