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Flexibly Fluid & Immutably Innate: Perception, Identity, and the Role of Choice in Race

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FLEXIBLY FLUID & IMMUTABLY INNATE: PERCEPTION, IDENTITY, AND THE ROLE OF CHOICE IN RACE

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INTRODUCTION

October 27, 2018, was an unfathomable day. Within the tranquility of the Squirrel Hill neighborhood in Pittsburgh, Pennsylvania, one of the deadliest attacks on the Jewish community in the United States had taken place. For nothing more than their faith, a remorseless white supremacist stripped eleven members of the Tree of Life Synagogue of their lives.[1] After twenty-two years in the FBI, special agent Robert Jones called this the "most horrific crime scene" that he had ever witnessed.[2] Though unfathomable, this

* JD, Vanderbilt Law School, Order of the Coif, 2019; Biology BS, Denison University, summa cum laude, 2016. I would like to thank Professor Beverly Moran for her exceptional teaching and guidance. The views expressed herein are solely my own. A special thank you to my partner, Lauren Krzystowczyk, for her support and encouragement.

1. Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html [https://perma.cc/VLL2-B5W6].

2. *Id.*

event was the culmination of a steady increase in violence against Jews. In 2017, FBI data revealed that there was a "37 percent spike in anti-Semitic attacks."[3] Indeed, just six months later, another shooting took place at Chabad of Poway Synagogue near San Diego.[4] The shooter was a nineteen-year-old male declaring that Jews sought to "doom" the white race and that the Pittsburgh synagogue shooting inspired him.[5] As the shock settles, the nation's consciousness has been awakened and left wondering why there has been such a sudden burst of inexplicable hatred towards this particular group of people.

One possibility is that history is circular and humans have a tendency not to learn from their past once it seems too far removed. The Jewish people have suffered continuous oppression despite comprising an incredibly small proportion—approximately 0.2 percent—of the world's population.[6] The Holocaust during World War II stands as the most horrific example as it resulted in the death of an estimated six million Jews.[7] Despite the atrocities of the Holocaust being well-documented, recent studies have revealed that one-third of Americans do not believe that six million Jews died.[8] Moreover, among millennials, twenty-two percent had never heard of (or were unsure if they had heard of) the Holocaust, and two-thirds did not

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3. Gina Cherelus, *U.S. Anti-Semitic Hate Crimes Spiked 37 Percent in 2017: FBI*, REUTERS (Nov. 13, 2018), https://www.reuters.com/article/us-usa-hate-crimes-report/u-s-anti-semitic-hate-crimes-spiked-37-percent-in-2017-fbi-idUSKCN1NI2H6 [https://perma.cc/N6JQ-3N5L] (noting an increase from 684 to 938 anti-Semitic incidents in 2017); *see also* Laurie Goodstein, *'There is Still So Much Evil': Growing Anti-Semitism Stuns American Jews*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/anti-semitism-attacks.html [https://perma.cc/M28J-TEH4] (noting a fifty-seven percent increase in anti-Semitic incidents in the United States).

4. Ray Sanchez & Artemis Moshtaghian, *Mayor Says Synagogue Shooting in California that Left 1 dead and 3 Wounded was a 'Hate Crime'*, CNN (Apr. 28, 2019, 12:43 AM), https://www.cnn.com/2019/04/27/us/san-diego-synagogue/index.html [https://perma.cc/NQ49-3A4B].

5. *Poway Synagogue Shooting Captured on Video, Prosecutors say, as They Describe Attack*, L.A. TIMES (May 2, 2019, 9:45 AM), https://www.latimes.com/local/lanow/la-me-san-diego-synagogue-shooter-camera-explainer-john-earnest-20190502-story.html [https://perma.cc/3VDC-Z5SF].

6. As of 2018, there are just 13.9 million Jews within the world's population of 7.8 billion people. *Current World Population*, WORLDOMETERS, http://www.worldometers.info/world-population [https://perma.cc/Z5UV-UVAV] (last accessed Jan. 15, 2020).

7. Raffi Berg, *The Holocaust: Who are the Missing Million?*, BBC NEWS (Apr. 24, 2017), https://www.bbc.com/news/world-middle-east-39062221 [https://perma.cc/3SKM-82SC].

8. David Brennan, *One-Third of Americans Don't Believe 6 Million Jews Were Murdered During the Holocaust*, NEWSWEEK (Apr. 12, 2018, 10:39 AM), https://www.newsweek.com/one-third-americans-don't-believe-6-million-jews-were-murdered-during-holocaust-883513?fbclid=IwAR3wCSBJDB8BGFIhDHAO3GGcMF4puFg49roJqSWutgmPTjYEXV4G0CXTd-4 [https://perma.cc/SBWC-MJX9].

know what Auschwitz was.[9] In the context of this ignorance, misplaced hatred brews quickly.

Targeted hatred is also bolstered by the manner in which humans categorize on the basis of race. Jews are a vastly diverse group of people that in many ways escape categorization altogether. Being "Jewish" does not mean the same thing for each individual identifying as such. Jews are not unified by religion alone. They are also unified by elements of ethnicity, culture, ancestry, nationality, race, and a shared history of prejudice. In the United States, sixty-two percent of Jews say that being Jewish is primarily about ancestry and culture, while only fifteen percent say that it is about religion.[10] In addition to the varying ways in which Jews identify themselves, there is also much confusion underlying how others perceives Jews. In *Concerning the Jews*, Mark Twain pondered how "[a]ll things are mortal but the Jew; all other forces pass, but he remains. What is the secret of his immortality?"[11] Russian author, Leo Tolstoy, also marveled at the Jewish identity, asking, "What is the Jew? . . . What kind of unique creature is this whom all the rulers of all the nations of the world have disgraced and crushed and expelled and destroyed . . . and who, despite their anger and their fury, continues to live and to flourish."[12] Given the vast array of internal and external perspectives, the Jewish identity is one continually fraught within a whirlwind of intrigue and clashing perceptions.

Today, being Jewish is usually viewed as a religion or ethnicity. But it was not always this way. Until the late 1990s in the Soviet Union, being "Jewish" (pronounced *Yevrei* in Russian) was regarded as one's nationality on internal passports—the equivalent of personal identification papers like a driver's license.[13] It did not matter whether one actually practiced Judaism, belonged to a synagogue,

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9. Julie Zauzmer, *Two-Thirds of Millennials Don't Know What Auschwitz Is, Holocaust Study Says*, WASH. POST (Apr. 12, 2018), https://www.washingtonexaminer.com/opinion/kids-don't-know-about-the-holocaust-because-schools-are-pre-occupied-with-social-justice [https://perma.cc/H42A-JYJV] (Aushwitz was the largest concentration camp in Nazi Germany where over one million Jews lost their lives).

10. *A Portrait of Jewish Americans*, PEW RES. CTR. (Oct. 1, 2013), https://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey [https://perma.cc/UN4Q-ULWU].

11. Mark Twain, *Concerning The Jews*, *in* THE COMPLETE ESSAYS OF MARK TWAIN 249 (1899) (published in Harper's Magazine).

12. Leo Tolstoy, *What is the Jew?*, *in* THE FINAL RESOLUTION 189 (1908) (originally printed in Jewish World Periodical as retrieved from Misha Galperin, *Hating Leo Tolstoy,* E-JEWISH PHIL. (Dec. 6, 2015), https://ejewishphilanthropy.com/haying-leo-tolstoy [https://perma.cc/WQT5-GC4E]).

13. Moshe Decter, *The Status of the Jews in the Soviet Union*, FOREIGN AFFAIRS (Jan. 1, 1963), https://www.foreignaffairs.com/articles/russian-federation/1963-01-01/status-jews-soviet-union [https://perma.cc/NGR6-3AVP].

or spoke Hebrew.[14] Rather, it was just a means of creating the "other" or an "outsider" group and ensuring that there was no real means of escaping the mark.

While in Russia being Jewish was a nationality, in the United States it was long seen as a race.[15] Under the chief antidiscrimination federal law, Title VII of the Civil Rights Act of 1964, courts have found that Jews are protected on the basis of "race."[16] On one hand, this can be regarded as a beneficial approach since it extends protections against discrimination.[17] On the other, it may play into white supremacist views of Jews as members of an inferior race.[18] This particular distinction illuminates the double-edged sword of categorization and underscores the manner in which constructed groupings mobilize hatred from extremist movements.

Even in countries that are seemingly welcome to all, immigrants continue to be marked as "other" because of a variety of characteristics such as accent, gesture, and the color of their skin.[19] And being racially "white" is not just about phenotype, ancestry, or upward mobility in society. Whiteness is a delicate performance, and entry into this dance is never guaranteed. What defines one's race is always in flux, and who has the power to define it is subject to the hierarchy of race.[20] It is for this reason that the nature of race is paradoxical: it is simultaneously flexibly fluid and immutably innate.

This Article delves into the power of identity and perception as a means of unveiling the role of choice in race. The American citizenry is growing increasingly diverse, with a "white minority" projected by 2045.[21] At the same time, racism is viewed as a major problem by more than six in ten Americans.[22] While this Article does not purport to

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14. *Id.*

15. RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 487 (Juan F. Perea et al. eds., 3d ed. 2014) [hereinafter RACE AND RACES].

16. Michael Kunzelman, *Judge: Jewish Heritage Can be Basis for Race Discrimination*, ASSOCIATED PRESS (July 16, 2018), https://apnews.com/82c5075c54ce4f179e6517f0e4f07824 [https://perma.cc/Q8CD-2ZA4].

17. *Id.*

18. *See* Brian Levin, *Why White Supremacist Attacks Are on the Rise, Even in Surprising Places*, TIME (Mar. 21, 2019), http://time.com/5555396/white-supremacist-attacks-rise-new-zealand [https://perma.cc/76XM-LTJ2] (noting that the white nationalist movement "is being globalized at a very rapid pace" across many countries).

19. *See, e.g.*, MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1999).

20. *Id.*

21. William H. Frey, *The US will Become 'Minority White' in 2045, Census Projects*, BROOKINGS (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects [https://perma.cc/UH6G-HBDK].

22. Eugene Scott, *Most Americans Say Race Relations are a Major Problem, but Few Discuss it with Friends and Family*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/05/31/most-americans-say-race-relations-are-a-major

discover an antidote to racism, it strives to take a tangible step to better inform how race is understood by focusing on the disconnect that often arises because of the fluidity of race.[23] We are in the midst of a time where the protection of racial minorities is especially vital, and where individuals are grappling with conflicting notions of "race" due to the increased visibility of white supremacy, DNA ancestry tests, and focus upon self-identification. Consequently, Part I illuminates the deliberate construction of race and the racial hierarchy in America's pursuit of territorial expansion, systemic oppression, and political gain. Part II, then offers a historical perspective on how American law developed a dynamic yet vague understanding of race, and peers into the inconsistencies across judicial opinions wherein judges struggled to construe race vis-à-vis congressional intent.

Having established the foundation upon which race has been built in America, Part III addresses how the race that an individual identifies with is not always in alignment with the race that the external world perceives them as.[24] Although perception is not truly reality, when it comes to race, external perception can override one's self-identity.[25] This variance between identity and perception presents a direct challenge to how racial identities have been categorized, collected, and protected.[26] Accordingly, Part III suggests that courts embrace a more holistic and nuanced approach within claims of discrimination on the basis of color, and proposes that the U.S. Census Survey ask individuals *both* what race they personally identify with and what race they are perceived as.

I. THE CONSTRUCTION AND RECONSTRUCTION OF RACE

The practice of categorization has long been a perplexing one among scholars.[27] On one hand, categorization is an inherent instinct acquired from animals that use it as a means of identifying

-problem-but-few-discuss-it-with-friends-and-family/?utm_term=.1429bc4027eb [https://perma.cc/T7WU-DAM5].

23. This Article uses the concept of "racial fluidity" as a means to underscore the context-dependent nature of race rather than the rejection of race altogether. Although "race" is a human-made social construct, the harmful effects of a "color blind" society (see discussion of Brazil in Section I.B *infra*) push against advocating for the removal of race from our discourse altogether.

24. *See, e.g.*, Erin Cooley, Jazmin L. Brown-Iannuzzi, Darren Agboh, Brian Enjaian, et al., *The Fluid Perception of Racial Identity: The Role of Friendship Groups*, 9 SOC'Y. PSYCHOL. & PERSONALITY SCI. 32, 32 (2017).

25. *See infra* Part III.

26. *Id.*

27. *See, e.g.*, Rupert Brown et al., *Automatic Category Activation and Social Behaviour: The Moderating Role of Prejudiced Beliefs*, 21 SOC. COGNITION 167, 167–72 (2003); Patricia M. Gonzales, Hart Blanton & Kevin J. Williams, *The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 PERSONALITY & SOC. PSYCH. BULL. 659, 659–70 (2002).

and distinguishing between predators and non-predators.[28] On the other, categorization is a deeply problematic means of essentializing race. Racial essentialism assumes that race reflects an individual's "underlying essence," such as disposition, character, and physiology.[29] Yet, geneticists have made it perfectly clear that there is *no* scientific basis for race.[30] Thus, although it makes little sense to draw generalizations on the basis of race while ignoring nuance and diversity, society has continued to do so for centuries.[31]

While categorization is not a uniquely American problem, the manner in which it has evolved (or perhaps, more aptly, devolved) in the United States has enabled the reoccurrence of insidious eruptions within race relations. Arguably, "[t]here is not a country in world history in which racism has been more important, for so long a time, as the United States."[32] While the black-white "color line" remains pervasive, the construction of the racial hierarchy has proven to be yet another thorn thrust deeply into America's race relations.[33] Part I thus explores the process of how the black-white binary and the racial hierarchy were deliberately constructed in America to serve concrete purposes—from using slavery to fulfill labor demands to applying colonial rhetoric to justify territorial expansion.

A. Race & Rhetoric: Justifications for Slavery and American Imperialism

The institution of slavery slowly chipped away at the American conscience by systematically constructing racism as an antidote to the depravity and immorality of the institution. In cultivating "that

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28. *See* Douglas P. Chivers, Mark I. McCormick, Matthew D. Mitchell, Ryan A. Ramasamy & Maud C. O. Ferrari, *Background Level or Risk Determines How Prey Categorize Predators and Non-Predators*, 281 PROC.: BIOLOGICAL SCI. 1, 1–5 (2014).

29. *See* Melody Manchi Chao, Ying-yi Hong & Chi-yue Chiu, *Essentializing Race: Its Implications on Racial Categorization*, 104 J. PERSONALITY & SOCIAL PSYCH. 619, 619, 621 (2013) ("By construing race as a meaningful entity with inferential potential, racial essentialism heightens the relevance of race in making social judgment.").

30. Elizabeth Kolbert, *There's No Scientific Basis for Race—It's a Made-Up Label*, NAT'L GEOGRAPHIC (Apr. 2018), https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa [https://perma.cc/Z478-VQWC].

31. Nicholas Hudson, *From "Nation to "Race": The Origin of Racial Classification in Eighteenth-Century Thought*, 29 EIGHTEENTH CENTURY STUDS. 247, 247–48 (1996) ("Historians of science and anthropology have often noted that the idea of race began to emerge at some point in the eighteenth century, particularly in the work of Linnaeus and of authors who advocated polygenist theories of human origin.").

32. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 1492–PRESENT 23 (1980).

33. The manifestation of the "racial hierarchy" is discussed in Part I, whereas its implications are explored in Part II.

special racial feeling—whether hatred, or contempt, or pity, or patronization," slavery relayed a sense of black inferiority and the "derogatory thought we call racism."[34] Even as other countries abolished slavery, the United States sought to retain it.[35] From the outset, white settlers found themselves in desperate need of labor.[36] To fill their labor needs, the settlers realized that importing African slaves would be easier than enslaving Indians or other whites.[37] The exploitable vulnerability of Africans was rooted in their relative lack of military power to thwart the guns and ships that came for them.[38] Moreover, unlike immigrants that made an active choice to move, Africans were "torn from their land and culture" and forced into a country where their voices were entirely silenced.[39] Of note, however, was that despite their differences, enslaved blacks and poor free white workers viewed one another as equals and formed strong bonds at the onset of their labor relations.[40] Unsurprisingly, the southern states immediately put an end to this fraternization by enacting laws that provided whites with financial advantages.[41] In this sense, there was nothing "natural" about racism; it did not emerge organically. Rather, racism required active efforts to construct whiteness as superior through the creation of an economic gap that made racial division more tangible.[42]

In its original form, the United States Constitution was suffused with race and demonstrated the centrality of black slavery in developing American jurisprudence.[43] Indeed, the Constitution blatantly accommodated and protected slavery, counting slaves as "three fifths of all other Persons"[44] for the purposes of representation in Congress. In so doing, the clause allowed southern slaveholding states (which had a smaller white population than the northern free states) to exert a disproportionate influence upon the U.S. government leading up to the Civil War.[45] Intriguingly, despite the Constitution's overt

34. ZINN, *supra* note 32, at 23.

35. While Britain abolished slavery in 1834 and France abolished it in 1848, the Thirteenth Amendment of the U.S. Constitution banning slavery did not come until 1865. *See* KEVIN BALES, NEW SLAVERY: A REFERENCE HANDBOOK 55–68 (2d ed. 2004).

36. ZINN, *supra* note 32, at 24.

37. *Id.* at 23–25.

38. *Id.* at 26.

39. *Id.* at 26.

40. *Id.* at 31.

41. *Id.* at 56–57.

42. ZINN, *supra* note 32, at 38.

43. RACE AND RACES, *supra* note 15, at 104.

44. U.S. CONST. art. I, § 2.

45. Malik Simba, *The Three-Fifths Clause of the United States Constitution (1787)*, BLACKPAST (Oct. 3, 2014), https://www.blackpast.org/african-american-history/events

safeguards for slavery, the drafters did not use the word "slave."[46] In a heated debate in the House of Representatives, one Congressman proclaimed that "it would be better not to stain the Constitutional code with such a term, since . . . the same sense was conveyed by the circuitous expression of 'three fifths of all other persons.'"[47] On one hand, this suggests that even early on in history, men regarded slavery as an ugly "stain." On the other, it exposes the cruelly coded and "circuitous" language that was baked into the Constitution. Thus, despite attempts at subtlety, the Constitution's framework was inherently imbued with racist undertones.

America's gravitation towards stratifying race through slavery served as an ideal primer for its imperialist ambitions to establish an "American Empire" during the late 1800s and early 1900s. Marked by Europe's "Scramble for Africa" beginning in the 1870s, the third wave of colonialism (New Imperialism) influenced America's approach to territorial expansion as well as its overarching desire to become a global power.[48] During this imperial period, the federal government developed a distinct, yet familiar, relationship between the American body politic and the inhabitants of the new overseas possessions.[49] In effect, America came to incorporate its relegation of the African race "to a status of second-class citizenship" within its new territories.[50] In 1898, the United States signed the Treaty of Paris with Spain to establish Puerto Rico as one of its acquisitions.[51] Article IX of the Treaty declared that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[52] In so doing, the Treaty made "no promise of citizenship . . . nor any promise, actual or implied, of statehood."[53] A year later, Congress enacted the Foraker Act of 1900 to mark Puerto Rico as a separate nationality from the United States.[54] The Act established Puerto Rico's governance and regulation, and did not provide a Puerto Rican seat (or vote) in the U.S. House of Representatives.[55]

-african-american-history/three-fifths-clause-united-states-constitution-1787 [https://perma.cc/5CJF-CX2B].

46. RACE AND RACES, *supra* note 15, at 107.

47. *Id.*

48. Getachew Mengistie & Michael Blakeney, *Geographical Indications and the Scramble for Africa*, 25 AFR. J. INT'L & COMP. L. 199, 199 (2017).

49. RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM 15 (1972).

50. *Id.*

51. Treaty of Peace with Spain (Treaty of Paris), U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754.

52. *Id.* art. 9.

53. JOSE A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 20 (1979).

54. Foraker Act of 1900, c. 191, 31 Stat. 77 (1900).

55. *Id.*

The Supreme Court upheld the constitutionality of the Act in *Downes v. Bidwell*, underscoring that "[a] false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire."[56] Justice Harlan vigorously dissented, arguing that the law must be uniform across all territories and that Congress fundamentally lacked the power to ignore constitutional provisions "under special or embarrassing circumstances."[57] Despite Justice Harlan's reasonable and textual interpretation of the Constitution, the Court's majority was well aware that the federal government had a different preoccupation—an ideology of imperialist expansion that ought not be deterred or infringed upon at any cost.[58]

America's imperialist approach hinged upon an implicit understanding that Puerto Ricans were inferior because of their ethnic and racial diversity.[59] The government justified its "outright intervention in the internal affairs" through a so-called "vision of order" that fixated upon "stability as the cornerstone of progress."[60] This rhetoric focusing upon the inhabitants' disarray served as a means of couching racism within political speech.[61] Even when the Jones Act of 1917 naturalized Puerto Ricans as U.S. citizen, Congress vehemently challenged the extent of the rights provided and ultimately cabined its reach.[62] Senator Foraker emphasized that the Act was merely intended to recognize that Puerto Rico belonged to the United States rather than any individual rights for its inhabitants.[63] Meanwhile, members of Congress vocalized their concern that Puerto Ricans were ill-suited for citizenship because of their "mixed racial character and the tropical climate of their birth."[64] Despite these rather odd concerns, the Supreme Court agreed. In *Balzac v. People of Porto Rico*, the Court determined that the Constitution's guarantee of the right to a jury trial under the Sixth Amendment did not extend to Puerto Ricans.[65] The Court found that it was Congress' intent to leave the Puerto Rican people with the power to decide whether they wished to adopt "this institution of Anglo-Saxon

56. 182 U.S. 244, 286 (1901).

57. *Id.* at 384–85 (Harlan, J., dissenting).

58. *Id.* at 286–87.

59. RACE AND RACES, *supra* note 15, at 358.

60. Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 288 (1996).

61. *Id.*

62. *Puerto Rico*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Foreign-Domestic/Puerto-Rico [https://perma.cc/7KN7-36CR] (last visited Mar. 22, 2020).

63. RACE AND RACES, *supra* note 15, at 357.

64. *Id.* at 358.

65. 258 U.S. 298, 309 (1922).

origin, and when."[66] While it may seem that the Court was merely being "sedulous to avoid forcing a jury system" upon Puerto Ricans, the reality was that the Court viewed them as part of an inferior civilization, "living in compact and ancient communities."[67] Together, the legislature and judiciary made unmistakably clear the sharp divide between the white Anglo-Saxons and the racially mixed Puerto Ricans.

Even as late as 1950, little changed in America's relationship with Puerto Rico. Although Puerto Rico was eventually declared a "Commonwealth" of the United States, this was nothing more than yet another "euphemism for the term 'colony.'"[68] Indeed, Puerto Rico was subjected to an ongoing shift in legal status that left its "political spectrum in a state of turmoil."[69] The tactic of fluctuation and inconsistency inflicted upon America's "colonials" was in direct (and deliberate) contrast to its grandiose vision of order and balance for itself.[70] By continually leaving Puerto Ricans in disarray, America cultivated its power as the colonizing master and reinforced control over the territory.[71] Thus, while slavery was abolished in 1865, America's desire to assert its dominance over a race it deemed inferior persisted long after.

In the same year as the Treaty of Paris, the United States also signed the Newlands Resolution to acquire Hawaii as one of its territories.[72] Although the timing was similar, the ultimate fates of these two "colonial" realms differed substantially because of the impact of the insidious nature of racism.[73] Undeniably, the manner in which Hawaii became a territory was fraught with the erosion of the indigenous monarchy as well as the suppression of Hawaiian natives and the cheapening of their culture.[74] However, America's longer history with and physical presence in Hawaii enabled it to assimilate more fully than it did in Puerto Rico. For example, during the

66. *Id.* at 310.
67. *Id.* at 310–11.
68. RACE AND RACES, *supra* note 15, at 361.
69. EDIBERTO ROMAN, THE OTHER AMERICAN COLONIES 144 (2006).
70. Ramos, *supra* note 60, at 288.
71. *Id.* at 290–91.
72. Newlands Resolution, 30 Stat. 750 (1898) (codified as 40 U.S.C. § 661 (1940)).
73. One might wonder why two similarly situated lands would have disparate outcomes under the same imperial power, but this is not the first such example. During the rise of Nazi Germany, countries like France that protected and offered citizenship to Jews in Europe readily allowed their persecution and internment in the context of its colonies in North Africa. MEHNAZ M. AFRIDI, THE ROLE OF MUSLIMS AND THE HOLOCAUST 5 (2014), http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935420.001.0001/oxfordhb-9780199935420-e-005?print=pdf.
74. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 3 (rev. ed. 1993).

1880s, American sugar and pineapple companies in Hawaii sought to limit voting rights to wealthy individuals of select ethnicities, and ultimately staged a coup (with the help of the U.S. government) to overthrow Hawaiian royalty altogether.[75] Following this pivotal inflection point, America began to actively exert its "whitening" influence upon Hawaii—politically, linguistically, and culturally.[76]

Yet, even with America's assimilation into a prospering Hawaii, members of Congress resisted the admission of Hawaii as a State because of its racially and ethnically diverse population.[77] It was not until the composition of Congress changed drastically to a majority of northern, liberal Democrats that Hawaii gained statehood.[78] Today, sixty years after Hawaii became a State, a similarly radical shift would have to take place in Congress in order for Puerto Rico to gain statehood.[79] When looked at through the lens of America's ambitions, the outcomes within and outside of its territories become more straightforward. In order to effectuate its goals of increased domestic power and territorial expansion, America constructed racism as a tool to justify and obfuscate its inferior treatment of races it deemed as "the other."

B. Dominance Through Division: The Racial Hierarchy's Ultimate Illusion

While the creation of the black-white binary may have been sufficient to maintain America's labor needs and justify colonialist pursuits, it could not adequately account for the entire spectrum of races that America regularly interfaced with. As a result, the construction of a "racial hierarchy" emerged as a useful tool for accommodating numerous racial identities. The key premise within the hierarchy is that some races are superior to others and are therefore entitled to more rights and privileges. However, despite being more encompassing than a binary, the hierarchy still maintains an overly simplistic notion of race that propagates ignorance and racism. By arbitrarily ordering humans into differing races and deeming some inferior or superior relative to others, the hierarchy goes beyond the

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75. Jesse Greenspan, *Hawai'i Monarchy Overthrown with U.S. Support, 120 Years Ago*, HISTORY (Jan. 17, 2013), https://www.history.com/news/hawaiis-monarchy-overthrown-with-u-s-support-120-years-ago [https://perma.cc/46XK-6Y9H].

76. TRASK, *supra* note 74, at 18.

77. WESTON, *supra* note 49, at 65.

78. David Stebenne, *The Political Dealmaking That Finally Brought Hawaii Statehood*, SMITHSONIAN MAG. (June 15, 2017), https://www.smithsonianmag.com/history/what-puerto-rico-learn-hawaii-180963690 [https://perma.cc/SMK8-467F].

79. As discussed in Section I.B, *infra*, the effects of the racial hierarchy would likely exert a disproportionately negative effect upon Puerto Ricans as opposed to Hawaiians because of elements like skin color and cultural assimilation.

noxiousness of categorization by flattening the contents of the boxed racial identities into competing (and continually shifting) one-dimensional tiers.

The racial hierarchy creates the toxic illusion that elevation to a higher tier is possible. But, this process of elevation is artificial as it occurs by virtue of lowering other races. The horrendous irony is that in this contentious battle to get ahead within the hierarchy, the fundamental problem—the hierarchy itself—becomes obscured. The jarring and racially charged response to the *People v. Hall* decision exemplified precisely this obfuscation.[80] After the California Supreme Court held that no one could use Chinese testimony in a criminal trial against a white defendant, Lai Chun-Chuen, a Chinese merchant, proclaimed that the Chinese should not be subject to the same treatment as Indians who "know nothing about the relations of society[,] . . . know no mutual respect [and] . . . live in wild places and in caves."[81] Lai's tactic of differentiation may have been an outburst of unfiltered rage, but it illustrates the tensions among racial groups in the late 1800s. And although Lai is but one voice, he embodies the devastating and potentially fatal impact of racism upon efforts to unify and propel civil rights.

Although viewing strategies in retrospect has its limits, critiquing strategies of the past provides insight into how to improve those of the future. If the hegemonic race imposes a category upon a particular race, one way of reclaiming power is to disrupt that very categorization. Dominance thrives when division is rampant—division enables the dominant group to appear invincibly strong and united. Nevertheless, if power is gained by division, then it can be lost by union amongst the fractured. As historian and activist Vine Deloria, Jr. puts it, "preoccupation with race obscure[s] the real issues."[82] For example, "[b]y defining the problem as one of race and making race refer solely to black, Indians were systematically excluded from consideration."[83] Likewise, in limiting civil rights issues to a black-white dichotomy, Native Americans, Asians, and other "non-white" immigrants were left without a point of entry into the battle to dismantle the hierarchy.[84] In this sense, limiting those that are included within the oppressed race traps those excluded in a liminal space along the spectrum of race, oscillating between white, non-white, black, semi-black, or "a subcategory of black."[85] Moreover, this exclusionary

80. *See* 4 Cal. 399, 399 (1854).

81. CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN THE NINETEENTH-CENTURY AMERICA 22 (1994).

82. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 168 (1988).

83. *Id.*

84. *Id.*

85. *Id.* at 170.

approach makes it difficult to isolate the relevant issues of each group, as well as the crucial differences across groups.[86] Ultimately, a narrow conception of what races "count" in the fight for civil rights results in a disorienting cacophony of identity politics that obscures the issues common to racially oppressed minorities.

In the midst of the rush to reposition a race and claim greater entitlement to rights and privileges than others, the precise aims of the hierarchy are attained: stratification, creation of categories, and hostility bred across groups.[87] After *Hall*, racial groups could have been unified by their struggles—arbitrary categorization, systemic discrimination, and fundamentally unequal treatment in the United States. Nevertheless, instead of recognizing the shared interests and collaborating, the fracture among the races grew both deeper and wider.

Critically, the solution to the overarching dilemma is *not* to create a homogenous, all-encompassing whole that erases distinct racial identities. Indeed, by envisioning a utopian model wherein race is not a meaningful difference, communities become diluted and their voice is disenfranchised.[88] As evidenced by the race relations in Brazil, a color-blind culture where a cloud of silence envelopes racism does not lead to harmony. Brazil's "racial democracy" is built upon the notion of a racially fluid society.[89] The country boasts a spectrum of races and skin tones with forty-seven percent of the population being mixed race and one third of marriages occurring across racial boundaries.[90] Yet, the top one percent of Brazil's economy is eighty percent white, whereas the bottom ten percent is seventy-five percent mixed-race or black.[91] Despite the stark divide and inequity, racism remains obscured by the racial democracy.

By pretending that there is no disparity and that categories are meaningless, the racial democracy silences stifles public discourse and debate and enables "a hierarchy based on skin color . . . to

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86. *Id.* at 170–71.

87. Kazuo Seiyama & Jackie Miyasaka, *The Modern Stratification System and its Transformation*, 30 INT. J. SOCIOLOGY, 7, 14–16 (2000).

88. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 18 (1991) ("[T]he technique of nonrecognition ultimately supports the supremacy of white interests.").

89. Rebecca Reichmann, *Introduction* to RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY 1, 1–7 (Rebecca Reichmann ed., 1999) (underscoring that Brazil's racial democracy is a myth that denies the existence of racism).

90. Maria Carolina Tomas, *Interracial Marriage in Brazil: A Discussion About Local Marriage Market, Parents' Characteristics, and Household Chores* (Fall 2012) (unpublished Ph.D. dissertation, University of California, Berkley).

91. Cleuci de Oliveira, *Is Neymar Black? Brazil and the Painful Relativity of Race*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/opinion/is-neymar-black-brazil-and-the-painful-relativity-of-race.html [https://perma.cc/PE29-KYFT].

congeal."[92] In other words, ignoring the existence of race results in the dissemination of implicit racism on the basis of external factors like skin color. Thus, instead of "color-blindness" towards race, the path away from the hierarchy's toxicity requires the recognition of heterogeneity and the nuance within and between individuals.

C. Ensnared Elevation: The Plight of Races Deemed Superior

The ill-conceived racial hierarchy and its subtle yet sinister effects continue to control all those captured within in. Since the construction of "whiteness" throughout the nineteenth and twentieth centuries, the hierarchical structure has served as an enabling patina to enable those classified as white to rise to the top.[93] The creation of this tiered stratification has certainly had immense consequences upon those deemed Black, mixed, Indian, Asian, or simply "the other."[94] In analyzing the economic mobility of twenty million Indian, Asian, White, Black, and Hispanic American children that are now in their thirties, research from the U.S. Census Bureau and a Harvard-based policy group reveals that across all income levels, race restricts economic opportunity and exerts a far greater influence than any other factor.[95] The near uniformity of economic outcomes by race is staggering, with only the Asian and Caucasian races demonstrating growth and mobility.[96] This economic inequity is unsurprising as American society has been constructed to create imbalance and disparity that benefit the "superior" races while marginalizing the rest.[97] Yet, despite the privileges that come with "whiteness," hierarchical thinking has also had a perversely toxic (and deluding) effect upon both white individuals and the Asian "model minority."[98]

With projections that the United States will become "minority white" by 2045, the fragility and volatility of whiteness has taken

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92. *Id.*
93. *Id.*
94. *See supra* Sections I.A and B.
95. Aria Bendix, *Striking Maps Show How Race Keeps Kids from Climbing the Economic Ladder Across the US*, BUS. INSIDER (Oct. 2, 2018), https://www.businessinsider.com/maps-show-how-black-hispanic-and-american-indian-children-stay-poor-2018-10#-2 [https://perma.cc/P3KW-T4YK].
96. *Id.*
97. *Id.*
98. Bernadette Lim, *"Model Minority" Seems Like a Compliment, But It Does Great Harm*, N.Y. TIMES (Oct. 16, 2015), https://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/model-minority-seems-like-a-compliment-but-it-does-great-harm [https://perma.cc/SGX9-DHN8].

center stage.[99] In the U.S., the two greatest risk factors for suicide are being white and male.[100] In spite of the institutions built to afford white men immense privilege, their placement at the top of the racial hierarchy subjects them to impossible standards and the pressure of preserving masculinity and whiteness.[101] And so, as it has become increasingly difficult to claim the superiority of whiteness, retaliatory and reactionary fear have arisen. The reincarnation of the alt-right, white-supremacist movement and the drastic spikes in racially motivated crimes are no coincidence.[102] And as diversity continues to grow, the perceived "threat" to whiteness may only bolster violence and oppression.

The United States has also made concerted efforts to differentiate across minority races. Asian Americans have been deemed the "model minority," but the term has been subject to appropriation by both sides of the political spectrum.[103] On one hand, Asians are portrayed as a hard-working group that does not rely on welfare or handouts like *other* immigrants and minorities.[104] On the other, Asians are viewed as a group that is willing to embrace a welfare system that benefits other minorities more than them.[105] With the latter view, Asians are part of the "multicultural river washing white hegemony away."[106] Regardless of which characterization is wielded, the reality remains that the "Asian-American" group is in itself an American construction. Asian Americans are *not* a homogeneous group. There is a rich diversity of ethnic subgroups that vary drastically in terms of economic and educational attainment.[107] For instance, a vast array of Asian Americans stands to benefit from affirmative action.[108] While eighty-five percent of Mongolian and

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99. Frey, *supra* note 21.

100. Philip Perry, *This May be responsible for the high suicide rate among white, American men*, BIGTHINK (July 2, 2017), https://bigthink.com/philip-perry/this-may-be-responsible-for-the-high-suicide-rate-among-white-american-men [https://perma.cc/PDN2-625T].

101. *Id.*

102. *See* Levin, *supra* note 18; John Eligon, *Hate Crimes Increase for the Third Consecutive Year, F.B.I. Reports*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html [https://perma.cc/8XJW-USLE].

103. Lisa Kiang, Virginia W. Huynh, Charissa S. L. Cheah, Yijie Wang & Hirokazu Yoshikawa, *Moving Beyond The Model Minority,* 8 ASIAN AMERICAN J. PSYCHOL. 1, 1–6 (2017).

104. *Id.*

105. *Id.*

106. Ross Douthat, *The Asian-American Age*, N.Y. TIMES (Sept. 1, 2018), https://www.nytimes.com/2018/09/01/opinion/asian-american-harvard-lawsuit.html.

107. Kiang et al., *supra* note 103.

108. Janelle Wong, *Actually, Race-Conscious Admissions Are Good for Asian-Americans*, CHRONICLE (Oct. 4, 2018), https://www.chronicle.com/article/Actually-Race-Conscious/244727 [https://perma.cc/DP3X-KZXS].

Taiwanese Americans attend college, only fifteen percent of Bhutanese Americans and thirty-four percent of Burmese Americans do.[109] This example alone demonstrates a pressing need to disaggregate data when analyzing trends within a racial group. Thus, despite clear disparities within a group, when generalizations are superimposed through the construction of race, difference becomes obscured.

II. IN SEARCH OF CLARITY: DECONSTRUCTING RACE IN THE COURTROOM

The American legal system does not exist in a vacuum. Rather, the law is inextricably linked to the society it governs, and the equitability and justice it provides are contingent upon the power structures in play. Although courts have a role in the protection of minorities and are relatively insulated from politics, courts continue to adhere to the status quo set by the legislature, executive, and societal consensus.[110] The judiciary's multifaceted role therefore becomes particularly strained when the topic of race comes before it. At least in part, this is because America's relationship with race is a perplexing one.[111] And while there is no precise or absolute way to quantify how much race has influenced the law, the immense impact that it has had in shaping the American legal system is difficult to ignore. Part II thus explores the manner in which the judiciary grappled with racism, wavered in its definition of race apropos congressional intent, and ultimately came to recognize the double-edged clout and complexity of race as a category.

A. Endorsing Racism

In a series of nineteenth century cases, U.S. courts made artful attempts to obscure the magnitude of race in the justice system before ultimately endorsing outright racism. In *State v. John Mann*, the Supreme Court of North Carolina sought to avoid the issue of how slaves could permissibly be treated.[112] To do so, Judge Ruffin determined that "[t]he power of the master must be absolute, to render the submission of the slave perfect," while acknowledging

109. Sylvia Guan, *Gaps in the Debate About Asian Americans and Affirmative Action at Harvard*, CENTER FOR AM. PROGRESS (Aug. 29, 2018), https://www.americanprogress.org/issues/education-postsecondary/news/2018/08/29/455316/gaps-debate-asian-americans-affirmative-action-harvard [https://perma.cc/79NZ-PMUQ].

110. Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1162–65 (1977).

111. *See supra* Part I.

112. 13 N.C. 263, 268 (1829).

that "as a principle of moral right" this notion should be repudiated.[113] Intriguingly, Judge Ruffin felt that "in conscience the law might properly interfere" with "cruelty and deliberate barbarity," but that in truth, the rights of the slave-master could *not* be brought before courts.[114] In doing so, the Court dejectedly disclaimed "the power of changing the relation, in which these parts of our people stand to each other," and punted to the legislature.[115]

In *Prigg v. Pennsylvania*, however, the U.S. Supreme Court showed no reluctance in declaring the federal Fugitive Slave Act of 1793—which guaranteed slaveholders a right to recover escaped slaves—constitutional and granting it an expansive interpretation.[116] Although *Prigg* did not preclude a state from forbidding its officials to cooperate in the return of a slave, state laws could *not* interfere with a slaveholder's right to enter into another state to recapture their slave via private action.[117] Beyond this pronouncement of federalism, the Court underscored that "we have not the slightest hesitation in holding . . . [that] the owner of a slave is clothed with entire authority."[118] This was certainly a holding that sought to solidify federalism and assert the power of the federal government during the country's early beginnings.[119] Even so, however, the Court continued to underscore the absolute power of the slave master without explicitly mentioning race or color.[120]

While the aforementioned cases are indicative of the reluctance of courts to rule against slaveholders, they do not rise to the level of outright racism displayed by the Supreme Court in *Dred Scott v. Sandford*.[121] There, the Court determined that descendants of the African race, enslaved or free, are not citizens of the United States.[122] While this is one of the worst (and unanimously denounced) decisions by the Supreme Court, the Court's dicta is reflective of a change in the judiciary's conception of race.[123] From a quantitative perspective, the

113. *Id.* at 266.
114. *Id.* at 267.
115. *Id.* at 267–68.
116. 41 U.S. 539, 613–14 (1842).
117. *Id.* at 612–13.
118. *Id.* at 613.
119. *Id.* at 612–13.
120. *Id.* at 613.
121. 60 U.S. 393, 403–05 (1857).
122. *Id.* at 425.
123. Beyond the holding, the *Dred Scott* decision also reveals the chilling and pervasive influence that politicians may have upon the Court. Incoming President James Buchanon hoped that the Court would subdue (or at least silence) unrest in the court on the issue of slavery, and contacted several Justices regarding the case's developments. *See* EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY 115 (2007). Given the

word "African" appears over thirty times in Justice Taney's majority opinion.[124] And contrary to prior opinions that focused on the authority of the "master" rather than the identity of the slave, Justice Taney underscored that Dred Scott was "a negro of African descent, whose ancestors were of pure African blood."[125] Further, he took great pains to stress that the Constitution drew a "line of division . . . between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery,"[126] and that Africans were long "regarded as beings of an inferior order, and altogether unfit to associate with the white race."[127] Taney's originalist interpretation went on to emphasize that the Framers not only intended to erect "a perpetual and impassable barrier" between the African race and the white race, but also sought to impose "this stigma, of deepest degradation . . . upon the whole race."[128]

From one perspective, the *Dred Scott* decision portrayed race as essential and absolute by focusing upon ancestry and blood relations.[129] From another, the Court spoke of race as a deliberate construction or erected barrier by the Framers.[130] This attempt to reinforce the "inferiority" of the African identity through the intent of the Framers was ultimately nothing more than erroneous conflation.[131] There was nothing essential about the "African race" that made them inferior.[132] Rather, it was simply the desire of the Framers to build the nation on the backs of slaves of African descent.[133] Consequently, we can see that even in 1857, the Supreme Court was grappling to categorize racial identity in a way that seemed innate.

In spite of racism rapidly brewing in the judiciary, blacks[134] were active agents in the making of Reconstruction and did not hesitate to seize the opportunity to "stake a claim to equal citizenship."[135] In

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current climate of divisive, racially charged rhetoric by the Trump Administration on top of partisan polarization, this sort of scenario feels all too realistic.

124. *See generally* Scott v. Sandford, 60 U.S. 393 (1857).
125. *Id.* at 400.
126. *Id.* at 420.
127. *Id.* at 407.
128. *Id.* at 409.
129. *Id.* at 407–08.
130. *Scott*, 60 U.S. at 420.
131. *Id.*
132. *Id.*
133. *Id.*
134. The usage of "blacks" in reference to African Americans acknowledges the role of structural racism, and is intended as a catchall word to encompass black individuals born in Africa and America.
135. ERIC FORNER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, xxiii, 29 (1989).

some ways this was an "experiment in interracial democracy."[136] Black political leaders artfully employed America's "republican values" as a means of attacking its "racial caste system."[137] However, in seeking to form a diverse, equal opportunity nation, blacks were posing a direct threat to "local autonomy" that triggered "ugly counterattacks from advocates of white supremacy."[138] The Southern Democratic party—the "conservative institution of the era"—trended towards "cultural homogeneity," strongly opposed black suffrage, and stigmatized those advocating for it as dangerous fanatics.[139] At the same time, the Democrats made intense efforts to deprive blacks the right to vote.[140] And as the reform movement continued to grow in size, the white South opted for a "Reign of Terror" to disenfranchise and weaken the political power of blacks and Republicans through intimidation.[141]

Ironically, by focusing upon terrorizing their political clout, Southerners failed to deprive blacks an education.[142] And so, despite all odds, "an almost totally illiterate population" found a way to self-educate and elevate themselves into the governmental sphere.[143] During the Reconstruction Era, sixteen black legislators were elected to Congress.[144] Many of these legislators would not see another black individual elected to office until the 1980s and 1990s—nearly a century after Reconstruction.[145] Accordingly, the legislators seized the moment and passed the incredibly progressive Civil Rights Act of 1875 that sought to attain equality for Blacks.[146] Unsurprisingly, the Supreme Court ruled that the Act was unconstitutional because it was beyond the powers of Congress to reach private discrimination.[147] The Court's approach reflected the judiciary's "general disenchantment with the Reconstruction program" and echoed a long line of decisions sweeping away efforts to elevate equality above racism.[148]

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136. *Id.*
137. *Id.*
138. *Id.* at xxiv, 29–30.
139. *Id.* at 30–31.
140. *Id.*
141. W.E.B. Du Bois, *Reconstruction and Its Benefits*, 15 AM. HIST. REV. 781, 785 (1910).
142. *Id.* at 782–85.
143. *Id.* at 782.
144. ERIC FORNER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, 352 n.12 (1988).
145. *Id.*
146. *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm [https://perma.cc/XF7H-DHT7] (last visited Mar. 22, 2020).
147. *Id.*
148. BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 10–11 (1970).

B. Judicial Waffling

Arguably, racial classifications are fundamentally ill-suited for the fact-intensive evidentiary pursuits in a court of law. There is something perverse about asking a group of predominantly white men[149] to make judgements about the oppression of racial minorities. In 1878, for example, the Ninth Circuit Court in California refused to accept the "Mongolian" race as white for the purposes of naturalization.[150] In the *In re Ah Yup* decision, Judge Sawyer explained that although "white person" is "a very indefinite description of a class" and that those who are perceived as white "may be found of every shade," the common, well-settled meaning of a white person is restricted to the "Caucasian race."[151] To further bolster this understanding of race, the court looked to the Webster Dictionary's five ethnological classifications of race that placed Mongolians within the "yellow race."[152] Judge Sawyer then went on to underscore that Congress "universally understood" and expressly made the decision to retain the word "white" to exclude the Chinese from the right of naturalization.[153] Further, since Congress had recently extended naturalization to the "African race," the court inferred that Congress was not prepared to resolve "the Chinese problem" in the face of the foreseeable entry of millions of immigrants.[154]

Although Congress was deliberately racist in its intent, courts were both hesitant and uncertain when it came to applying this intent. Some courts were staunchly unwilling to thwart Congress. In *Ex parte Shahid*, for example, Judge Smith found that "[i]t would be most unfortunate" if the decision were to be determined by "the conclusions of a judge based on ocular inspection."[155] As such, it would be "safest to follow the reasonable construction of the statute as it would appear to have been intended at the time of its passage."[156] Here, the court certainly demonstrated a great deal of deference to Congress and rejected arguments "of the emotional ad captandum order, that have no place in the judicial interpretation of a statute."[157] Beyond this fidelity to congressional intent, however, the court also relied on its own understanding of race. The plaintiff was a Syrian

149. TRACEY E. GEORGE & ALBERT H. YOON, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?* 7, 12 (2016).
150. *In re Ah Yup,* 1 F. Cas. 223, 225 (D. Cal. Cir. Ct. 1878).
151. *Id.* at 223.
152. *Id.*
153. *Id.* at 224.
154. *Id.*
155. 205 F. 812, 816 (E.D.S.C. 1913).
156. *Id.* at 815.
157. *Id.*

born in Asia Minor whose skin color Judge Smith described as "about that of a walnut, or somewhat darker than is the usual mulatto of one-half mixed blood between the white and the negro races."[158] The emphasis on skin color continued as Judge Smith wondered how the court should classify race based upon the "degree of colorization."[159] In light of "the uncertainties of shades of color" the court decided to limit whiteness to individuals of European descent with the "controlling element" being their "fair-complexioned" skin color.[160] As such, the court simultaneously equated color with race and discredited the court's role in determining race on the basis of color.[161] In adopting this bewildering and perplexing approach to construing race, the court further emphasized the incongruities of racial classification.[162]

In sharp contrast, other courts rejected racial categories that were constructed through the political process. In the case of *In re Rodriguez*, Judge Maxey held that the laws of naturalization were applicable to Mexican citizens.[163] The court did not believe that the applicant's fate should be determined "from the standpoint of the ethnologist" or through "strict scientific classification of the anthropologist."[164] Rather, the court elevated the role of a man's "daily walk" and his ability to honor the principles of the Constitution through his actions.[165] Unfortunately, despite the seeming progress suggested by the *In re Rodriguez* decision, the reality within society itself did not match the court's ruling or the Treaty of Guadalupe-Hidalgo, which incorporated thousands of Mexicans into American citizenship.[166] In practice, Mexican Americans that were deemed "white as a matter of law" experienced no corollary privilege or status.[167] Indeed, whiteness was in a state of flux as well—judges would rule that Mexicans were "co-whites" when it favored the dominant group, but "nonwhite when necessary to protect Anglo privilege and supremacy."[168] In this sense, the law continually reinforced the privileges of the "white race" and left individuals grappling to find ways to qualify.

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158. *Id.* at 813.
159. *Id.*
160. *Id.* at 814–15.
161. *Ex parte Shahid*, 205 F. at 814–16.
162. *Id.*
163. 81 F. 337, 351, 355 (W.D. Tex. 1897).
164. *Id.* at 349, 354.
165. *Id.* at 355.
166. *Id.*
167. George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 337 (1997).
168. George A. Martinez, *Mexican-Americans and Whiteness*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 212 (Richard Delgado & Jean Stefancic eds., 1997).

C. Recognizing the Power of Perception

Throughout the early and mid-1900s, courts were continually vexed by the task of construing race within the statutory frameworks that Congress had enacted. But, by the end of the twentieth century, delivering the protections within Title VII of the Civil Rights Act became the next frontier for the judiciary.[169] Under Title VII's broad ambit, it is unlawful for employers to discriminate against or limit, segregate, or classify an individual on the basis of "race, color, religion, sex, or national origin."[170] However, although race, color, and national origin are protected classes, the legislative history of the Act indicates that Congress was primarily focused on the "binary distinction between Black and White," and intended African Americans as the beneficiaries.[171] Further, there is no guidance for interpreting who qualifies under the "color protected class,"[172] which effectively delegates the issue to the whims of external perceptions and courts with no direction.

The 1994 case of *Perkins v. Lake County Department of Utilities*[173] provides an illustrative example of the role of external perception in race and the courts overarching confusion about its authority in determining race.[174] In *Perkins*, the plaintiff filed a Title VII claim of disparate treatment because of his American Indian race. He was regularly subjected to derogatory comments and names regarding his race and was denied numerous opportunities to be promoted or apply for promotion.[175] As litigation unfolded, the defendant-employer sought to undermine the plaintiff's claims by arguing that Perkins was not truly an American Indian and therefore could not make a claim under Title VII.[176] To do so, the defendant conducted "exhaustive research" on ancestry and race through birth records and documentation from the U.S. Census and the Bureau of Indian Affairs.[177] The U.S. Census revealed that after the 1830 Census where the Perkins family listed itself as "Free Colored," it began to list itself as "Mulatto."[178] Further, in the genealogical researcher's opinion, Perkins had "no provable ancestral ties to any of the recognized Indian

169. *See* 42 U.S.C. § 2000e (1994).
170. *Id.*
171. Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 9 (2015).
172. *Id.* at 7, 13–15.
173. Perkins v. Lake Cty. Dept. of Utilities, 860 F. Supp. 1262, 1277–78 (N.D. Ohio 1994).
174. *Id.* at 1263.
175. *Id.* at 1264.
176. *Id.*
177. *Id.* at 1266.
178. *Id.* at 1267.

Nations" and possessed "less than one sixteenth Indian blood."[179] Thus, the defendant maintained, Perkins had failed to demonstrate "any perceptible degree of Indian blood" and could not qualify as a member of a protected class under Title VII.[180]

Despite ambiguities in his ancestry, Perkins' lived experience cut in the opposite direction. His family was regarded as being of American Indian heritage, his father "publicly claimed" this heritage, Perkins was called "Redbone" in a derogatory manner, and he always held himself out to be an American Indian.[181] There was testimony that Perkins "looked Indian" because of his "facial structure" and "complexion."[182] Moreover, his employer and co-workers perceived him as an American Indian, and the employer's records indicated that he was an American Indian.[183] The court in *Perkins* acknowledged that classifying an individual on the basis of race "is deceptively complex" and "complicated first by the amorphous definition of the term 'race,' and second by the difficulty of categorizing individuals with varied and/or unclear ancestry within a particular racial grouping."[184] Additionally, the court was reluctant to endorse racial classifications because they have traditionally been "used to justify the exploitation of certain groups," and have been reconfigured by social scientists so many times "that the very notion of 'race' may be deemed illusory."[185] Ultimately, since Title VII was intended to "equalize rather than separate," the court concluded that Perkins *was* entitled to the statutory protections.[186]

Likewise, the U.S. Supreme Court has underscored that because there is no one formula or definitive test to determine race, "common understanding" governs.[187] The Supreme Court has relied upon the research findings of biologists and anthropologists to recognize that race is "for the most part sociopolitical, rather than biological, in nature" and "[c]lear-cut categories do not exist."[188] Unsurprisingly, lower courts continue to struggle in applying the seeming arbitrariness of racial classification to "our heterogeneous society."[189] In

179. *Perkins*, 860 F. Supp. at 1269.
180. *Id.*
181. *Id.*
182. *Id.* at 1270.
183. *Id.*
184. *Id.* at 1271.
185. *Perkins,* 860 F. Supp. at 1271.
186. *Id.* at 1276 ("Title VII does not single out Indians for special benefits or treatment, but, rather, attempts to equalize the position of all employees . . . .").
187. Morrison v. California, 291 U.S. 82, 86 (1934).
188. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987).
189. *See* McCleskey v. Kemp, 481 U.S. 279, 316 n.39 (1987); *see also* Budinsky v. Corning Glass Works, 425 F. Supp. 786, 788 (W.D. Pa. 1977) ("The terms 'race' and 'racial discrimination' may be of such doubtful sociological validity as to be scientifically

particular, when a court is tasked with distinguishing between race and national origin, judges begin to question their authority, pondering whether courts should "be in the business of 'certifying' bloodlines and races."[190] Ultimately, courts have settled upon the view that race is a dynamic (rather than static) category that "lives and changes according to popular beliefs."[191] Yet, because of the spectrum-like fluidity across race, color, and national origin, courts continue to return to the binary of white and non-white in rooting their analysis.[192] What thereby emerges is the centrality of external perception with regards to racial classifications.

III. MITIGATING THE BATTLE BETWEEN PERCEPTION AND IDENTITY

Appearance is often not reality, but merely a façade. Yet, if one's "street-race"—how others perceive your race on the street—supersedes one's self-identified race, then the external perception becomes reality.[193] A key component in this dissonance is the notion of "racial fluidity," which encompasses "the belief that race, like gender, is a choice, not a biological identity you're assigned at birth."[194] Individuals that view themselves as racially fluid outright reject the concept of being categorized by race, and instead develop their own racial identities.[195] Even though sex has a greater biological basis than race, society is far more comfortable accepting that we can choose our gender than our race.[196] Nevertheless, racial identities are becoming increasingly mixed and viewed as something that is imbued with choice rather than something we are inherently assigned at birth.[197] At the core of fluidity is the recognition that broad sweeping categories (like "Latino") fail to capture the immense diversity within the group and give rise to problematic (and potentially dangerous) misunderstandings of national origin, ethnicity,

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meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding.").

190. Ortiz v. Bank of America, 547 F. Supp. 550, 559 n.16 (E.D. Cal. 1982).

191. Perkins v. Lake Cty. Dept. of Utilities, 860 F. Supp. 1262, 1272 (N.D. Ohio 1994).

192. Gonzalez v. Stanford Applied Engineering, 597 F.2d 1298, 1300 (9th Cir. 1979).

193. Nancy Lopez, Edward Vargas, Melina Juarez, Lisa Cacari-Stone & Sonia Bettez, *What's Your "Street Race"? Leveraging Multidimensional Measures of Race and Intersectionality for Examining Physical and Mental Health Status Among Latinxs*, 4 SOC. RACE & ETHNICITY 49, 49–51 (2017).

194. John Blake, *The Blurring of Racial Lines Won't Save America. Why 'Racial Fluidity' is a Con*, CNN (June 11, 2018), https://www.cnn.com/2018/03/02/us/racial-fluidity/index.html [https://perma.cc/5HBX-XFZC].

195. *Id.*

196. *See* ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES 18–19 (2016).

197. *See id.* at 50–56.

and culture.[198] Therefore, as the United States trends towards becoming a minority white population, the nation—from its judiciary to its populace—must look critically at its incomplete understanding and assumptions of race.

A. Choosing a Racial Identity

For all the controversy surrounding her, Rachel Dolezal presents a staunch example of racial fluidity and the myriad of challenges it presents in the U.S. consciousness. Rachel identified as an African-American woman and served as the president of the NAACP in Spokane, Washington before being "outed" by her biological parents as white.[199] This led to public outcry as she was accused of belittling and appropriating the struggles of African Americans by pretending to be black while lacking the ancestry and lived experience.[200] In particular, Rachel was mercilessly condemned for not acknowledging that her biological parents were white. While this response was understandable, particularly with respect the lawsuit she filed against Howard University for creating "a racially hostile environment because she was white,"[201] it left unresolved the viability of being "transracial" in America.[202]

Rachel grew up immersed in a family with four adopted black siblings and was always interested in ethnicity and diversity.[203] After college, she attended Howard University to pursue her passion for art—specifically, African-American portraiture.[204] There, she began to transform and take on the racial identity she maintains today.[205] To be clear, Rachel has privileges afforded to her by virtue of her light-skinned complexion as well as her ability to "pass" as white.[206] In the context of the racial hierarchy, Rachel's whiteness allows her greater social and economic mobility than non-white

198. RACE AND RACES, *supra* note 15, at 374 (noting that the aggression and animosity against undocumented immigrants leaves countless citizens at risk of violence solely because of their racial identity).

199. Matthew Haag, *Rachel Dolezal, Who Pretended To Be Black, Is Charged With Welfare Fraud*, CNN (May 25, 2018), https://www.nytimes.com/2018/05/25/us/rachel-dolezal-welfare-fraud.html [https://perma.cc/66XR-MUGU].

200. *See* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 286 (2017).

201. *Id.*

202. Faith Karimi, *Rachel Dolezal, White Woman Who Portrayed Herself as Black, Accused of Welfare Fraud*, CNN (May 25, 2018), https://www.cnn.com/2018/05/25/us/rachel-dolezal-welfare-fraud-allegations/index.html [https://perma.cc/M77B-9QAA].

203. THE RACHEL DIVIDE (Netflix 2018).

204. *See id.*

205. *See id.*

206. *See id.*

individuals.[207] While Rachel's lawsuit against Howard University may point towards a shift in the hierarchy because of the incentives of affirmative action, her life after college suggests a different conclusion.[208] Much of Rachel's adult life has been lived as light-skinned black woman serving the African-American community.[209] During her tenure with the NAACP, she fought against pervasive racism and police brutality in Spokane—a city in which its state representative was reelected after distributing a document calling for the death of all non-Christian males.[210]

Undeniably, Rachel made numerous missteps in her period of transition,[211] chief among which was not being more honest about her past. That said, Rachel's oppressive childhood sheds light on why she sought to relinquish all ties to her biological parents and assignment to whiteness at birth.[212] Two of Rachel's adopted African-American siblings, Esther and Izaiah Dolezal, attested to the fact that their parents raised them to be white.[213] In response, Rachel took it upon herself to "bridge the cultural divide" to empathize with her siblings—something she says, "spoke to her soul."[214] Esther also recounted how their parents would spank the children with a glue-gun stick and a black baboon whip so intensely that they left scars visible upon them to this day.[215] Upon seeing the deep scars on Izaiah's back, Rachel felt she had to sever any connection to her parents.[216] From a psychological perspective, one can understand why Rachel sought to dissociate herself from her family and begin a journey of self-discovery and "becoming" through the years. In some ways, Rachel's transition in her racial identity can be viewed as a

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207. Tanya Kateri Hernandez, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 118 (1998).

208. Beydoun & Wilson, *supra* note 200, at 289.

209. Ray Sanchez & Ben Brumfield, *Rachel Dolezal's Appearance is 'Blackface,' Brother Says*, CNN (June 15, 2015), https://www.cnn.com/2015/06/13/us/washington-rachel-dolezal-adopted-brother/index.html [https://perma.cc/8AXM-6ATQ].

210. *Id.*; Owen Daugherty, *GOP State Legislator who Called for 'War' Against Enemies of Christianity Wins Reelection*, THE HILL (Nov. 7, 2018), https://thehill.com/blogs/ballot-box/415595-gop-state-lawmaker-who-published-manifesto-calling-for-war-against-enemies [https://perma.cc/UZZ6-E6FG].

211. *See, e.g.*, Susan Svrluga, *Rachel Dolezal Sued Howard for Racial Discrimination. Because she was White*, WASH. POST (June 15, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/06/15/rachel-dolezal-sued-howard-for-racial-discrimination-because-she-was-white/?noredirect=on&utm_term=.74cd303aa748 [https://perma.cc/J39P-2E6M].

212. THE RACHEL DIVIDE, *supra* note 203.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

performance, but in others, it can simply be regarded as an evolution of self-identity—a delicate dance between perception and the power to choose.

B. Taking One Small Step in a Delicate Dance

Racial fluidity presents challenges for both data collection and advocacy efforts. Studies of affirmative action programs and racial discrimination in the workplace are contingent on having statistics that fully encapsulate and reflect the disparity.[217] Therefore, if individuals that are perceived as black in the workplace (and discriminated as such) report themselves as multiracial or racially fluid, then the statistics are disaggregated and likely diluted. Likewise, if individuals that are perceived as white begin to report themselves as a minority race for purposes of affirmative action, then the underlying aims of social justice efforts begin to decay.

At the core of the tension between self-identity and external perception are two intriguing developments in the law and society. First, the judiciary's ongoing belittlement of "colorism"[218] claims within the Title VII employment discrimination framework has diminished the role of external perception in the context of discrimination. And second, the popularity of DNA ancestry tests has resulted in a perverse sense of empowerment to adopt new racial identities without considering the privilege of being able to do so.[219] Together, these two developments suggest that there is a need to differentiate between self-identity and external perception in the U.S. Census Survey to better understand the populace and its lived experience.

Research has continually underscored the disparate effect of skin tone on employment outcomes. For instance, despite having higher levels of education and prior work experience, darker-skinned African-American males are "significantly less preferred" to lighter-skinned African-American males with *less* education and experience.[220] In addition, empirical research has found that the majority

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217. *See* Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CAL. L. REV. 1243, 1245 (2014); *see also* Teamsters v. United States, 431 U.S. 324, 339–41 (1977) (holding that statistics can prove a prima facie case of racial discrimination).

218. "Colorism," a term coined by Alice Walker, is the "prejudicial or preferential treatment of same-race people based solely on their color." ALICE WALKER, *If the Present Looks Like the Past, What Does the Future Look Like?* (1982), *in* IN SEARCH OF OUR MOTHER'S GARDEN 290, 290–91 (1983).

219. Wendy B. Roth & Biorn Ivemark, *Genetic Options: The Impact of Genetic Ancestry Testing on Consumers' Racial and Ethnic Identities*, 124 AM. J. SOC. 150, 169–75 (2018).

220. Tennille McCray, *Coloring Inside the Lines: Finding a Solution for Workplace Colorism Claims*, 30 L. & INEQUALITY 149, 149 (2012).

of African Americans in positions of authority are generally lighter-skinned.[221] Yet, despite the empirical data (and lived experiences of darker-skinned racial minorities), courts have largely ignored claims of colorism and focused instead on racial discrimination.[222] This neglect is problematic because color is often used to discriminate against individuals—both between and within races on the racial hierarchy—regardless of their actual categorization on the basis of race.[223]

Title VII of the Civil Rights Act expressly carves out "color" as a protected class (on par with race and national origin) in employment discrimination.[224] Nevertheless, courts have consistently assessed color and race claims as though they were one and the same, and in effect rendered color claims superfluous.[225] In doing so, courts fail to protect individuals from the insidiousness of colorism and fail to understand the interaction effect between race and color.[226] Alternatively, a court could adopt a holistic and nuanced test that would: (1) acknowledge the independent role of skin color within discrimination; and (2) recognize its compounding function when presented alongside of evidence of national origin and race discrimination.[227] While courts have notoriously fumbled with "intersectional claims"[228] under Title VII, the stakes are simply too high to continue analyzing color, race, and national origin in silos. Put simply, the judiciary must take note of the compounding effects of intersectional discrimination, and give credence to the power of external perception in discrimination.

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221. Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 777 (1991).

222. *Id.* at 775–77; *see also* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213, 217 (Evelyn Nakano Glenn ed., 2009).

223. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L. J. 1487, 1490 (2000); *see also supra* Parts I and II for historical context and the judiciary's inconsistent approach to categorizing race.

224. 42 U.S.C. § 2000e-2(a) (1994). Arguably, Section 1981 of the Civil Rights Act of 1866 also impliedly affords protection from private and public employment discrimination. *See* 42 U.S.C. § 1981(a) (1994) ("All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."); Jordan v. Whelan Sec. of Ill., Inc., 30 F. Supp. 3d 746, 753 (N.D. Ill. 2014) ("[L]ower courts have held that § 1981 *does* recognize discrimination claims based on a person's color.").

225. Jones, *supra* note 223, at 1537–38.

226. *See id.*

227. This Article does not purport to develop a new framework under Title VII, but simply proposes a different way of viewing intersectional claims in the context of race.

228. Intersectional claims arise in cases wherein a single element (sex, for example) is insufficient to bring a claim, but two elements together (such as sex and race) rise to the requisite level of discrimination. *See id.* at 1551 n.256. While some courts have recognized the theory of intersectionality, others have rejected it altogether. *See, e.g.*, DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976) (finding that Title VII's was not to create a new class of "black women").

Today, the fluidity of race is further complicated by the advent of DNA ancestry tests, such as 23andMe,[229] that purport to reveal ethnicity through genetics despite there being no scientific or statistical difference across the genomes of all humans.[230] The results of these DNA ancestry tests typically inform an individual that they are a mixture of ethnicities with ties to European, Asian, and African countries.[231] Thereby creating the impression that ethnicity can be expressed as a statistical comparison to the DNA of natives in the geographic regions.[232] Beyond being nonsensical, ancestry tests conflate heritage with ethnicity and edge individuals closer to viewing race as being biologically rooted in our DNA—a notion that has been revoked decades ago.[233] The effect of DNA ancestry tests may have perverse effects on U.S. Census statistics and ultimately result in an underestimate of racial inequities. A recent research study found that individuals tend to selectively embrace certain aspects of the ancestry tests results as part of their racial identity.[234] Further, over eighty percent of those that "adopted geneticized racial identities," documented the change within the census.[235] Most problematically, white respondents expressed excitement about "trying on" their new identities[236] as though they were temporary costumes, which reinforces a fundamental misunderstanding of race and the permanent consequences that it bears for non-white individuals.

In addition to the judicial misunderstanding of colorism and the perverse effects of geneticized racial identity, the U.S. Census continues to fall dramatically short by asking the wrong questions. When it comes to surveys and statistics, it is particularly important to study race in the context of power and remain cognizant of potential biases within the governing perspective.[237] If the perspective originates within a dominant group, it may well be reinforcing "a form of shared reality in which its own superior position is seen as natural."[238] As such, it is crucial that when conducting a census survey, the right questions are asked for the right reasons.

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229. 23ANDME, https://www.23andme.com/?myg=true [https://perma.cc/N6KX-5YGG] (last visited Mar. 22, 2020).

230. *See* Kolbert, *supra* note 30.

231. *See* 23ANDME, *supra* note 229.

232. John Edward Terrell, *Ancestry Tests Pose a Threat to Our Social Fabric*, SAPIENS (Aug. 23, 2018), https://www.sapiens.org/technology/dna-test-ethnicity [https:/perma.cc/5QVP-23YW].

233. *See id.*

234. Roth & Ivemark, *supra* note 219, at 152.

235. *Id.* at 165.

236. *Id.* at 169–75.

237. *See, e.g.*, Lopez et al., *supra* note 193, at 55–61.

238. Richard Delgado, *Storytelling for Oppositionist and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

Though it may appear that the U.S. Census is not a topic of controversy in the law, in April of 2019, the Supreme Court heard oral arguments to resolve whether the Department of Commerce could reinstate a question inquiring into citizenship status in the 2020 Census.[239] The effects of this single question are far reaching. The government's analysis indicates that approximately 6.5 million people (primarily undocumented or Hispanic immigrants) will not respond to the census, which would therefore reduce federal funding and the number of seats in the House of Representatives.[240] Given the immense implications of each question on the census, the utmost care should be taken in determining how and why particular inquiries are made.

At present, the U.S. Census Bureau simply asks each individual to report their race, noting that this is "based on self-identification and generally reflects a social definition of race" as opposed to one that is genetic or biological.[241] On its face this definition appears to be adequate, but it actually creates challenges for a large swath of minority groups. For instance, there is no category on the race question for those who would identify as Latino or Hispanic.[242] On one hand, expanding the number of race combination groups in the census may not be an adequate solution as this approach complicates the data analysis process.[243] On the other, attempting to group diverse identities into broad umbrella terms fails to account for the array of meaningful differences across subgroups.

The broader issue is that the very question of choosing a race is limiting because it does not take into account the individual's daily realities regardless of how they may self-identify. Empirical evidence reveals that one's "street race" is a strong measure of race in exploring the inequality and racialization experience across individuals within minority groups.[244] Nonetheless, the census continues

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239. *See Department of Commerce v. New York*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/department-of-commerce-v-new-york [https://perma.cc/G37N-M6UF] (last visited Mar. 22, 2020). At the time that this Article was written, the Supreme Court had heard oral arguments for the case but had not yet issued its decision. *Id.*

240. Amy Howe, *Justices will Review Challenge to Census Citizenship Question: In Plain English*, SCOTUSBLOG (Apr. 2, 2019), https://www.scotusblog.com/2019/04/justices-will-review-challenge-to-census-citizenship-question-in-plain-english/ [https://perma.cc/R26D-WRWZ].

241. U.S. CENSUS BUREAU, QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY 11–12 (2018), https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf.

242. *Id.* at 9.

243. *See* Nancy Lopez, *The US Census Bureau Keeps Confusing Race and Ethnicity*, CONVERSATION (Feb. 28, 2018), http://theconversation.com/the-us-census-bureau-keeps-confusing-race-and-ethnicity-89649 [https://perma.cc/RG4T-427V].

244. *See, e.g.*, Montalvo Frank & Codia G Edward, *Skin Color and Latinos in the United States*, 1 ETHNICITIES 321, 333–35 (2001); Lopez et al., *supra* note 193, at 50.

to confuse race and ethnicity, and has been resistant to change.[245] The 2020 Census, for example, will retain the same outdated ethnic and racial categories that it used in 2010.[246] As demographics continue to shift and new identities develop, it is perplexing that "some other race" remains the third-largest racial group.[247]

All of us, no matter our race, know the feeling of having something integral to our personhood that the external world either does not perceive or perceives differently. So, why not make something of the dissonance between our personal identity and the external world's perception? This Article proposes that the U.S. Census Survey ask individuals *both* what race they personally identify with and what race they are perceived as. This would allow individuals to express not only how they are externally classified on the basis of their lived experience, but also how their racial identity may transition over time. Moreover, given the strong correlation between street race and both discrimination and economic disparity, this solution would provide data on a nationwide level that has never before existed. Ultimately, this small change in how statistics are collected has the potential to make implicit assumptions about race explicit and extend legal protections far beyond their current reach.

CONCLUSION

As the United States becomes increasingly diverse and fraught with tensions across racial divides, the nation cannot proceed with an incomplete understanding of race. Whether Jewish or African American, the construction of race and the racial hierarchy has continued to exert toxic effects upon minorities. This Article strives to remedy some of the pervasive ignorance at the intersection of racial identity and external perception, and to identify the interaction effects between and across the multitude of categories, labels, and groups that comprise an individual's identity within the legal system. An individual's identity is not always in alignment with the world's perception, and the variance between the two poses a fundamental challenge to how American law has historically categorized and conceived of race. Ultimately, the path forward requires an increased empathy and understanding of our diverse nation. To do so, we must first begin by asking the right questions.

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245. *See* Lopez et al., *supra* note 193.

246. Hansi Lo Wang, *2020 Census To Keep Racial, Ethnic Categories Used In 2010*, NPR (Jan. 26, 2018), https://www.npr.org/2018/01/26/580865378/census-request-suggests-no-race-ethnicity-data-changes-in-2020-experts-say [https://perma.cc/N4F6-UTT5].

247. *Id.*