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SYMPOSIUM: BORDER PEOPLE AND ANTIDISCRIMINATION LAW: Boundaries of the Racial State: Two Faces of Racist Exclusion in United States Law

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BIO:

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SUMMARY:

... Thus, the legislature subsequently amended its statute with an additional clause ordering that "no . . . Mongolian or Chinese shall be permitted to give evidence in favor of or against any white person." ... And it has never been the case that any one having visible tokens of African descent has been regarded by the community generally as a white person." ... The law prohibited "Negroes, Mulattoes, Indians, and all persons of mixed blood descended from Negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person" from testifying "in any cause, civil or criminal, except for or against each other." ... Numerous states passed exclusion statutes that set guidelines for categorizing racially mixed persons by marking the racial content of their family trees. ... The United States Supreme Court foreclosed this line of precedents, ruling in 1923 that a Hindu, even one of "high caste" and "of the Caucasian race," is not a white person within the meaning of the naturalization laws. ...

TEXT:

[*85] If the history of the U.S. Census is anything to go by, whiteness is a founding concept of the Union. The singular constant in the history of census-taking in the United States has been to count whites, and to count them first. One might say that this concern has been multifold: to maintain the artifice of white homogeneity, and to preserve the powers and privileges historically associated with whiteness. The prevailing concern of the law in this regard, accordingly, as illustrated by the law's treatment of those who straddle racial borders, has been with the extension (or contraction) of the category: who it "properly" includes or not, the contours of the category, the shape and substance of its content, the policing of its boundaries and the preservation of its privileges and powers. These matters obviously say something significant about the contribution of law's instrumentality to racial commitments and about law's concern not simply to create and maintain racial categories, but rather to force those who seem otherwise not to fit into the "given" divides. Indeed the law seems to force racial conception into what one might call the prevailing social mentality. This also says something of deeper concern, however, about the racial shaping of law in American history from the eighteenth century to the present. It is these considerations that concern us below.

I. RACIST NATURALISM, RACIAL HISTORICISM

Most commentators have presumed that the legitimation of racial order has turned invariably and singularly on the assumption that non-whites are inherently inferior to whites, so inferior as to be incapable for the most part of self-governance or contributing to the governance of the modern state. Thus, Charles Mills is not atypical in insisting that "since its emergence as a major social category several hundred years ago, race [*86] has paradigmatically been thought of as a 'natural,' a biological fact about human beings, and the foundation of putatively ineluctable hierarchies of intelligence and moral character." ⁿ¹ This tradition, which may be called "naturalist," runs from Hobbes and Pufendorf, through Rousseau and Kant, to Hegel and Carlyle. Its contemporary representative is *The Bell Curve*.

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However, there is an equally powerful tradition, almost always overlooked not least because in some ways it is revisionary. Here

the claim is not that the non white are inherently inferior, but rather that they are developmentally immature, historically not yet capable of self-governance and so requiring the guidance of white benevolence. This is the expression of racial arrangements from Locke to Comte and Marx, John Stuart Mill and Lord Acton, Thomas Sowell and Shelby Steele. This tradition can be called "historicist" or "evolutionary."

These two traditions of racial rule, while conceptually distinct and seemingly mutually exclusive, coexist historically. The naturalist conception dominated from the seventeenth well into the nineteenth century. The historicist or progressive one displaced its dominance in the second half of the nineteenth century but far from eclipsed it. Therefore, those committed to naturalist principles on some issues or as to some racially conceived groups might be found to express themselves in historicist terms on other issues or regarding different groups. For example, in 1857 Chief Justice Taney declared in his majority opinion in *Dred Scott v. Sandford* that "it has been found necessary, for their sake as well as our own, to regard them [American Indians] as in a state of pupilage." ⁿ³ Suggesting a historicist hope that Indians might eventually leave their "uncivilized" state(s), he claimed that they could be naturalized as citizens of the United States, "and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." ⁿ⁴ Taney argued that black people by contrast,

had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. ⁿ⁵

He concluded that black people were excluded from being considered citizens under the Constitution and unprotected by constitutional rights, immunities and privileges. Relatedly, from the mid-1800s until at least the 1930s American Indians were regarded in the United States as assimilable [*87] while people of African descent were considered segregable. ⁿ⁶ Because the two groups were taken to occupy different rankings on prevailing racial hierarchies, the former were targeted by assimilation policies and deemed capable of evolutionary progress and of being whitened in a way the latter were not. ⁿ⁷

The distinction between naturalism and historicist progressivism likewise accounts, at least in part, for the vacillation regarding slavery and social integration by U.S. politicians such as Jefferson and Lincoln. Jefferson notoriously insisted that

the difference [between black and white] is *fixed in nature*, ⁿ⁸ indeed, that the blacks . . . are inferior to the whites in the endowments both of body and mind . . . The [Roman] slave, when made free, might mix with, without staining the blood of his master. But with us [Americans] . . . when freed, [the black slave] is to be removed beyond the reach of mixture. ⁿ⁹

Lincoln, on the other hand, initially espoused naturalist commitment (inherent inferiority) while he later expressed and acted on historicist assumptions in the name of a racial political progressivism. Therefore, although Lincoln's debate with Stephen Douglas in 1858 makes clear his sense of "Negro" inferiority (a naturalist sentiment), his commitment to expatriation of blacks to Liberia (in keeping with the prevailing emigrationism of the day) implicitly acknowledged, in historicist fashion, their (potential) capacity for self-governance, even as it addressed naturalist concerns to keep blacks beyond the reach of mixture.

The displacement of naturalist by historicist discursive dominance as the prevailing common sense of racial presumption would take almost another century of racist brutality and bestiality. In fact, naturalism did not disappear as a commitment of rule within and across all (or indeed any) racial states. Although now representing the extremes of racial expression, naturalist commitments continue to circulate at the social margins and beneath the surface, as sometimes exemplified by slips of the tongue by public figures. Similarly, the lingering threats of white supremacist groups in the United States, as elsewhere, reveal the circumspect circulation of naturalism just beneath the surface of contemporary historicist discursive dominance. The argument at play here does not rest on a claim of "progression" from less to more enlightened views, though historicism certainly has proclaimed itself in those terms; and it does not follow that naturalism has withered and deceased. A rearticulated naturalism has asserted itself as the social position of marginalized "conscience" and "critic" of hegemony, the object of state repression while bearing the burden of social progress.

[*88] Therefore, the increasing ideological and administrative dominance of historicism in state modernization has made naturalist ideologies the extreme, the antique, or the anomaly. ⁿ¹⁰ Witness the recent marginalization of white supremacist militias in the United States now understood as extremist or terrorist. These groups define themselves as dismissive of the contemporary state because the contemporary state is viewed as representative of the racial interests of those not white at the expense of those who are. Here we see the modern day transition from a once historicist conception (the supremacy of all white persons in regard to non white persons) to the naturalist position (the eternal superiority of all white persons). The white supremacist militias reject the contemporary state's historicist notion of recognizing non-white persons as they begin to reach historicist benchmarks and instead resign to the naturalist position that

assimilation is not possible or desirable. Accordingly, naturalism and historicism remain dialectically definitive and distinct in regard to each other's respective parameters of articulation. Yet both constitute forms of racist exclusion; historicism's conceptual distinctiveness vis-a-vis naturalism figures centrally in the transition to a subtler racial rule.

Law plays a central role in these shifts from racial naturalism to historicism, early modernity to high modernism, the absolutist state to the modern one.ⁿ¹¹ The authoritative influence of legal positivism, in particular, served to structure these shifts. Under older naturalist regimes, those more expressive of absolutism, law was a means simply to shore up, to whitewash, to legitimize the physical violence imposed upon bodies that was the preferred, more direct and primary mechanism of racial rule and social control. Law served violence, rendering acceptable the reign of racial terror by the state, state agents, and state members.ⁿ¹² With historicism, the recourse to law shifts. Law becomes the primary means of racial order while the threat of violence becomes the means to ensure legal enforcement. Racial rule from the late nineteenth century onwards became rule by and through law. Under historicist challenge, racial rule became embodied in the rule of law and the rule of law became instrumental at once in both defining racial social boundaries and securing and maintaining the patrol of racial borders literally as well as metaphorically and symbolically.

II. RACIAL PREREQUISITES AND THE POSITIVITY OF RACIAL BORDERS

With the ending of slavery, the dismantling of Reconstruction, and the dramatic increase in migrations from South to North and East to West, concerns about race were marked by a shift in racial focus from conceiving race as the outside of civil(ized) society--as its negative space, as the natural landscape of the state of nature--to keeping out those considered racially uncivilized (at least relatively speaking): out of the state (immigration [*89] and naturalization restrictions), out of the courts (witness exclusion laws), out of the polls (voting restrictions), out of white neighborhoods (residential restrictions and removals), in short, out of white space. Law is instrumental to these renewed and renewable modes of subjugation and exclusion, and to the reiterable and reiterated commitment to the homogeneity of whiteness. As indicated above, under naturalistic assumptions law served principally as rationalization for and legitimization of racial conditions established and extended through force; one might say the conditions are legitimized at the extreme through the force of law itself. With the shift to historicism, the law assumed the principal (and principled) mode through which racial distinction was elaborated and sustained. State force and violence became the recourse of last resort, where the law was considered to fail, or, perhaps states merely rationalized the use of force in that way. In either case, the law was invoked to reinforce the "integrity" of racial categories by squeezing into the prevailing categories those nominally falling betwixt and between the distinctions. In seeking to save both the phenomena and the logic of its racial rule, this categorical forcing and fixture served ironically to underline the very artifice of racial categorizing the law seemed to consider a "natural" condition.

In *People v. Hall*, the well known case more or less coterminous with *Dred Scott*, the California Supreme Court interpreted a criminal procedure statute that provided that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man."ⁿ¹³ The court's concern was to prohibit the testimony of Chinese witnesses against a white defendant. Confronted with persons whom it could not fit neatly into any of the statutorily enumerated racial categories, the court under-took a pained assessment of various "sciences," legislative history and "common" knowledge, which included linking Indians to "the Mongolian race" via Christopher Columbus. The court concluded that the statute excluded the testimony of Chinese witnesses. Even if Indians were not "Mongolians," the court reasoned, "the words 'black person' . . . must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."ⁿ¹⁴

People v. Hall was one of many racial prerequisite casesⁿ¹⁵ arising in the nineteenth century (when racial address was concerned with exteriorizing racial others) in which courts applied statutes conferring or denying privilege on the basis of race to "straddlers" whose racial classification was at issue. These historical cases demonstrate the legal creation and reification of racial borders. As seen in these cases, the courts (individually and collectively) wrestled with those aspects of the social creationism of race that eluded legal vocabulary and endeavored to find determinate bases for delineating the borders of racial categories and simultaneously to force those between borders to one side of the line. Law in the end cannot tolerate ambiguity, even as it necessarily trades in that currency. The [*90] aftermath of *Hall* indicates the law's (endless) positivistic pursuit of racial and legal determinacy, as the California legislature sought to patch up the gap that had been exposed in the case and at least preserve the facade of legal rationality through consistency. Thus, the legislature subsequently amended its statute with an additional clause ordering that "no . . . Mongolian or Chinese shall be permitted to give evidence in favor of or against any white person."ⁿ¹⁶

In other jurisdictions, where the boundaries of whiteness were not clearly codified, courts deployed variants of the "status race"ⁿ¹⁷ reasoning illustrated in cases like *Dred Scott* to categorize racially mixed people. In *Dred Scott*, Chief Justice Taney insisted that, because Black people were almost universally considered by whites to be inherently inferior, "Negroes" were clearly diminished in material and legal status.ⁿ¹⁸ An expression of naturalistic commitment, status race mixes presupposition and perception with material conditions, and the former is taken to legitimate the relative standing in regards to the latter, and the latter reinforcing the former.

This concern delineated in and through law, (which we find with *People v. Hall* and *Dred Scott*) to force an increasingly heterogeneous and hybrid set of social arrangements into the unambiguous divides of black and white is extended to voting considerations in *People v. Dean*.ⁿ¹⁹ Here, status race trading on naturalistic presumption figured into the racial classification of a person who was prosecuted for "illegal voting," in violation of a Michigan state constitutional clause that limited the right of voting to "'white male' citizens or inhabitants."ⁿ²⁰ In support of his position that the defendant was not white, the Michigan Attorney General

argued that "persons known to have more or less negro or African blood in their veins, have uniformly been excluded from ordinary social and familiar intercourse with white persons; the former everywhere, in this country, constituting a class by themselves for all such purposes." ⁿ²¹ Naturalist commitment, clearly reserved for black people, was inscribed in and reproduced through the law. Because "the prejudice which has existed in the minds of the white people of this state towards our colored population . . . has extended to all known to have any African blood in their veins," he argued, Michigan's legislation, "wherever it has been prejudicial, on account of color, was so framed as to almost always bring within its purview all such persons. And the same is more or less true of the ruling class throughout the United States." ⁿ²²

The judge concurred with the Attorney General's reasoning: "When the people of Michigan decided to retain their ancient system, and to allow none but white persons to vote, they must have intended to embrace only such as were commonly so called and received." Although "there [*91] may have been persons . . . with whom social prejudices did not seriously affect their intercourse . . . it cannot be maintained that they would have been esteemed white. And it has never been the case that any one having visible tokens of African descent has been regarded by the community generally as a white person." ⁿ²³ People are racially defined, here as elsewhere, on the basis of claimed natural or inherent abilities. In this case, the court questioned those supposedly having to do with the rational capacity to cast a vote--revealed by "traditional" phenotypical characteristics. The *Dean* court disposes of the classification of a person not characteristically falling within the boundaries of the prevailing racial paradigms "black" and "white" by resorting to tautological logic. The court insists that the notion of blacks, in terms of which the pattern of discrimination against people of African descent (of any degree) itself is posited as the basis for locating those "known to have any drop of African blood in their veins," should be restricted to the non white (out)side of the borders circumscribing those racially qualified to vote. ⁿ²⁴

Some jurisdictions approached the problem of racially mixed persons by enacting more elaborately defined racial boundaries. An Alabama case construing racial prerequisites for witnesses contemplated the application of a statute even more extensive in its exclusionary reach. The law prohibited "Negroes, Mulattoes, Indians, and all persons of mixed blood descended from Negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person" from testifying "in any cause, civil or criminal, except for or against each other." ⁿ²⁵ This statute, the court determines, requires a "computation of the generations from ancestors one of whom is purely white; otherwise, it might be that persons of mixed blood, by intermarriage among themselves, might produce descendants, competent to testify against white men, without any admixture of additional white blood in any generation." In the court's calculation, "there must be one white ancestor, of each generation, for three generations, before a competency to testify can be established; and the proposed witnesses, being of the third generation, were incompetent to testify." ⁿ²⁶ The Alabama law, as constructed by the *Dupree* court, naturalistically necessitates a sufficient "whitening out" of a multiracial person's genealogy for witness eligibility. The law serves to map the contours and terrain of the state of whiteness, giving definition to the landscape of racial rule even as it clears the ground for racial assertion.

Numerous states passed exclusion statutes that set guidelines for categorizing racially mixed persons by marking the racial content of their family trees. In 1794, Tennessee enacted a witness exclusion statute that was substantially like the one applied in *Dupree*. ⁿ²⁷ North Carolina's various "third [or fourth] generation inclusive" laws gave rise to many cases in which judges engaged in genealogical mathematics, a tortuous and tortured "rational calculation" of the gradations of racial rule. In a case [*92] involving the indictment of a defendant under a statute prohibiting "free negroes" from possessing arms, the North Carolina Supreme Court upheld a trial judge's jury instruction that insisted upon the "white-out" condition for defining a "free negro" in interpreting the statute at issue: "No person in the fifth generation from a negro ancestor becomes a free white person," the trial judge had instructed, "unless there shall be such a purification of negro blood by the admixture of white blood as will reduce the quantity below the one-sixteenth part." ⁿ²⁸ Under the "generation inclusive" laws, to be designated a person not "of color," racial border straddlers must show a significant threshold bleaching of the stain of color in their lineages. But while genealogical descent would seem to offer the artifice of precise calculability, the ultimate underlying standard often continued to be physical appearance. The less white one looked, the less likely it would be for one to be taken as white, satisfaction of the requisite degrees of genealogical separation notwithstanding.

III. NATURALIZING THE BORDERS OF RACE, NATION, AND STATE

There is an analogy to be drawn here between the experience of racial border straddlers and immigrants. As the socio-legality of borders produces the category of the immigrant, the border-crosser, so the boundaries of racial categorization produce the in-between status of the racial anomaly, of racial-passer or boundary-crosser. As immigrants are pressed for socio-economic, cultural, political, and familial reasons to leave familiar places rendered estranged, so those classified as black (and this invariably is the direction) find themselves lured for analogous reasons into making the estranged places of whiteness familiar. In each instance, boundaries instantaneously fashion the outside and the inside, the alien and the citizen, and the social conditions of loathing and lure, exclusion and inclusion, of the one morphing into the other.

Legal contests over the citizenship eligibility of people in between racial categories demonstrate the concern with maintaining the possessive investments in the privileges of "white space" within U.S. borders. A series of naturalization cases between 1878 and 1944 bear out the judiciary's struggle over racial admission and belonging, and so explicitly over the scope and character of whiteness. The holdings in these cases illustrate as they constitute conjunctions of the borders of race, nation and state. The courts found themselves torn between preserving the conceit that in 1790 "the United States were a more or less homogeneous people who . . . had come from what has been termed 'Northern Europe'" ⁿ²⁹ and the interpretation of laws obviously at odds with rapidly expanding heterogeneity. That

national admittance is filtered in the name of naturalization already predisposes the process to racially fashioned principles. The naturalization cases grapple openly and tortuously with whom are to count as white, and therefore naturalizable as American citizens. The language of exclusion is explicitly and for the most part unapologetically racial, the significance heightened against the background of U.S. imperial expansionism at the time.

[*93] In 1790, Congress had delimited citizenship to "free white men."ⁿ³⁰ This was extended in the wake of the post--Civil War amendments in 1870 to "aliens of African nativity and to persons of African descent."ⁿ³¹ The prevailing deliberations in the wake of this amendment and the increasing heterogeneity effected by rapidly expanding immigrant populations thus concerned whether those in the borderlands of whiteness outside the western European frame should count as white. Court after court pained over congressional intent in its naturalization restrictions to free white men, and usually did so explicitly, in the context of "scientific" theories of race. Significantly, despite the 1870 amendment to the racial requirements for naturalization, there is almost no troubling over who might qualify as African or of African descent. There is but one reported contentious court claim to naturalization on the basis of invoking African heritage, and no court appeals by the immigration and naturalization apparatuses of the state that an already naturalized citizen should have their naturalization revoked because of a misrepresented claim to African descent. Africans or those of African descent apparently could be assumed self-evidently--"naturally"--classifiable as such. The comparatively overwhelming number of cases contesting the borders of whiteness also attests to the value vested in "whiteness as property."ⁿ³²

A federal district court troubled briefly in 1938 over whether to grant naturalization to a man "half African and half Indian by his mother and fully Indian by his father" on the basis of his being "of African descent." Transposing naturalization case precedents for determining whiteness to the case at hand, the court denied the petition, reasoning that the applicant would not be granted citizenship if he were one-quarter white and three-quarters Indian. Hinting at its discomfort with the idea of affording persons of African descent any more privileges than white persons, the court explained that it would "seem entirely incongruous to reason that the words 'African descent' should be construed to be less exacting in denoting eligibility for naturalization, than the term 'white persons.'"ⁿ³³

While the 1870 amendment resulted in increased Afro-Caribbean naturalization, the courts nevertheless continued to reveal and reify the degraded status of people of African descent. "To refuse naturalization to an educated Japanese Christian clergyman and accord it to a venerated savage of African descent from the banks of the Congo would appear illogical . . . yet the courts of the United States have held the former inadmissible and the statute accords admission to the latter."ⁿ³⁴ The artifice of homogeneity was refashioned first and foremost through the reinvention of whiteness.

As litigated contestations over the contours of whiteness unfolded, courts determined that certain groups were clearly not white; these included Chinese, Hawaiians, Japanese, Filipinos and Koreans.ⁿ³⁵ Courts [*94] also deemed not white persons with white and non-white ancestors. A federal district court in Pennsylvania ruled that a petitioner from the Philippines who was "ethnologically speaking, one-fourth of the white or Caucasian race and three-fourths of the brown or Malay race" was not white.ⁿ³⁶ Similarly, another court placed a person with a German father and Japanese mother outside the bounds of whiteness, stating that while "in the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity," with regard to "such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood."ⁿ³⁷

As these cases suggest, courts adjudicating the racial status of naturalization applicants of mixed ancestry generally adopted a "preponderance of whiteness" standard to determine if a person was white. A federal court in Oregon, in deciding that a person of Indian and white parentage was not white, expressly voiced this test, noting that Ohio courts had held that "where the colored blood was equal to or preponderated over the white blood, the person was not white."ⁿ³⁸ Another court advocated a strict "majority rule" for whiteness/racial determination, insisting that "a person, one-half white and one-half of some other race, belongs to neither of those races, but is literally a half-breed."ⁿ³⁹ The courts' "preponderantly white" standard and their reluctance to accord citizenship to border-straddling applicants who were descendants of both whites and those already definitively marked as non-white speaks to the self-conscious concern with racial purity and homogeneity involved in the judicial reconstitution of the borders of whiteness and nation in the naturalization cases.

At the same time, there are court rulings that render this teleological homogeneity more troubled and ambiguous. In 1910 a federal court in Massachusetts, acknowledging the dramatic extent of race mixture, refused to allow that there is any such thing as "a European or white race" or indeed any "Asiatic or yellow race which includes . . . all the people of Asia."ⁿ⁴⁰ To its credit, the court refused to "deny citizenship by reason of their color to aliens [sic]," though it limited the refusal to those "hitherto granted it."ⁿ⁴¹ Elsewhere in its decision the court nevertheless affirmed the definition of whiteness by negation, characterizing as white any person "not otherwise classified as . . . Africans, Indians, Chinese, and Japanese." Whites were left "as a catch-all word to include everybody else."ⁿ⁴² Thus, according to the evidentiary authority of the most prominent anthropologists [*95] of the day,ⁿ⁴³ Armenians were to count among whites as were Persians whether living in Persia or having long migrated to India.ⁿ⁴⁴

The naturalization quests of other groups caused even more judicial equivocation. A federal district court in 1909 concluded that Asian Indians were probably not white though it allowed an Asian Indian to be admitted to citizenship in the absence of an authoritative pronouncement on the matter (and in the presence of the government's willingness to appeal its order permitting naturalization). The

court noted that there were "serious objections to accepting the words 'white persons' as including all branches of the great race or family known to ethnologists as the Aryan, Indo-European, or Caucasian. To do so will bring in, not only the Parsees . . . but also Afghans, Hindoos, Arabs, and Berbers." ⁿ⁴⁵ Other courts in the ensuing decade ruled that Asian Indians were white. ⁿ⁴⁶ The United States Supreme Court foreclosed this line of precedents, ruling in 1923 that a Hindu, even one of "high caste" and "of the Caucasian race," is not a white person within the meaning of the naturalization laws. ⁿ⁴⁷

Syrians were the courts' ultimate poltergeist. Deemed white by federal district courts in Massachusetts and Oregon in 1910, ⁿ⁴⁸ Syrians saw their classification altered three years later by a federal district court in South Carolina. ⁿ⁴⁹ To explicitly deny citizenship to Syrians, the court opted for a construction of the statute that would exclude from naturalization "all inhabitants of Asia, Australia, the South Seas, the Malaysian Islands and territories, and of South America, who are not of European, or mixed European and African descent," noting that "what is the race or color of the modern inhabitant of Syria it is impossible to say. No geographical area of the world has been more mixed since history began." ⁿ⁵⁰ The court decided upon a "geographical interpretation that 'free white persons' meant persons of European habitancy and descent," which it believed would facilitate the judicial application of the statute in light of what it considered to be a problem posed by the porousness of Syrian borders and the pouring of immigrants across them, that yielded this racially "mixed" composition of Syria.

The court conjectured that Syria may have been "originally . . . of Hittite or non-Semitic races," then "under Egyptian domination," followed by "possession . . . possibly almost exclusively, by the Semitic peoples," which then became "overlaid with immigration from European races, . . . another Semitic conquest in the shape of the Arabian Mahometan eruption, . . . the Mongolian and Turkish conquests, and through it all with an infusion of blood by slaves brought from any accessible part of the [*96] world." ⁿ⁵¹ Presenting hypothetical racial scenarios, the court mused and queried, "one Syrian may be of pure or almost pure Jewish, Turkish, or Greek blood, and another the pure-blooded descendant of an Egyptian, an Abyssinian, or a Sudanese. How is the court to decide?" ⁿ⁵² The court thus transposed an implicit concern about racial heterogeneity within U.S. nation-state borders, (manifested in the exclusion of Syrians from U.S. citizenship) by explicitly voicing a concern over heterogeneity within Syrian borders. As it tended to its concern over racial boundary transgression, the court was quite confident in the determinacy and neutrality of its statutory construction, stating that the "geographical interpretation" was "at least capable of uniform application, and gives to the statute a construction that avoids the uncertainties of shades of color and invidious discriminations as to the race of individuals." ⁿ⁵³ The boundaries of color give way to already configured geographical boundaries to save the threatened cartography of race. In doing so, the law silently affirms that race is a key to the mapping of modern global space, even as it is reified by the cartographical presumptions. Thus the tautology of racial law is maintained.

In a 1914 case involving another Syrian applicant for naturalization, the same federal district court in South Carolina again declared Syrians not white, and affirmed its opinion on rehearing. ⁿ⁵⁴ It nevertheless encouraged the applicants to appeal the matter to the Supreme Court to "[settle] . . . this most vexed and difficult question." ⁿ⁵⁵ The following year, the Fourth Circuit Court of Appeals overturned the district court rulings, noting that many courts had given the term "white persons" in the statute a "more liberal construction," to include "Syrians, Armenians, and Parsees," and that accordingly many Syrians had been "naturalized without question." ⁿ⁵⁶

Found in the complex of these examples, then, are tensions over racial definition within and between state agencies. The Justice Department, and in some cases Congress, are occasionally at odds with the judiciary over the scope of whiteness, and at times even over its fact. These cases reveal a struggle internalized within the courts over the face of America, over the boundaries of belonging and the homogeneity of the national constitution, of who could claim a home and claim to be at home, and of how to resolve the "inbetweenness" inevitably arising out of these tensions. They highlight the ambiguities and ambivalences over the definition of whiteness cracking at the smoothed surface of national commitment just as racial belonging and excludability were taken as givens of national order. Thus, the renegotiation of whiteness recreates no straight-forward homogeneity but a troubled hierarchy of internally differentiated and differentially privileged "white races," and reinforces the lived experiences of those whom Barrett and Roediger properly characterize as "inbetween [*97] peoples." ⁿ⁵⁷ Yet, contrary to Anthony Marx, these cases also reveal, that even though racial boundaries in the United States were most clearly articulated in the dualism of black and white, racial rule in the United States, especially from the mid-nineteenth century on, was never simply binary. ⁿ⁵⁸

Barrett and Roediger trace the logic of "inbetweenness" in terms of the lived experiences of the new European immigrant working classes, and in particular, their affinity with some of the common grievances suffered by people of African descent alongside their manufactured distance from blackness. ⁿ⁵⁹ By contrast, the logic of "inbetweenness" should be considered from the standpoint of the state, and in particular in terms of the negotiation of sociolegality. Here, "inbetweenness" is at once a necessary product of categorical rigidity and fixity, of the non-isomorphic equation between categories, and the uncontainable heterogeneities of the populations so categorized.

In the historical racial exclusion cases, there was no coherent "black-letter" law on how to categorize those who were cast(e) between racial borders, as the inconsistencies within and between jurisdictions construing "white" and "black" suggest. Nevertheless, most courts reified racial borders authoritatively and boxed straddlers into one category. These racial prerequisite cases of the nineteenth and early twentieth centuries feature sketches of the legal positivist notion that "the law is a complete and closed system, and

that judges and juries are mere automata to record its will." ⁿ⁶⁰ Much in the way that legal positivism attempts to suture(s) the indeterminacies in law, the courts and legislatures attempted to reify racial categories, proclaiming the certainty of categorical racial boundaries in the face of their ambiguities. The law is instrumental in fashioning the racial categories and manifesting the ambiguities necessarily ensuing. The concern in denying the ambiguities--the lived experiences between the categories--reinforces law's forced reification of the categories. The historical racial exclusion cases illustrate the law's inflection with positivism's embrace of the epistemological commitments of science; courts often relied upon the racial classification systems established by the "sciences" of the day to dispose of questions about the racial identity of border straddlers. Much like craniometrists and others who sought to legitimate naturalist claims with empirical, "scientific" proof veiled the slip-pages in their methodologies ⁿ⁶¹ that served their racist commitments, courts, drawing upon the authority of "science," inscribed and pronounced naturalism-driven racial demarcations as the authority of positive law.

[*98] The simple "fixed" constant in these cases is their insistence that being deemed "white" meant being included and privileged, while those fashioned as "non-white" were excluded and disprivileged. As Derrick Bell notes, legal realism is intimately wedded to racial realism. ⁿ⁶² In the end, the uneven and unpatterned treatment of racial border straddlers in the courts' application of exclusion laws evidences the power of judicial (re)definition in the business of recreating and regulating the contours of whiteness, of continuing to massage the boundaries of national belonging.

IV. FROM DENATURALIZING RACE TO HISTORICIZING RACIAL INEQUALITY

The historical immaturity claim took hold, increasingly and increasingly assertively, as a counter-voice to naturalist racial presumptions (the inherent inferiority claim) from roughly the later nineteenth century on. For a century or so, these two paradigms of racial rule were in more or less sharp and explicit contest with each other, both within and between racially conceived and ordered regimes. By the close of the nineteenth century, in the wake of slavery's formal demise, naturalism found itself increasingly on the defensive. The intensifying migrations and heterogeneous urban arrangements were accompanied by an emergent shift from biologically driven to culturalist conceptions of race. As a set of conceptual commitment(s), naturalism was thus challenged explicitly to defend and rationalize its claims in ways it had not hitherto faced. By the mid-twentieth century, naturalism had shifted from the given of racial rule to the anomaly, from the safely presumed to the protested, and from the standard of social sophistication to the vestige of vulgarity.

Racial historicism is a mediation between the extreme, classical expression of racist embrace in naturalism and the universalism in epistemology, morality and legality that is considered a central mark and commitment of modernity. ⁿ⁶³ Historicism makes it possible for proponents of modernity to hold onto the privileges of state and civil society bestowed by racial configuration without abandoning the expressed commitment to universalism. Law and order become key components of this mediation: those social arrangements or states considered racially less developed are exhorted to modernize precisely by adopting the mandates of a legality considered to be rationally configured. Race at once serves as premise ("less developed societies"), administrative medium (classification schemes), target of state intervention ("racial progress"), and teleological object of categorical evaporation (legally fashioned colorblindness or racelessness).

As the transition from naturalism to historicism in racial thinking also permeated legal discourse, court challenges to racially exclusionary laws mounted following Reconstruction. By the mid-twentieth century, the law had expressly marked naturalism as a remnant of the unrefined. The move from naturalism to historicism in law figures in the discursive tensions in *Perez v. Sharp*, a 1948 case deciding the fate of a nineteenth-century [*99] anti-miscegenation statute. The California statute at issue provided in part that "all marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." ⁿ⁶⁴ The California Supreme Court held that the statute was too vague to be an enforceable regulation of the "fundamental right" to marry and violated the Equal Protection Clause by restricting the right to marry based on race alone. An early precursor of *Loving v. Virginia*, the *Perez* decision was the first case in which a United States jurisdiction declared an anti-miscegenation statute unconstitutional. ⁿ⁶⁵ It marked a significant moment in the move towards the end of *de jure* racial segregation.

Anti-miscegenation statutes were centrally connected with attempts to keep those considered racially uncivilized out of white space. The *Perez* court notes that California's statute, "like most miscegenation statutes . . . prohibits marriages only between 'white persons' and members of certain other so-called races." ⁿ⁶⁶ The moral panic over miscegenation was driven by the disturbed imaginary of mixed sex offspring sired by the moral degeneracy of non-white bodies consorting with white. Increasingly such panic was expressed as an anxiety regarding mixed offspring, and the resultant make-up, look, peopling of and requisite demographic power over public space.

The respondent in *Perez*, the Los Angeles County Clerk, voiced this fear of the racially mixed and defended California's anti-miscegenation statute with a naturalist argument that "the amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race." ⁿ⁶⁷

The *Perez* court's treatment of the blatant naturalist claims posed by the County Clerk exemplified the conflict between naturalism and historicism, and the law's shift towards the latter. The respondent contended that the anti-miscegenation statute "prevents the

Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." ⁿ⁶⁸ The majority opinion rejects this position, observing that "the categorical statement that non-Caucasians are inherently inferior is without scientific proof." ⁿ⁶⁹ With respect to the respondent's assertion regarding the mental inferiority of "non-Caucasians," the court notes, "There is no scientific proof that one race is superior to another in native ability Although scientists do not discount the influence of heredity on the ability to score highly on mental tests, there is no certain correlation between race and intelligence." ⁿ⁷⁰

The court thus dismisses, though somewhat ambivalently, the inherent inferiority of non-whites proffered in the respondent's arguments. In the footnote following its discussion, however, the court quotes the work [*100] of economist/sociologist Gunnar Myrdal, declaring that "the ordinary white American's firm conviction that there are fundamental psychic differences between Negroes and whites" is not based entirely upon "an error in observation, for most studies of intelligence show that the average Negro in the sample, if judged by performance on the test, is inferior to the average white person in the sample." Rather, the "ordinary white American" has erred "in inferring that observed differences were *innate* and a *part of 'nature.'*" He has not been able to discern the influence of gross environmental differences, much less the influence of '*more subtle life experiences.*'" ⁿ⁷¹ Although the *Perez* majority repudiates the respondent's naturalist insistence upon the inferiority of blacks and other non-whites, it resorts to covert, footnoted claims that imply cultural, experiential bases for the "differences" between whites and racial others.

One of the *Perez* concurrences contains related historicist notions of the "transience" of the inferiority of blacks even as it emphatically renounces inherent racial inequality. Laced with language trumpeting the slogan that "all men are created equal," the concurring opinion juxtaposes its references to the Declaration of Independence with a quote from Thomas Jefferson expressing reservations about his own naturalist leanings: "I have supposed the black man, in his present state, might not be in body and mind equal to the white man, but it would be hazardous to affirm that, equally cultivated for a few generations, he would not become so." ⁿ⁷² Even the dissent evinces the legal retreat from naturalism. The dissenting justice, who would uphold the statute, bases his decision largely on the long history of laws prohibiting miscegenation and their judicial validations, and cloaks his naturalist references with a shroud of legal precedent. ⁿ⁷³

The *Perez* majority also bases its decision on the difficulty of applying the miscegenation statute to border straddlers, noting that even if a state could restrict the right to marry solely on the basis of race, the California Civil Code provisions are unconstitutionally vague because "the Legislature has made no provision for applying the statute to persons of mixed ancestry." ⁿ⁷⁴ While the "apparent purpose of the statute is to discourage the birth of children of mixed ancestry," this objective, the court stresses, "cannot be accomplished without taking into consideration marriages of persons of mixed ancestry. A statute regulating fundamental rights is clearly unconstitutional if it cannot be reasonably applied to accomplish its purpose." ⁿ⁷⁵ Consulting *Black's Law Dictionary*, the court notes the lack of uniformity between jurisdictions in the definitions of the terms "Negro" and "mulatto" and the uncertainty that "surrounds the meaning of the terms 'white persons,' 'Mongolians,' and 'members of the Malay race.'" ⁿ⁷⁶ The court asks, "If the classification of a person of mixed ancestry depends upon a given proportion of Mongolians or Malaysians among his ancestors, how can this court, without clearly invading the province of [*101] the Legislature, determine what that decisive proportion is?" ⁿ⁷⁷ Invoking a racial corollary of the "political question doctrine," the court suggests that setting the boundaries of racial categories is more appropriately the domain of the legislature than of the courts. The vagueness rationale of the *Perez* decision indicates the court's commitment to racial-legal determinacy and the authoritativeness of law as it participates in the law's transition from naturalism to historicism.

This shift from racial naturalism to historicism in and by the law exacerbates the tensions over racial definition. On the one hand, American Indians, as noted earlier, have long been referenced by the law in historicist terms. This has continued to be the case as insistence upon explicit racial commitments is reproduced regarding federal Indian law. By contrast, recourse to racelessness has become the standard more generally. The analysis below discusses each of these implications.

V. "ILLEGAL ENTRY": RACIAL JURISDICTION IN FEDERAL INDIAN LAW

Although the contemporary commitment to colorblindness in U.S. law generally wishes out of court those historically placed between racial borders, contemporary federal and state courts still grapple openly in Indian law with questions of how to categorize racially mixed persons. These cases arise in several areas of Indian law, and the criteria used to designate an individual as Indian or non-Indian vary with the legal context. Criminal jurisdiction cases (disputes regarding whether jurisdiction over crimes committed in "Indian country" ⁿ⁷⁸ belongs to tribal, federal or state courts) constitute one context in which contemporary courts still expressly contemplate racial borders. Judicial and congressional encroachments into tribal sovereignty made the race of the defendant and/or victim relevant to jurisdiction over crimes occurring within tribal territorial borders. For example, the Major Crimes Act of 1885 placed jurisdiction over several enumerated "major" crimes committed by an Indian in "Indian country" under federal jurisdiction. ⁿ⁷⁹ Nearly a century later, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that tribes did not have criminal jurisdiction over non-Indians. The court invoked Indian nations' "domestic dependent" status and divined an "implicit" divestiture of jurisdiction on the basis of an inaccurate review of congressional legislation, treaties and other legal history. ⁿ⁸⁰ A complex of statutory and case law has thus rendered jurisdiction over crimes committed in Indian country "racially contingent," forcing courts to determine whether parties in criminal cases are Indian.

Contemporary state and federal court deliberations over racial borders in determining who is an Indian for purposes of criminal jurisdiction are reminiscent of historical judicial ponderings over racial classification. A 1982 Oklahoma decision established a two-pronged test for determining whether a person is "an Indian under federal law," stating: "Initially, it must appear that he has a significant percentage of Indian blood. Secondly, [*102] the appellant must be recognized as an Indian either by the federal government or by some tribe or society of Indians." ⁿ⁸¹ The court found that although the first prong of the test was satisfied by testimony that the appellant "was slightly less than one-quarter Cherokee Indian," in the absence of "any evidence tending to show that the appellant was recognized as an Indian," he was not an Indian under the Major Crimes Act. ⁿ⁸² Applying the *Goforth* test, a Utah court indicated that "five-sixteenths Indian blood clearly qualifies as a 'significant percentage'" to classify a person as an Indian for purposes of criminal jurisdiction. ⁿ⁸³ A 1990 Montana Supreme Court decision, citing a similar two-part test for Indianness established by an 1846 decision, ⁿ⁸⁴ ludicrously determined that an individual who "possesses 165/512 of Indian blood" met the blood quantum requirement of its standard. It held that the person in question was nevertheless not an Indian because "overall, the record reveals an integration into non-Indian society, and an absence of cultural identity as an Indian." ⁿ⁸⁵

In the criminal jurisdiction context of Indian law the pragmatics of racial borders determine geopolitical borders. Although the racial prerequisite may cut in favor of or against individual parties in criminal cases, depending upon the circumstances, the racial contingency of jurisdiction in Indian law detrimentally affects the self-determination of Indian nations since it departs from a territorial conception of jurisdiction. Jurisdictional analyses also reveal the U.S. courts' fear of the perceived racial otherness of Indians, which lurks behind the courts' reluctance to subject non-Indians to "external and unknown" ⁿ⁸⁶ native justice systems. Additionally, the state of criminal jurisdiction in Indian law in the wake of *Oliphant* reflects an inversion of the historical racial focus on the exteriorizing of race and racial others. Divesting Indian nations of jurisdiction over non-Indians enables non-Indians to transgress the boundaries of Indian lands without regard for the laws of Indian nations.

The consequences of this divestiture surfaced in the *Oliphant* Court's discussion of *Ex Parte Crow Dog*, ⁿ⁸⁷ an anomalous 1883 Indian law decision preceding (and precipitating) the Major Crimes Act that declared a crime committed by an Indian against an Indian to be exclusively within tribal jurisdiction. Suggesting that the *Crow Dog* Court "was faced with almost the inverse of the issue before us here," Justice Rehnquist's majority opinion in *Oliphant* observes that in the 1883 case, the United States sought to extend U.S. law

[*103] by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. ⁿ⁸⁸

These considerations, Rehnquist asserts, "applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of [the] contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure." ⁿ⁸⁹

In accordance with Rehnquist's reasoning, the "racial difference" of Indians is a justification for stripping tribes of criminal jurisdiction. The inroads into Indian self-determination carved by federal Indian law are the persistent effects of a racially inscribed colonialism. Under the *Oliphant* rule, non-Indians (most often whites), like the colonial settlers before them who were thought destined to manifest themselves in Indian lands, are allowed to violate the social and territorial borders of Indian nations with impunity. In contrast to the racial exclusion cases, in the Indian law cases, the insecurities of ambiguity are resolved not by hardening the distinction as much as by extending the privilege and power of whiteness. Indeed, the *Oliphant* Court states that although "we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians," these considerations "have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and punish non-Indians." ⁿ⁹⁰ The criminal jurisdiction cases in Indian law illustrate the conjunction of racial and geopolitical borders. The enduring significance of this relationship is evinced by the struggles of today's courts to delineate who is or is not Indian. U.S. courts resort to the inherent ambiguities in racial definition to restrict the scope of Indian sovereignty. While insisting on racelessness in instances already under its jurisdiction, the legal branches are quite comfortable to invoke race to extend their jurisdiction forcefully into spaces from which U.S. state power would otherwise be excluded.

VI. RACIAL HISTORICISM AND RACELESS LAW

If race is clearly invoked to serve pragmatic political purposes in federal Indian law, and to make accessible what otherwise would remain the "outside" of law's imperial reach, contemporary constitutional law would have racial reference restricted to the embarrassments of law's past. The latter half of the twentieth century witnessed the swell of liberal legalism's [*104] commitment to formal equality, universalism and uniformity, which was linked to the recession of naturalism and the rise of historicism. Even as naturalism fell into disrepute, the law did not have to depend on bare naturalist claims, but could preserve racial orderings through the

assertion of its own supreme authority. Legal positivism emerged historically out of blending state assertion with the epistemological commitments of scientific positivism.ⁿ⁹¹ In large part, it is through the authoritative influence of legal positivism that the law structures the bridge from racial naturalism to historicism.

Law and legal consciousness assist in proliferating state control and discipline across the landscape and population in disseminating the marks and effects of the state and state reason, its modes of comprehension and logic, and in contrasting state civility with primitivist anarchy. Law fashions state identity and order over increasingly diffuse regions, people(s), and activities. People are united in the face of their apparent anonymity by law. The diffusion of legal consciousness through the population promote(s) even as it defines and divides those it unites in contradistinction to those falling outside of the defining criteria. Liberal legality's imposed uniformity, seeming neutrality, and supposed impartiality help to hide--to paper over--these deep contrasts and divisions across space, place, people, and classes. Law accordingly promotes as it serves the "national fantasy" of homogeneity.ⁿ⁹²

Despite its idealized claims to fairness, objectivity, impartiality, and so integrity, there is something inherently alienating and dehumanizing about (liberal) legality (a point driven home by the work on legal consciousness and critical legal studies). In its imperious insistence upon universality, modern (liberal) law opposes particularity and proceeds from a stance of anonymity. As Kant emphasized, a person is moral not in terms of any specificity but in virtue of exemplifying the abstract moral law. Here law's efficiency is a function of its abstraction, more specifically, the appeal of its capacity to be blind to particular conditions or status. Therefore, there is a subtle sense in which liberal legality is indiscriminate, deeply committed both to a specific ordering of social relations and to the denial of such commitment. Liberal law's objectivity and impartiality are thus achieved by the distancing technology, and ultimately by this (moral) blindness, central to its mode of applicability.

In modern constitutional terms, the law is committed to the formal equality of treating all alike regardless of actual social conditions. In turn, this abstract(ed) commitment to formal equality entails the colorblind constitutionalism of racelessness as the teleological narrative of modernization and racial progress. Racelessness is the logical implication of racial historicism, the perfect blending of modernist rationality and the maintenance of de facto racial domination. All in the name of law.

Against the background of the shift from biology to culture in racial articulation and historicism's challenge to naturalism, the modern state in the twentieth century promotes its claims to modernization through its [*105] insistence upon racelessness. These notions render invisible the racial sinews of the body politic as well as the modes of rule and regulation. Racelessness represents state rationality regarding race and is articulated and constituted in large part by and through law.

The shift to colorblindness in U.S. law has entailed a disavowal of racial borders, their historical legacies and exclusionary roots. As such, contemporary cases discussing explicitly how to figure persons who are in between racial borders are extremely rare. As contemporary courts tout the liberal commitment to the "irrelevance" of race,ⁿ⁹³ turn a blind eye to racial borders and silence any and all references to them, the status of racial border straddlers becomes a virtually "moot" question.

As Reva Siegel has noted, the legal system enforces social stratification through multiple and fluid means, and "status-enforcing state action evolves in form as it is contested."ⁿ⁹⁴ The expressed commitment to racelessness was really about the re-shaping of the state in the face of civil rights, integrationist, and demographic challenges to privilege and power. Justice Harlan, himself a former slave owner, had already recognized the challenge colorblindness posed as the appropriate reaction in his seminal vocalization of the concept in 1896:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.ⁿ⁹⁵

Thus, having established through racial governance and racist exclusion the indomitable superiority of whites--in prestige, achievements, education, wealth, and power--not as a natural phenomenon but as historical outcome, the best way to maintain it, as Harlan insisted, is to treat those de facto *unlike* as de jure *alike*.ⁿ⁹⁶ Under the logic of legal segregation separate but (in law) equal was the veiling designation for separate and (in fact) unequal, and formal equality's blind uniformity was the formaldehyde of actual inequality. Harlan's historicism makes clear that the reproduction of white supremacy requires labor, a fact obscured of course by naturalists. One naturalist, Robert Nozick, argues that illegitimate inequalities and historical injustices in acquisition or transfer are to be legitimized by laundering them through the white wash with the detergent of colorblindness.ⁿ⁹⁷ Colorblindness enables as acceptable and as a principle of historical justice the perpetuation of the inequities already established. Harlan outstripped his peers by more than half a century in recognizing that colorblindness would maintain--should maintain, as he [*106] conceived it--white supremacy, as well as in being able to openly admit to it.ⁿ⁹⁸

After Harlan's dissent in *Plessy*, several decades passed before U.S. courts began appealing to colorblindness in an ahistorical, race neutral sense. Such a deployment of the concept resurfaces in Supreme Court jurisprudence in another dissent nearly a century after

Plessy. In 1980, the Court upheld, against a challenge alleging violations of equal protection and federal anti-discrimination statutes, a provision of the Public Works Employment Act requiring a "set-aside" of federal funds for minority businesses on local public works projects in *Fullilove v. Klutznick*.ⁿ⁹⁹

The dissent in *Fullilove* by Justice Stewart, joined by Justice Rehnquist, opens with an echo of Harlan's dissent: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . The law regards man as man, and takes no account of his surroundings or of his color."ⁿ¹⁰⁰ Harlan's colleagues "disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a 'reasonable' exercise of legislative power and had been 'enacted in good faith for the promotion [of] the public good.'" The *Fullilove* majority, according to Justice Stewart, "upholds a statute that accords a preference to citizens who are 'Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts,' for much the same reasons. I think today's decision is wrong for the same reason that *Plessy v. Ferguson* was wrong."ⁿ¹⁰¹ Acknowledging himself as a dissident descendant of Harlan, Stewart deems equivalent the *Fullilove* and *Plessy* majorities. He equates the minority set-aside provision with *Plessy* segregation: "the equal protection standard of the Constitution has one clear and central meaning--it absolutely prohibits invidious discrimination by government . . . Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."ⁿ¹⁰² As Gotanda notes in his analysis of formal race, colorblindness views race-conscious policies as completely "disconnected" from their social and historical contexts.ⁿ¹⁰³ Stewart's colorblind severance contrasts with the views expressed by Justice Marshall's concurrence in *Fullilove*: "By upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric."ⁿ¹⁰⁴ Marshall's position recognizes not only the historical background of the provision at issue, but also the potential of an abstract formal equality to cement racial exclusion.

Justice Stevens's dissent in *Fullilove* also resorts to a formal-race conception, which he complements with a criticism of the "vagueness" of the [*107] set-aside provision's delineations of racial borders reminiscent of the majority's rationale in *Perez v. Sharp*. Insisting that the guidelines are unclear for determining who is eligible for the set-aside, Stevens remarks sarcastically that "if the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reich's Citizenship Law," and proceeds to cite a Nazi law defining who is a Jew.ⁿ¹⁰⁵ Stevens's oblique interposition of Reich racial classifications thus insidiously insinuates an equation between Nazi rule and affirmative action.

By 1989, the jurisprudential entrenchment of colorblindness becomes apparent, formal-race becomes common sense, the *Fullilove* dissenters' position becomes the majority opinion, and Justice Marshall's notion of historical-race the dissenting interpretation in *City of Richmond v. J.A. Croson Co.*ⁿ¹⁰⁶ Under the *Croson* majority's approach, all governmental uses of racial classification trigger strict scrutiny, and through the myopic lens of raceless colorblindness, the connection of the historical configurations of racial boundaries and their legacy to contemporary racial formations is disavowed. Indeed, this abstracted excision of race from its history enabled the Supreme Court, in its recent formal race review of the Fifteenth Amendment in *Rice v. Cayetano*, to equate a policy requiring native Hawaiian ancestry as a condition of eligibility for voting in Office of Hawaiian Affairs trustee elections with "grandfather clauses" and other "manipulative devices and practices" used to disenfranchise black voters in the wake of Reconstruction.ⁿ¹⁰⁷

The immediate effects of racelessness's referential repression are threefold. First, no longer racially addressable, racial inequities and inequalities are beyond the boundaries of racial redress. Second, racist inequity is magically transformed from its historical manifestations and effects perpetrated for the most part by whites against those who are not into the "reverse discrimination" against those whites supposedly suffering the exclusionary effects of "preferential treatment" for those not white.ⁿ¹⁰⁸ And third, the assumption of the raceless state identifies all race-consciousness as extreme. As seen in the Supreme Court's contemporary colorblind jurisprudence, formal-racial algebra equates by implication (or in some cases even by direct reference), the likes of white terror groups such as the Ku Klux Klan with resistant black nationalist groups such as the Black Panthers or SNCC under Stokely Carmichael, White Aryan Resistance with Negritude, the Third Reich with Pan Africanism.ⁿ¹⁰⁹

In addition to making it virtually impossible to connect the racial configurations of past and present, the claimed commitment to colorblindness has effected the relative silencing of public analysis or serious discussion of everyday racism.ⁿ¹¹⁰ And each of these effects has displaced the tensions of contemporary racially charged relations to the relative invisibility [*108] of private spheres, seemingly out of reach of public policy intervention.

Relatedly, this commitment to colorblindness, as to racelessness generally, leads not to the demise of racist exclusion but to its "privatization." In excising racial reference, social commitments shift, as Siegel notes, from redressing past and present racist exclusion to protecting the expression of private racial preference in the "racial marketplace"ⁿ¹¹¹ from state restriction. It is revealing to conceive of race in this context as constituting a "political religion,"ⁿ¹¹² a civic investment to create and promote a "political community" by the state in its absence. Here "whites," "blacks" and other "non-whites" may be constituted as "communities," civic fraternities in the face of and giving face to an otherwise altogether anonymous and so threatened project of nation-building or national reproduction by the state. In so far as race can be conceived as a civic religion, it is to be treated in a liberal democracy as if a religion. "What we need," insists Dinesh D'Souza, "is a separation of race and state."ⁿ¹¹³ So, if race is a religion or religion-like, then the state cannot be seen to express

itself in favor of one rather than another in the public realm. But nor can the state, given the equal protection requirement of state action, interfere with *private* racial expression, much as it is precluded from unduly burdening religious exercise. The colorblind consignment of race to the private sphere thus accords racist discrimination state protection.

Colorblindness and other forms of racelessness legally mapped and massaged accordingly sew the deep legacy of racial differentiation and distinction, material racial and social positions into the social structures of society as the baseline, the given of social arrangements, the racial status quo as natural social order. Naturalism formalistically removed but its legacy, its structural implications, firmly reproduced through historical enactment. Racelessness is an attempt to go beyond--without (fully) coming to terms with--racial histories and their accompanying racist inequities and iniquities; to mediate the racially classed distinctions to which those histories have given rise without reference to the racial terms of those distinctions; to transform, via the negating dialectic of denial and ignoring, racially marked social orders into racially erased ones.

Colorblindness, like other forms of racelessness, becomes the public naming of racial reference, a way of speaking about racial conditions in the face of their unnameability or formal unspeakability. Thus, state agencies are restricted from addressing, let alone redressing, the effects of racial discrimination. Colorblindness is literally concerned with being blind to color. In the historical ambiguity of the failure of whiteness to recognize itself as a racial color, this is to imply that colorblindness concerns itself exclusively with being blind to *people* of color. And through this blindness whiteness veils from itself any self-recognition in the traces of its ghostly power. Whiteness finds itself in colorblindness strung out on the gallows of Hegel's notorious dilemma of recognition. As a racial presumption, [*109] colorblindness continues to conjure people of color as a problem in virtue of their being of color, in so far as they are not white. As whiteness studies has stressed centrally, whiteness remains unquestioned as the arbiter of value, the norm of acceptability, quality, and standard of merit. Color is considered a bruise, a blot on social purity, an unfortunate fact of life to be ignored, seen past yet still seen even if in blurred outline. Raced racelessness thus reproduces the contours of racial delineation. By reaffirming the common spaces of inbetweenness as places of racial distinction, and therefore, insisting that hybridization give way once more to (a new) segregation, ⁿ¹¹⁴ raced racelessness is trading the insecurities of racial ambiguity for the false security of privatized racial distinction and managed apartness.

CONCLUSION

In its sanctioning capacity, then, law both opens up and closes down forms of representation, spaces of accommodation and transformation, possibilities of expression, truth claims, and legitimation. While the law closes off areas of contestation (to state power and its expression, to the privatized expressions of civil society, indeed, to thought itself), it simultaneously opens up areas of reform or subversion in the face of repression, of counter-formation in the face of social reification, of counter-hegemony in the face of hegemonic totalization. It thus offers a venue, conceptual and material, in and around which mobilization might take place to effect the representation of interests, the legitimation of social standing, extensions of rights (as interest, claim, liberty, and power) to social resources. However, in offering such possibilities the law shapes and mediates not just public meaning but the scope of economic expression, cultural signification, and political practice.

In more socially specific terms, race has marked the founding of America and its development constitutively. The racial state in this sense represents the paradigmatically modern making of the United States. It is not simply that modern American governmentality has invoked race and the social arrangements fashioned in its name as technologies or instrumentalities of governance, though this clearly has been quite common. Rather, at the basis of the possibility of such invocation is the notion that racial configurations have ordered this country's formation and elaboration, its founding and shaping, while modern state apparatuses have helped to fashion racial conceptions and concerns, classification schemas and population controls. Thus the narrowing of social heterogeneities in the name of racial conception is not something simply or merely ordered by state instrumentalities, most notably law, though this is not to deny such racial instrumentality on the part of the state either. Underlying the very possibility of such homogenizing effect is that the United States is inherently constituted through racial conception and arrangement, though not in any given or singular form.

The very terms of race are disposed to homogenization, and its malleability in meaning makes it especially open to political arrangement. [*110] Modern state imperative is directed toward the fantasy of homogenization precisely because modern state formation is constitutively marked from its inception by self-defined racial design, by racial restriction. State architecture is racial by definition as modern racial conception in the final analysis is state mobilized or maintained, managed or mediated. In the absence of state prompting or promotion, articulation or ambivalence, invocation or implication, (explicit) racial conception would become marginal at best. But that would imply the end of the United States as it has emerged and as we have come to know it.

Through law, the modern state thus narrows heterogeneity in form as it sharpens the particularity of social distinction. The abstraction from particularity and to general principle necessary to law's conception and application at once makes possible civil rights protections--that abstraction away from the discriminatory particularity of race--and the impossibility of (fully) addressing the particularities, the specificities, of racist exclusions, derogations, (dis)privileges, and (in)opportunities. As Comaroff and Comaroff note, the almost "universal *lingua franca* of [modern] law, of rights and constitutions" fashions the means through "which human beings, divided by irreconcilable distinctions of one sort or another, might render commensurable, and hence negotiable, otherwise inimical values, demands, and expectations." ⁿ¹¹⁵ Law's formal narrowing of heterogeneity accordingly leaves to the non-formal--the private--realm those distinctions and hierarchies that formality is unable to tolerate.

So, unlike the more vicious naturalist racial regimes, liberal legality does not seek to obliterate the distinct but fashions a space outside, beyond its self-authorized realm, for such distinction to be enacted.ⁿ¹¹⁶ That the emergent legal emphasis on privacy in modern constitutional law is coterminous with the legally mediated shift noted above from racial naturalism to historicism is not a superficial coincidence. The soon-to-be-Justice Brandeis's famous essay on the constitutional place of privacy that he penned with Samuel Warrenⁿ¹¹⁷ opens the possibility for thinking about the extension of privatized racial privilege and power in the shift to formalized constitutional colorblindness first marked by Justice Harlan's equally famous dissent in *Plessy*.

The terms of racial legality and of a law that refuses to face up to the historical implications of racial configuration in the wake of racial erasure, are thus always ambiguous. Modern America, like modern states more generally, are modern in virtue of legislating race. Written into law, race rules in, through, and by legislation. But inscribed in law, racial order in a sense becomes required by law. Every attempt to go beyond race is weighted by its legacy, every gesture at universalization by race's particularities. No escaping modernizing racial positioning from within or without precisely because modernity and modernization are defined by, in relation to, and in terms of the index measuring the progression of [*111] states of whiteness. In this, racial legality mirrors--and is deeply related to--the condition of law as patriarchal (so well conceptualized in the past two decades by feminist legal theorists).ⁿ¹¹⁸ White by law, modern state formation authorizes itself in the name of the imperatives of whiteness. The United States, as the quintessentially modern state, is one governed by a patriarchal whiteness, at once a masculinist state of white being, a state ruled by those self-nominated white and representing the interests of white privilege and patriarchies.

The state of colorblindness, we are suggesting, is a state of post-racial racisms. We are just now coming to understand the shape of the law for such a state.ⁿ¹¹⁹ But how might we think of a post-racist law, a law after racisms? How ought we to think about a law that both postcedes racisms and may be mobilized to pursue racisms critically? If every racial invocation drips with ambiguity, it suggests that racial ambiguities are not simply restricted to exclusionary or discriminatory purpose but that they might hold out a hint of critical promise. We have been suggesting throughout that race and liberal legalism fix each other in place. To hold out the possibilities (and indeed the practices) of making the anomalies of racial inbetweenness the rule of a liberal post-legalism, those of categorical ambiguity and racial indistinction the norm, and homogeneity the questioned and questionable would be to turn racial America inside out. Which is to say, right side up.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Criminal Offenses
Miscellaneous Offenses
Illegal Consensual Relations
Interracial Relations
Elements
Criminal Law & Procedure
Witnesses
Presentation
Immigration Law
Citizenship
Citizenship by Descent

FOOTNOTES:

n1 CHARLES MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* xiii (1998).

n2 RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: THE RESHAPING OF AMERICAN LIFE BY DIFFERENCE IN INTELLIGENCE* (1994).

n3 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857).

n4 *Id.* at 403-04.

n5 *Id.* at 407.

n6 See, e.g., *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880s* (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984); *FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

n7 *See, e.g.*, JOHN CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* (1982).

n8 THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 138 (William Peden ed., Univ. of North Carolina Press 1955) (1781) (emphasis added).

n9 *Id.*

n10 *Cf.* PHILOMENA ESSED, *DIVERSITY: GENDER, COLOR, AND CULTURE* 20-29 (1996) (discussing tolerance of other people in modern Holland as the state's socially acceptable cover for the racist marginalization of immigrants.)

n11 *See, e.g.*, ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* (1995).

n12 *Cf.* Upendra Baxi, *Postcolonial Legality*, in *A COMPANION TO POSTCOLONIAL STUDIES* 540, 547 (Henry Schwartz & Sangeeta Ray eds., 2000).

n13 *People v. Hall*, 4 Cal. 399, 399 (1854).

n14 *Id.* at 404.

n15 *See, e.g.*, IAN F. HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 49 (1996).

n16 Act of Mar. 18, 1863, ch. 70, Cal. Stat. 69, 69 (repealed 1872).

n17 Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *STAN. L. REV.* 1, 37 (1991).

n18 *Dred Scott*, 60 U.S. (19 How.) 393 (1857).

n19 *People v. Dean*, 14 Mich. 406 (1866).

n20 *Id.* at 414.

n21 *Id.* at 407.

n22 *Id.* at 407-08.

n23 *Id.* at 418.

n24 *Id.*

n25 *Dupree v. State*, 33 Ala. 380, 387 (1859) (citation omitted).

n26 *Id.* at 387-88.

n27 *See, e.g., Jones v. State*, 19 Tenn. 120 (1838).

n28 *State v. Chavers*, 50 N.C. 11, 13 (1857).

n29 *In re Sadar Bhagwab Singh*, 246 F. 496, 498-99 (E.D. Pa. 1917).

n30 Act of March 26, 1790, ch. 3, 1 Stat. 103.

n31 Act of July 14, 1870, ch. 255, 16 Stat. 254.

n32 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

n33 *In re Cruz*, 23 F. Supp. 774, 774 (E.D.N.Y. 1938).

n34 *Ex Parte Dow*, 211 F. 486, 489 (E.D.S.C. 1914).

n35 *See, e.g., In re Ah Yup*, 1 F.Cas. 223 (C.C.D.Cal. 1878); *In re Gee Hop*, 71 F. 274 (N.D.Cal. 1895) (holding that Chinese are not white); *In re Saito*, 62 F.

126 (C.C.D.Mass. 1894); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that Japanese are not white); *In re Kanaka Nian*, 6 Utah 259, 21 Pac. 993 (1889) (stating Native Hawaiians are not white); *In re Rallos*, 241 F. 686 (E.D.N.Y. 1917) (holding that Filipinos are not white); *In re Easurk Emsen Charr*, 273 F. 207 (W.D.Mo. 1921) (holding that Koreans are not white).

n36 *In re Alverto*, 198 F. 688 (E.D. Pa. 1912).

n37 *In re Young*, 198 F. 715, 717 (W.D. Wash. 1912).

n38 *In re Camille*, 6 F. 256, 258 (C.C.D. Or. 1880).

n39 *In re Knight*, 171 F. 299, 301 (E.D.N.Y. 1909).

n40 *In re Halladjian*, 174 F. 834, 838 (C.C.D. Mass. 1909).

n41 *Id.* at 845.

n42 *Id.* at 843.

n43 *Id.*; *United States v. Cartozian*, 6 F.2d 919, 919 (D. Or. 1925). In *Cartozian*, Franz Boas, among a litany of prominent anthropologists, gave supporting evidence on behalf of the successful petition of an Armenian man the U.S. was seeking to denaturalize on the ground that he was not a "free white person."

n44 *United States v. Balsara*, 180 F. 694 (2d Cir. 1910).

n45 *In re Balsara*, 171 F. 294, 295 (C.C.S.D.N.Y. 1909).

n46 *See, e.g., Balsara*, 180 F. 694; *United States v. Dolla*, 177 F. 101 (5th Cir. 1910); *In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919).

n47 *United States v. Thind*, 261 U.S. 204, 204 (1923).

n48 *See In re Mudarri*, 176 F. 465 (C.C.D. Mass. 1910); *In re Ellis*, 179 F. 1002 (D. Or. 1910).

n49 *Ex Parte Shahid*, 205 F. 812 (E.D.S.C. 1913).

n50 *Id.* at 816.

n51 *Id.*

n52 *Id.*

n53 *Id.*

n54 *See Ex parte Dow*, 211 F. 486 (E.D.S.C. 1914); *In re Dow*, 213 F. 355 (E.D.S.C. 1914).

n55 *Dow*, 213 F. at 367.

n56 *Dow v. United States*, 226 F. 145, 148 (4th Cir. 1915).

n57 James R. Barrett & David Roediger, *Inbetween Peoples: Race, Nationality and the "New Immigrant" Working Class*, J. AM. ETHNIC HIST., Spring 1997, at 3. *See also* MATHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998).

n58 ANTHONY W. MARX, *MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL* (1998).

n59 Barrett & Roediger, *supra* note 57, at 28.

n60 Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237, 238 (1927).

n61 *See* STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981).

n62 Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

n63 *Cf.* Peter Fitzpatrick, *Passions Out of Place: Law, Incommensurability, and Resistance*, in *LAWS OF THE POSTCOLONIAL* 39, 39-40 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

n64 *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948) (quoting Cal. Civ. Code § 60 (1872)).

n65 *See Loving v. Virginia*, 388 U.S. 1, 6, n.5 (1967).

n66 *Perez*, 198 P.2d at 22 (citation omitted).

n67 *Id.*

n68 *Id.* at 23.

n69 *Id.* at 23-24.

n70 *Id.* at 24-25 (emphasis added).

n71 *Id.* at 24, n.6 (emphasis added).

n72 *Id.* at 30 (Carter, J., concurring).

n73 *Id.* at 35-47 (Shenk, J., dissenting).

n74 *Id.* at 27.

n75 *Id.* at 28.

n76 *Id.*

n77 *Id.* at 29.

n78 For a statutory definition of "Indian country" see 18 U.S.C. § 1151 (1948).

n79 18 U.S.C. § 1153.

n80 *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

n81 *Goforth v. State*, 644 P.2d 114, 116 (Okla. Crim. App. 1982).

n82 *Id.*

n83 *State v. Hagan*, 802 P.2d 745, 748 n.2 (Utah 1990).

n84 *See* *United States v. Rogers*, 45 U.S. 567 (1846).

n85 *State v. LaPier*, 790 P.2d 983, 988 (Mont. 1990).

n86 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). The Supreme Court recently expressed its concern over the "foreignness" of tribal courts in a civil jurisdiction case, declaring that requiring non-Indian parties to defend a claim "in an *unfamiliar court* is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'" *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (emphasis added) (citation omitted) (alterations in original).

n87 *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

n88 *Oliphant*, 435 U.S. at 210-11 (citation omitted) (alterations in original).

n89 *Id.* at 211.

n90 *Id.* at 212.

n91 CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 162 (1989).

n92 John L. Comaroff & Jean Comaroff, *Naturing the Nation: Aliens, Apocalypse, and the Post Colonial State*, Vol. 1:16 HAGGAR (2000).

n93 *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

n94 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

n95 *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

n96 Kimberle W. Crenshaw, *Color Blindness, History and the Law*, in *THE HOUSE THAT RACE BUILT* 280, 285 (Wahneema Lubiano ed., 1998).

n97 ROBERT NOZICK, *ANARCHY, STATE, UTOPIA* (1974).

n98 *Cf.* LESLIE G. CARR, "COLOR-BLIND" RACISM 116 (1997).

n99 *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

n100 *Id.* at 522-23 (Stewart, J., dissenting) (citation omitted).

n101 *Id.* at 523 (citation omitted) (alteration in original).

n102 *Id.*

n103 *See* Gotanda, *supra* note 17.

n104 *Fullilove*, 448 U.S. at 522 (Marshall, J., concurring).

n105 *Id.* at 534, n.5 (Stevens, J., dissenting).

n106 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

n107 Rice v. Cayetano, 120 S. Ct. 1044, 1054-55 (2000).

n108 DAVID THEO GOLDBERG, RACIAL SUBJECTS: WRITING ON RACE IN AMERICA (1997).

n109 Cf. Gary Peller, *Race-consciousness*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 127 (Kimberle Crenshaw et al. eds., 1995).

n110 PHILOMENA ESSED, EVERYDAY RACISM (1990).

n111 Crenshaw, *supra* note 96, at 283.

n112 ERIC VOEGELIN, RACE AND STATE, COLLECTED WORKS, VOL. 2 (Klaus Vondung ed. & Ruth Hein trans., Louisiana State Univ. Press 1997) (1933).

n113 DINESH D'SOUZA, THE END OF RACISM 545 (1995).

n114 David Theo Goldberg, *The New Segregation*, in RACE AND SOCIETY (1998).

n115 Comaroff & Comaroff, *supra* note 92, at 17, n.22.

n116 Cf. Reva Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 31, (Robert Post & Michael Rogin eds., 1998).

n117 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

n118 See, e.g., KATHARINE BARTLETT & ROSANNE KENNEDY, FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (1991).

n119 Robert C. Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2001).