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The Fetish for Authentic Race in American Law

Christopher A Bracey, George Washington University

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THE FETISH FOR AUTHENTIC RACE
IN AMERICAN LAW

Christopher A. Bracey*

Abstract

This article offers an interdisciplinary and transhistorical account of race authentication as it has evolved over the past two centuries within American law and culture. As 21st century Americans, we find ourselves in the midst of an authenticity revival – a reaction to the increasingly vapid and digitized world in which we live. We generally crave authentic items and experiences, and this impulse has gained increased traction in the racial context. Most commentators agree that American society has become increasingly multiracial, and that race now takes on diminished significance as a determining factor of one’s life chances. Yet there are many who believe that race can and should continue to matter – perhaps a great deal – for the foreseeable future. And, thus the need to authenticate race persists in order to sustain a system in which race retains social meaning.

By race authentication, I refer to the means by which we validate race as a socially meaningful concept and sort individuals into the socially constructed categories of race. The power that race exerts upon society is directly correlated to the robustness of the concept of race and our ability to confidently sort human beings into racial categories. Put differently, for race to have any social significance, we must believe that race is not only “real,” in some sense, but that we can “know” it when we see it.

Modes of authenticating race, much like the concept of race itself, evolve, take shape, and transform over time. Historically, racial authentication functioned much like a blunt sorting mechanism that shunted individuals into a prevailing set of racial categories. Rights, status, privilege or the lack thereof gave social meaning to the racial categories and attached to members identified within the racial group. Race authenticators, whether courts, law officers, or everyday people, made threshold race distinctions designed to police racial boundaries and preserve the integrity of the racial order of society.

Today, race authentication is less about rough policing of categorical boundaries and more focused on racial salience – the depth and saturation level of one’s professed racial affiliation. Race authenticators fetishize a presumptively known yet largely unarticulated core of authentic racial identity. A person who wishes to authenticate his own race seeks to demonstrate racial salience through performance of a racialized identity. Similarly, an individual or group seeking to authenticate the race of another engages in a racial performance critique, examining the demeanor, life experience, community ties, culture, politics, and normative commitments of the race claimant against this backdrop to test the authenticity of the claim. Fidelity to the core is paramount, for the virtues of race, be they status, benefit, or kinship, are reserved for the most racially salient – those select individuals whose racial credentials and performance of racial identity meet or exceed our expectations.

An analysis of the “long view” of race authentication sheds important light on how society and individuals invest the concept of race with tremendous social meaning, become culturally and legally dependent upon that concept, and how this dependency fuels the endless pursuit to validate the concept as a meaningful analytical category. At the same time, it provides an opportunity to consider whether the prevailing insistence upon racial authenticity does more harm than good for American race relations.

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* Professor of Law, George Washington University Law School. B.S., University of North Carolina at Chapel Hill; J.D., Harvard Law School.
I. INTRODUCTION

We crave authenticity in everything around us. In a post-industrial age replete with synthetic knock-offs, virtual social networks, and sundry digital contrivances, many of us long for items and experiences that are not only “real,” but exude a coveted sense of truth and integrity. We fetishize the authentic because it signals to us an important degree of honesty and fidelity to the original. Urbanites and rural residents share equal disdain for sprawling suburbia. Our love affair with the food court in a local shopping mall recedes, supplanted by a renewed pursuit of organic and whole food consumption. The longevity of jazz, the magnetism of hip hop, and even the seductiveness of reality-based television programming are indicative of our insatiable appetite for the real.

Our relentless pursuit of authenticity is a powerful critique of the increasingly vapid and artificial world in which we live. Not surprisingly, the fetish for authenticity extends well beyond consumerism, reflected in the revival of fundamentalism within American politics – i.e. the Tea Party Movement – as well as within the Christian and Islamic faiths. We often debate the criteria used to determine authenticity. We do so because that which we identify as authentic enjoys a presumption of value and quality. The authentic, in this sense, is indicative of our perception of what is normatively good. Whatever the item or experience, the one that bears the hallmark of authenticity is invariably perceived as superior.

This prevailing fetish for authenticity emerges in the racial context as well. Indeed, we are arguably in the midst of a revival of racial authenticity. The triumph of multiculturalism had
ensured that race will remain at the center of American life for the foreseeable future. Prevailing rhetoric of a post-racial America has done little to shake the resounding belief held by most Americans – and racial minorities in particular – that race not only matters, but matters a great deal. But race no longer has presumptive catastrophic meaning. As racial progressives routinely emphasize, there is immense “good” in the concept of race. Race is often understood to be a critical element of personal identity. It serves as a marker of diversity and a site of self-expression in a society in which difference is generally appreciated and frequently enabling. Race also provides us with a deep sense of existential kinship and community with others, and facilitates the coordination of social and political power.

The virtues of race – identity, kinship, diversity, and coordinated social power – are thought to enrich and empower our lives. But their transformative power is only as strong as the foundation from which they spring. For race to have virtuous tractive force in our lives, it must be understood as socially meaningful in some critical sense. Race itself must be validated as a meaningful analytical concept, and so too must each socially constructed category. But the power of race to influence our lives and relationships ultimately turns on our ability to experience ourselves as racial beings. And much like everything else these days, this raced experience is perceived as superior when it can shown to be authentic.

The most prominent example of this push to authenticate race involved the questioning of whether the President Barack Obama, the son of a white woman and African immigrant, should be properly denoted the first “black” president and, relatedly, whether he was “black enough” to enjoy presumptive broad support from the traditionally black community. But one can point to a number of examples of this phenomenon. For instance, authenticity in race plays an important role in affirmative action policy. Opponents often question whether candidates with distinctive racial backgrounds actually represent true “diversity.” As the Fifth Circuit Court of Appeals observed in Hopwood v. Texas, “the use of race, in and of itself, to choose students simply achieves a student body that looks different.” Similarly, a Massachusetts judge upheld the dismissal of two firemen hired as a diversity candidates because their claim to racial distinctiveness (in this instance, African American heritage) was not sufficiently authenticated. More recently, and perhaps in response to the prevailing view that black Republicans and

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1. Alex M. Johnson, Jr., The Re-emergence of Race as a Biological Category: The Societal Implications--Reaffirmation of Race, 94 IOWA L. REV. 1547, 1561 (2009) (“Race, albeit socially constructed, continues to matter dearly in American society.”).
2. Mario Barnes et al., A Post-Race Equal Protection?, 98 GEO. L.J. 967 977 (2010) (noting that “some advocates of color-consciousness envision a world in which racial differences are acknowledged but are not assigned a stereotypically negative meaning – a world in which we celebrate racial diversity instead of using it as a means for perpetuating hierarchy.”).
4. See PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 201 (2003) (“[R]ace today is a poor proxy for the conditions affirmative action is supposed to remedy and that it is steadily becoming an ever cruder and more misleading proxy as the number of multiracial Americans increases and as intragroup differentiations proliferate.”).
conservatives are not authentically black, Michael Steele, former chairman of the Republican National Committee, sought to authenticate his status within the black community by infusing hip hop gestures and dialect into Republican party communications to voters.\(^7\)

Each of the foregoing examples illustrates a certain fetish for authenticity in the racial context. But what exactly does it mean to authenticate race? Historically, racial authentication was a blunt sorting mechanism that shunted individuals into a prevailing set of racial categories. Rights, status, privilege or the lack thereof gave social meaning to the racial categories and attached to members identified within the racial group. Race authenticators, whether courts, law officers, or everyday people, made threshold race distinctions designed to police racial boundaries and preserve the integrity of the racial order of society.

Racial authentication of this sort continues today. The 2010 Census asked each of us to “stand up and be counted.”\(^8\) Of course, the Census also called upon us to declare our race – to voluntarily slot ourselves into one or more prevailing racial categories, or define a new racial category for purposes of public racial accounting.\(^9\) Celebrity watchers often obsess over the racial composition of stars and entertainers, routinely calling upon them to declare their racial affiliation.\(^10\) At the same time, many celebrities seek to leverage their race or ethnicity to solidify their credibility among fickle and occasionally, race conscious fans.\(^11\) The same often holds true in everyday life as people encounter one another, simultaneously presenting their own personal identity (of which race is a constituent element) and reflexively categorizing others on the basis of race.

However, racial authentication today entails a great deal more than simply shunting oneself or others into a prevailing set of racial categories. When critics question whether President Obama is “black” enough, they are not expressing misgivings about his racial ancestry, color and physiognomy. Similarly, when opponents of race preferences bemoan the lack of “real” diversity among candidates of color, they do not dispute whether the candidate falls within a particular racial category. Critics of black conservatives concede that such individuals are African American, yet nonetheless question their racial authenticity.

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\(^7\) David Swerdlick, **Double-Edged Steele, The Browntable at The Root**, http://www.theroot.com/blogs/sarah-palin/double-edged-steele (“describing comments delivered by Steele at a Young Republican Federation conference, in which he which he joked openly about deploying “fried chicken and potato salad” to bring black people into the Republican fold); http://www.huffingtonpost.com/bil-browning/steele-gop-woos-blacks-wi_b_231534.html (providing the videotape of Steele’s comments).

\(^8\) The phrase “Stand up and Be Counted,” though not an official slogan of the U.S. Census Bureau, is routinely invoked to spur participation in the national census effort. See, e.g., Census Day in America – Stand Up and Be Counted, The Economist, (Apr. 2, 2010); Lori Croghan, Census 2010: Undocumented Immigrants Are Urged to Stand Up and Be Counted, New York Daily News, (Mar. 15, 2010); Raja Abdulrahim, *Iranian Americans Are Urged to Stand Up and Be Counted*, LA Times, (Dec. 29, 2009). Ironically, the phrase is also the title of an infamous rallying song of the Ku Klux Klan. The song includes the chorus “Stand up and be counted/ Show the world that you’re a man/ Stand up and be counted/ Go with the Ku Klux Klan.” A video rendition of this song is available at http://www.youtube.com/watch?v=QKc2lAYrPSO.


\(^11\) The examples of rapper MIA, singer Mariah Carey and multimedia sensation Jennifer Lopez are discussed *infra* text accompanying notes ___.
Today, racial authentication is less about rough policing of categorical boundaries and more focused on racial salience – the depth and saturation level of one’s professed racial affiliation. Race authenticators fetishize a presumptively known yet largely unarticulated core of authentic racial identity. A person who wishes to authenticate his own race seeks to demonstrate racial salience through performance of a racialized identity.\(^\text{12}\) Similarly, an individual or group seeking to authenticate the race of another engages in a racial performance critique, examining the demeanor, life experience, community ties, culture, politics, and normative commitments of the race claimant against this backdrop to test the authenticity of the claim. Fidelity to the core is paramount, for the virtues of race, be they status, benefit, or kinship, are reserved for the most racially salient – those select individuals whose racial credentials and performance of racial identity meet or exceed our expectations.

This article offers an interdisciplinary and transhistorical account of racial authentication as it has evolved over the past two centuries within American law and culture. America has had an uneasy relationship with race. Race distinctions have always been and continue to be the source of conflicting notions of pride and oppression, joy and devastation, and community and cruelty. Americans have spent the better half of a century attempting to reconstruct and reform our relationship with race. Racism in all its forms – from insensitivity and slights to stereotyping to full-blown discrimination – is anathema. We work tirelessly to disentangle the virtues of race from the tragedy of racism. Yet we remain willingly in the cul-de-sac of race, choosing to live in this agonistic and conflicting swirl of delight and domination, because we believe in the possibility of a world that retains the good of race – kinship, identity, joy, and diversity – without the scourge of racism.

Racial authentication has charted an uneasy course through our public consciousness. In its earliest forms, racial authentication was used most notoriously as a mechanism of exclusion – the principal means of selecting individuals for invidious, differential treatment. But racial authentication would later be re-purposed to serve the progressive ideological projects of community empowerment, antidiscrimination law, and diversity in college admissions. The very meaning of racial authenticity (ie. what it means to “be” of a particular race) would simultaneously evolve from a largely superficial threshold designation of membership within a particular group in relation to other racial groups to a powerful indicator of racial salience within a particular group.

As American society becomes increasingly multiracial, and race takes on diminished significance as a determining factor of one’s life chances, it is worth pausing to consider whether the prevailing insistence upon racial authenticity does more harm than good. Accordingly, this article proceeds as follows. Part II discusses the critical role of authenticity in the social construction of race. Part III discusses racial authentication in the 19th century, highlighting its conceptual origins in physical anthropology and natural history and its emerging presence in America law as the means by which people could be reliably sorted for purposes of differential

\(^{12}\) A more coded example of Obama’s racial performance was his gesture of brushing the symbolic dirt off of his shoulders in response to political attacks during the campaign – a gesture popularized by hip-hop artist Jay Z. See Teresa Wiltz, Obama Has Jay-Z on His IPod and The Moves To Prove It, WASHINGTON POST, Apr. 19 2008 (describing Obama as “a self-confessed hip-hop head and Jay-Z fan” and exposing the hip-hop context of Obama’s gesture); Video available at http://www.youtube.com/watch?v=yel8iJOAdSc. Similarly, Michael Steele attempted to assert is racial authenticity by offering to provide “fried chicken and potato salad” at future GOP events in order to attract African American participants. See Bill Browning, Steele: I’ll Woo Blacks To GOP With “Fried Chicken And Potato Salad,” Huffington Post, July 14, 2009, available at http://www.huffingtonpost.com/bil-browning/steele-gop-woos-blacks-wi_b_231534.html.
and often oppressive treatment. Part IV examines how racial authentication began to evolve both normatively and methodologically to keep pace with evolving notions of race during the 20th century. Beginning in the 1920s and 1930s with the Harlem Renaissance, blacks began to seize control over their own racial identity through artistic and cultural expression, and authenticate race on their own terms. By the 1970s, this transformed race authentication would become a litmus test for progressive racial politics, exemplified by the Black Power movement. Race authentication, when harnessed by racial minorities themselves, would be converted from a tool of external oppression into a means of human liberation, community building, and political activism. At the same time, racial authenticity begins to take on new meaning as a measure of racial salience. Part V traces the further evolution of racial authentication in the post-civil rights era. Here, I focus on the manner in which our fetish for authentic race is revealed in the ritualistic demand for performance of a racially salient identity, and how this fetish nurtures and sustains identity politics, influences law (from affirmative action policy to the processing of Census data), and exerts profound pressure on our personal identities and interpersonal interactions. Part VI examines the virtues and vices of racial authentication and its normative impact upon the future of race relations. Part VII concludes.

II. RACIAL FORMATION AND RACIAL AUTHENTICITY

Most people realize that race is socially constructed. They generally concede that race is not “real” in a biological sense, but they do not deny that race is useful as an analytical category. They appreciate that no single individual can change or ascribe new meaning to race. And they are deeply cognizant of the fact that race has very real consequences in peoples’ lives.

Further, most contemporary sociologists and race theorists subscribe to the view that race has no inherent meaning, but is invested with social meaning that arises from history, culture, and social conflict. Thus, race is in a perpetual state of reformation. Professor Ian Haney Lopez provides a particularly useful account of the process of racial formation:

First, humans rather than abstract social forces produce races. Second, as a human construct, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning systems surrounding race change

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13 See, e.g., MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (1994); see also IAN F. HANEY LÓPEZ, WHITE BY LAW 15 (1996) (“Race is not ... simply a matter of physical appearance and ancestry .... [I]t is primarily a function of the meaning given to these.”); Johnson, supra note ___ at 1561-63 (“I start with the assumption that race and the “one drop of blood” rule are not based on any established scientific or biological definition.”).

14 Barnes, supra note ___ at 967 n. 43 (2010) (observing that although “race is neither truly biologically or scientifically significant, this does not weaken the power of the construction.”); Johnson, supra note ___ at 1563 (footnotes omitted) “[R]ace is an intractable force in American society touching every facet of day-to-day American life – often affecting where one goes to school, the job opportunities presented, who one marries, where one lives, the health care one receives, and even where one is interred following death.”).

15 THOMAS C. HOLT, THE PROBLEM OF RACE IN THE TWENTY-FIRST CENTURY 22 (2000) (“[T]he meaning of race and the nature of racism articulate with (perhaps even are defined by) the given social formation of a particular historical moment. . . . [including] all the interrelated structures of economic, political, and social power, as well as the systems of signification (that is, cultural systems) that give rise to and/or reflect those structures.”).
quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation.16

Socially constructed race operates on multiple levels. At the most intimate level, race operates as a constituent element of personal identity. Racial identity gets formed through an internal conversation—treating oneself as an object—but it is a social process insofar as it requires one to take account of societal norms and expectations about race. Put differently, choosing one’s race is a self-reflective exercise, subject to an awareness of external restrictions on the propriety and credibility of such an individualistic determination.

Socially constructed race also operates in the context of presentation of the racial self in interaction with other individuals. Commenting on personal performance of ethnicity, sociologists Lyman and Douglass explain that “from the ethnic actor’s perspective, ethnicity is both a mental state and a potential ploy in any encounter, but it will be neither if it cannot be invoked or activated.”17 The same is true, albeit to a lesser extent, for race. People manage their racial presentation, emphasizing or deemphasizing the salience of race in the course of their social interactions.

Socially constructed race also operates at the group level. Racial groups construct race collectively, creating images of their own group and others.18 They may do this through a variety of means—via observable phenotype, cultural habits, or experience—in order to sustain judgments and impressions of their own group and others. These judgments and impression, in turn, are often but not exclusively relied upon to operationalize race as both relational and hierarchical.19 Races become understood as mutually exclusive categories that are placed within a system or structure that affords rights and privileges, typically in asymmetrical and hierarchical fashion.

The socially constructed nature of race exudes a fabricated quality that betrays the “plastic and inconsistent character of race.”20 Social meanings ascribed to race have evolved substantially over time, as has its normative valence likewise shifted to keep pace with changes in society. Nevertheless, race has remained a relevant fixture in American life. The longevity of the social power of race is a testament not only to the extent to which race saturates American society, but to which we have come to accept race as “real.”21

For race to be “realized,” however, requires that it be authenticated. Race gains tractive force in society, exerting its power upon our attitudes, assumptions, beliefs, laws and customs regarding individuals, because we believe in the idea of race as an analytical category and feel confident in our ability to authenticate ourselves and others as racial beings. For race to be a

18 See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 44-48 (1990) (explaining the difference between social groups and mere aggregates of individuals, and the process of group identity formation).
19 richard thompson ford, Racial Culture: A Critique 78-79 (2005) (observing that group identity formation “establishes lists and canonical accounts of group identity [that] include[] proscriptions and mandates, not only for those who would assert them and their contemporaries but also for future generations).
20 Lopez, supra note __ at 28.
21 Devon Carbado and Kimberle Crenshaw, The New Racial Preferences, 96 cal. l. rev. 1139, 1150 (2008) (“[M]ost people believe that race exists as a social relation, but they differ as to its meaning, its social and legal significance, as well as how it should be expressed and embodied.”) (footnotes omitted).
constituent element of one’s personal identity, one must first validate the concept of race as socially meaningful. If race is to be systematized and employed as a means of categorizing people for purposes of differential treatment, then the integrity of that system will rest largely upon the ability to reliably authenticate individuals as members of a particular racial category. Thus, race authentication – the ability to validate race as a socially meaningful concept and to sort individuals into the socially constructed categories of race – is of central importance to the formation and longevity of a society steeped in race.

One might characterize the relationship between race authentication and the social construction of race in dialectical terms. Race, as socially constructed, takes shape against the ever-shifting backdrop of prevailing social, political, and economic realities. Race authentication, in turn, affirms race as an analytical category and validates the social meanings ascribed to race. But because socially constructed race is useful only to the extent to which it can be meaningfully operationalized, the means by which we authenticate race will inform the scope and contour of race itself. Race and authenticity can be understood to be in constant conversation, as our means and criteria of authentication evolve to keep pace with the dynamism inherent in the concept of race.

That race as well as our means and criteria of authentication are in constant flux would seem to lend an air of artificiality to the entire racial enterprise. However, as discussed below, the longstanding investment of social meaning into race by individuals and institutions has ensured that race, though largely socially constructed and intensely malleable, would nevertheless be understood as “real” in some meaningful sense. And in a world in which one’s fate so often rides upon race, the authentication of racial categories and, by extension, of individuals as racial beings was and is as real as it comes.

III. RACE AUTHENTICATION IN THE NINETEENTH CENTURY

Throughout our nation’s history, we have remained enthusiastically fixated upon race and race distinctions. Ralph Waldo Emerson, writing in mid 19th century, declared “Men hear gladly of matters of blood and race.” Justice John Marshall Harlan, writes in Plessy v. Ferguson, “Every true man has pride of race.” Historian W.E.B. DuBois told us “the problem of the twentieth century is the colorline.” Progressive scholar Cornel West, writing near the close of the twentieth century, declared emphatically that “race matters” – a proposition generally conceded by most twenty-first century Americans, including many conservatives who struggle to reconcile their professed ideal of a colorblind society with the reality of race in American life.

By the early nineteenth century, race and race distinctions had already become a permanent fixture in American life. The institution of African slavery had been in place for nearly two centuries. Indian nations had been largely conquered or pushed outside the body

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22 Ralph W. Emerson, English Traits (1856), in 5 THE COMPLETE WORKS OF RALPH WALDO EMERSON 46 (Houghton Mifflin Co. 1903).
23 Plessy, 163 U.S. at 554, 537 (1896) (Harlan, J., dissenting).
25 See A. LEO HIGGINBothAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS; THE COLONIAL PERIOD 32-34 (1978) (noting that slavery was firmly in place in certain areas of America as early as the 1660s and 1670s and became more firmly entrenched by the 1680s).
Codes and customs solidified the distinction between slave and free, citizen and pariah. Colonial and state legislatures in the North and South passed laws prohibited interracial sexual relations and marriage and imposed painful consequences on violators of this cultural-turned-legal taboo. In short, race and race distinctions had been fully instantiated the American social and legal landscape.

The foundation of this pigmentocracy rested upon the prevailing social meanings ascribed to race. The integrity and longevity of this system of social ordering was thus dependent upon the validation of race as an analytically meaningful basis for categorizing people. It was therefore incumbent upon the architects and administrators of the system to devise a credible means of authenticating race and individuals as racial beings that could reliably distinguish between whites and nonwhites. Furthermore, if the system was to be understood as natural, if not inevitable, then race itself would have to be naturalized. Thus, elite thinkers endeavored to situate socially constructed race within the dominant discourse of natural history. This development, in turn, led to the most significant early mode of racial authentication – authentication based upon naturally observable traits.

A. Race Authentication as Normative Natural History

The task of authenticating race at the beginning of the nineteenth century was pioneered by a handful of physical anthropologists and historians who sought to categorize people based upon what were believed to be shared observable traits. One of the earliest and most significant efforts in this regard was German physiologist Johann Blumenbach’s 1775 book *On the Natural Varieties of Mankind*, in which he identified five races: Caucasian or white race, Mongolian or yellow race, Ethiopian or black race, the American Indian or red race, and the Maylayan or brown race. Blumenbach’s classification scheme, as well as certain terms he introduced, such as Caucasian and Mongolian — remain to this day. Although scientific in its approach, it is important to remember that Blumenbach’s early efforts to classify and authenticate race took shape against the backdrop of prevailing intellectual life. Put differently, “laws, hypotheses and

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26 REGINALD HORSMAN, RACE AND MANIFEST DESTINY 189-207 (1981) (recounting the rejection of the Indian by white society between 1815 and 1850 that would ultimately result in their physical and political removal from Western life and institutions).

27 See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 199-201 (Henry Steele Commager & Richard B. Morris eds., 1988); The Slaughterhouse Cases, 83 U.S. 36, 70 (1873)) (“Among the first acts of legislation adopted by several of the States . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.”).

28 The first of these laws was passed by the Virginia Legislature in 1691. See RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 19 (2001). The stated purpose of the law was to “prevent . . . that abominable mixture and spurious issue which hereafter may encrease [sic] in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull [sic] accompanying with one another.” Carlos Ball, The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages, 76 FORDHAM L. REV. 2733, 2740 (2008). (quoting 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 86 (William Waller Hening ed., 1823)).

29 JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND (3d. ed. 1795), reprinted in THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 145 (Thomas Bendyshe ed. & trans., 1865). Blumenbach scheme was actually an extension of earlier work conducted by Swedish biologist Carolus Linnaeus in the mid-1700s, who had classified human beings into four varieties based on skin color—red, yellow, white, and black. WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 9 (1994).
theories of [racial] science “necessarily reflect[ed] in large part the general non-scientific intellectual atmosphere of the time.” A key principle of the Enlightenment era was the scala naturae, or chain of being, which posited that inequality was the foundation of the natural order of things. If race could be understood as something that occurs in nature, then “it was but a small step to apply the same concept of hierarchical ordering within the ranks of humankind.” Thus, it was perhaps unsurprising that Blumenbach also concluded that among the racial groups he identified, Caucasians were the “most handsome and becoming.” Scholars around the world quickly adopted Blumenbach’s racial taxonomy, expanding or amplifying his research, and reaching the similar conclusion that the Caucasian was the naturally superior race.

Blumenbach’s basic approach is powerfully reflected in Thomas Jefferson’s comparative analysis of whites, blacks and Indians in Notes on the State of Virginia – the most significant, early nineteenth century effort undertaken by an American thinker to authenticate race. Notes on the State of Virginia not only provides crucial insight into the mechanics of race authentication, but the normative commitments imbedded within the concept itself. For Jefferson, authenticating race was not simply a matter of natural history, but served the greater purpose of advancing the argument for racial purity. “Would not a lover of natural history,” wrote Jefferson, “one who views the gradations in all the races of animals with the eye of philosophy, excuse an effort to keep those in the department of man as distinct as nature had formed them?” Thus, early efforts to authenticate race might be understood as normative natural history – that is, an effort to validate race as a meaningful analytical category in order to promote a particular normative end.

The ostensible task undertaken by Jefferson was to describe what he believed to be the defining features of Indians and blacks based upon a variety of observable features, including temperament, physiognomy, and “the faculties of memory, reason, and imagination.” In so doing, Jefferson often contrasted those features with that of the white race. Unlike his physical anthropologist predecessors, Jefferson offered no singular analysis on the distinctiveness of the white race, preferring instead to fixate upon the distinctiveness of blacks and Indians. This is unsurprising given the social construction of race that combined Anglo Europeans of various phenotypes and traditions, and the mode of social ordering that placed both blacks and Indians firmly outside the body politic. It also reinforces the notion that the prevailing mode of race authentication is rarely divorced from the normative aspirations of the day.

32 Id. at 265.
33 Scottish publisher and amateur scientist Robert Chambers adopted Blumenbach’s five categories and described the Caucasian as “fully developed” and the Mongolian, Malay, American, and Negro as “degenerate.” See ROBERT CHAMBERS, VESTIGES OF THE NATURAL HISTORY OR CREATION 277-310 (1844). A variation on this theme was endorsed by Joseph Arthur, Comte de Gobineu who asserted the existence of three races – white, yellow, and black – and the superiority of the first. See JOSEPH ARTHUR, COMTE DE GOBINEU, THE INEQUALITY OF HUMAN RACES 205-211 (transl. ed.) (1915) (originally published as Essai sur l’inegalite des races humaines (1855-55)). For an interesting counterpoint offered by French historian and social thinker Jean Finot, see Race Prejudice 309-320 (1905) (translated by Florence Wade-Evans (1906)) (declaring the “science of inequality is emphatically a science of white people” pursuant to which scientists “have elevated into superior qualities all the traits which are particular to themselves . . .”).
35 Id. at 7.
So what did it mean to be authentically Indian or black (and, by implication, white), according to Jefferson? Beyond physiognomic differences (which I will address in a moment), temperament figured prominently in Jefferson’s analysis. Indeed, Jefferson began his description of the Indian race by noting behavioral rather than physical differences. The Indian race, according to Jefferson, exuded great bravery, with a keen sensibility and “vivacity and activity of mind” equal to whites. Their bravery, however, was shaped by a flair for the strategic – “education with him making the point of honor consists in the destruction of the enemy by stratagem, and the in the preservation of his own person free from injury.” This stood in contrast with the temperament of whites, who while also brave, “honored force more than finesse.” Blacks, observed, Jefferson, were “at least as brave” as whites, and perhaps even “more adventuresome.” Unlike whites and Indians, however, bravery for blacks was shaped neither by strategy or an appreciation of superior force, but arguably “proceed[s] from a want of forethought, which prevents their seeing a danger till it be present.” Furthermore, when danger is presented, blacks “do not go through it with more coolness or steadiness than the whites.”

Jefferson relied upon other differences in temperament as well. Indians, he wrote, were family oriented (“he is affectionate to his children, careful of them, and indulgent in the extreme”) and loyal (“his friendships are strong and faithful to the uttermost extremity”), but were often oppressive of women, which Jefferson believed to be “the case with every barbarous people.” Whites, of course, were family oriented and equally loyal, but in his view, but far more respectful of women because “[c]ivilization [] replaces women in the enjoyment of their natural equality.”

Jefferson made no mention of misogyny or barbarity among blacks, observing instead a playful and lustful demeanor. Blacks, he observed, “seemed to require less sleep,” and “after hard labor through the day, will be induced by the slightest amusements to sit up till midnight, or later, though knowing he must be out with the first dawn of the morning.” At the same time, they exude a more lustful demeanor – they are more ardent after their female.” Lustfulness toward women, however, was not a virtue. As Jefferson remarked, “love seems with them to be more an eager desire, than a tender delicate mixture of sensation and sentiment” – presumably the idealized form of love typical of whites. Jefferson also viewed blacks as largely unaffected by tragedy. “Their griefs are transient,” he wrote, observing that “their existence appears to participate more of sensation than reflection,” in contrast to the more contemplative demeanor of whites.

Whites, blacks and Indians were also characterized by distinct phenotype. When describing Indians, Jefferson did not dwell on skin color, instead fixating upon rather mundane differences. Indians were “smaller in the hand and wrist,” and there was some evidence to
suggest that Indians “have less hair than whites, except on the head.”49 Skin color, however, figured prominently in his description of blacks:

Whether the black of the negro resides in the reticular membrane between the skin and scarf-skin, or in the scarf-skin itself; whether it proceeds from the color of the blood, the color of the bile, or from what other secretion, the difference is fixed in nature, and is a real as if its seat and cause were better known to us.50

This difference was of profound significance to Jefferson. He asked rhetorically, “Is [this difference] not the foundation of a greater or less share of beauty in the two races?”51 For Jefferson, dark skin was the “foundation” for diminished beauty. “Are not the fine mixtures of red and white, the expressions of every passion by greater or lesser suffusions of color in the one, preferable to the eternal monotony, which reigns in the countenances, that immoveable veil of black which covers the emotions of the other race?”52 Jefferson noted that blacks lacked other characteristic features of beauty, such as “flowing hair” and “elegant symmetry of form.”53 Given these phenotypical differences, along with his observation that blacks possessed a “strong and disagreeable odor,”54 Jefferson thought it unsurprising that black men held a strong preference for the beauty of white women “uniformly as is the preference of the Oran-utan for the black woman over those of his own species.”55

The races could also be reliably distinguished based upon their “faculties of memory, reason and imagination.”56 Indians, according to Jefferson, were plainly intelligent, but there was little evidence of “genius.” Instead, he characterized the Indian race as one that was intellectually curious, albeit without the benefits of education. Jefferson observed that “[The Indian] will crayon out an animal, a plant or a country, so as to prove the existence of a germ in their minds which only wants cultivation.”57 “They will astonish you,” he continued, “with strokes of the most sublime oratory; such as prove their reason and sentiment is strong, their imagination glowing and elevated.” Indians, he believed, also possessed a substantial imagination, though perhaps not on par with whites. “The Indian [] will often carve figures on their pipes not destitute of design and merit.”58 Blacks, Jefferson conceded, possessed memory equal to whites. Their reasoning, however, was inferior. “One could scarcely be found capable of tracing and comprehending the investigations of Euclid.”59 Unlike Indians, Jefferson believed blacks lacked imaginative prowess in oratory or art. “Never yet could I find that a black had uttered a thought above the level of plain narration; never saw even an elementary trait of painting or sculpture.”60 “In imagination,” according to Jefferson, blacks were “dull, tasteless and anomalous.”61 However, Jefferson conceded that blacks possessed talent in music. “They

49 Id. at 5.
50 Id. at 6.
51 Id. at 6–7.
52 Id. at 7.
53 Id. at 7.
54 Id.
55 Id.
56 Id.
57 Id. at 8.
58 Id.
59 Id. at 7.
60 Id. at 8.
61 Id. at 7.
are generally more gifted than whites,” he wrote, but whether their songs “will be equal to the composition of a more extensive run of melody, or of complicated harmony, is yet to be proved.”62

The multiplicity of criteria employed by Jefferson to authenticate race – particularly those related to temperament and reason – reflected a deeply nuanced understanding of race by nineteenth century standards. But having sketched the boundaries of race – at least with respect to whites, blacks, and Indians – what next? The normative thrust of Jefferson’s natural history project is revealed in the closing paragraph of his analysis. “I advance it,” wrote Jefferson, “as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstance, are inferior to the whites in the endowments of both of body and mind.”63 In this way, Jefferson’s analysis lent credence to the prevailing view that slavery was justified in part by the ideology of white supremacy. At the same time, his authentication of racial categories as both distinct and hierarchical reinforced prevailing ideas of racial purity and fear of racial amalgamation. According to Jefferson, “[t]his unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.”64

Contrasting American slavery to slavery in Rome, Jefferson pointed out that Roman slaves were white, and that “[t]he opinion that they [were] inferior in the faculties of reason and imagination must be hazarded with great diffidence.”65 Thus the Roman slave, “when made free, might mix with, without staining the blood of his master.”66 By contrast, the emancipation of blacks slaves presented the odious possibility of race mixing with an inferior. For Jefferson, race mixing and its concomitant perils were far too great – particularly given that blacks can be both rational and lustful, and that intermixing with whites improves the body and mind. Thus, Jefferson recommended that blacks, “[w]hen freed, [should] be removed beyond the reach of mixture.”67

Race authentication, then, was not simply an objective analysis of racial difference. Imbedded within the idea of racial authentication was a normative commitment to prevailing racial orthodoxy of white supremacy. By the 19th century, there was a growing and conspicuous presence of Americans of blended descent. Mixed race Americans presented a particularly unsettling challenge to white socioeconomic and political domination, evidenced by their blurring of phenotypical boundaries and ancestral lines. Although rape and extended concubinage conferred no legal status on the relationship and posed no real threat to the slave economy, the very notion of blended individuals slipping into the ranks of whites threatened to undermine the prevailing social order of the day that was premised upon racial purity, but also absolute dominance, superiority, and social control over non-Anglo European races. As the social meanings ascribed to race crystallized within the American consciousness and were reified within law, the intellectual curiosity that animated early efforts to authenticate race was increasingly displaced by ideological imperatives of the day.

62 Id. at 8.
63 Id. at 11.
64 Id.
65 Id.
66 Id.
67 Id.
B. Race Authentication in Slavery, Indian Policy, and Criminal Justice

From the outset, race authentication was understood as a mechanism to define racial boundaries, often with hierarchical implications. The normative impulse for Anglo American dominance, superiority, and social control through law meant that the practice of racial authentication would quickly evolve into a conduit for oppressive treatment. The examples below, drawn from the experience of blacks, Indians, and the Chinese, illustrate both how Jefferson’s normative natural history provided a basic framework for racial authentication in the legal context, and how racial authentication could, on occasion, be manipulated to satisfy the ideological objective of racial oppression.

1. The Negro

Nineteenth century law and policy for African Americans was profoundly shaped by the twin aims of social control and domination. The institution of slavery was dependent upon the master’s uncontrolled authority over the body of the slave. As Judge Ruffin explained in the infamous case of State v. Mann, the purpose of slavery “the profit of the master, his security, and the public safety, . . .”\(^\text{68}\) The slave, according to Ruffin, was “doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits.”\(^\text{69}\) Strict discipline and social control was inherent in the law of slavery. As Ruffin explained, “The power of the master must be absolute, to render the submission of the slave perfect.”\(^\text{70}\)

Law and policy directed at free blacks reflected a similar normative orientation. Free blacks, like their slave counterparts, were subject to harsh legal constraints designed control the population and enforce their subordinate status. In Virginia, for example, free blacks were subject to unique criminal laws and processes that imposed comparably harsher penalties than those imposed upon whites for similar offenses.\(^\text{71}\) Virginia law also required free blacks to register with the state, restricted in their ability to assemble, regulated more harshly in terms of their economic activities, and generally prohibited from possessing weapons.\(^\text{72}\)

Although these laws clearly applied to blacks (or Negroes), it was not entirely clear who was to be properly considered black. The economics of slavery, the pervading ideology of white supremacy and racial purity, and the taboo against interracial marriages – particularly between Anglo Europeans and blacks or Indians – gave rise to the tradition of hypodescent. This tradition, commonly referred to as the “one drop rule,” became the dominant device used to authenticate race. Pursuant to this rule, one drop of non-white blood categorically excluded that person from the white race and often lumped him in with members of the non-Anglo European race.\(^\text{73}\)

\(^{68}\) State v. Mann, 2 Dev. 263, 13 N.C. 263, 1829 WL 252, at *2 (1829).

\(^{69}\) Id.

\(^{70}\) Id.


\(^{72}\) Id. at __.

the word ‘Negro,’ for purposes of its laws, “shall be construed to mean mulatto and negro.”

Louisiana, given its far greater history of miscegenation, initially declared anyone with a “traceable” amount of negro blood to be Negro for purposes of law, and later modified this rule in 1970 with the passage of a new statute stating that “a person having one-thirty-second or less of Negro blood shall not be deemed, described, or designated by any public official in the state of Louisiana as ‘colored,’ a ‘mulatto,’ a ‘black,’ a ‘negro,’ a ‘griffe,’ a ‘Afro American,’ a ‘quadroon,’ a ‘mestizo,’ a ‘colored person,’ or a ‘person of color.’”

In addition, Negro status in many southern states carried with it a presumption of slavery. In a dispute over whether a person was slave or free, racial authentication was of central importance because a person classified as black or negro carried the burden of proving his freedom while a person not authenticated as black for purposes of law was presumed to be free.

Given the dearth of birth records and similar documentation of bloodlines, Courts predictably struggled with how to best authenticate the race of petitioners. The case of Gobu v. Gobu is an early example of this. Gobu involved a petition for freedom filed by individual orphaned as a child, but claimed by a twelve year old white girl who took care of him and claimed him as her property. Under North Carolina law, Negroes were presumed to be slaves. This presumption existed, according to the Court, because “the negroes brought to this country were slaves, and their descendents must continue to be slaves until manumitted by proper authority.” Aside from his mistress’ testimony, there was no additional proof that petitioner was indeed a slave. Thus, his status would turn on whether the presumption of slavery applied. But in order to trigger the presumption, the Court would first have to authenticate petitioner as a member of the negro race.

The petitioner was orphaned as a child, so there was no birth record available that denoted his race. How, then, was the Court to determine his race? Consistent with the prevailing natural history understanding of race, the court began with an examination of petitioner’s physi attributes. But the court, but immediately ran into difficulty because, according to the case history, petitioner was “of an olive colour, between black and yellow, had long hair and a prominent nose.” The Court received this as evidence of a mixed blood line that counseled against application of the presumption of slavery. As the court explained, the petitioner “may have descended from Indians in both lines, or at least the maternal; [he] may have descended from a white parent in the maternal line or from mulatto parents originally free, in all cases the offspring, following the condition of the mother, is entitled to freedom.” Thus, the court concluded that, in light of “how many probabilities there are in favor of liberty[, petitioner] ought not be deprived of it upon mere presumption.”

74 Code of Virginia 1849, Title 30, Ch. 103, Sect. 3.
76 Kenneth M. Stampp, THE PECULIAR INSTITUTION: SLAVERY AND THE ANTEBELLUM SOUTH 194 (Knopf 1961) (1956)) (citing Hudgins v. Wrights, 11 Va. 134, 141 (1806)) (“In the case of a person visibly appearing to be a Negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom; but in the case of a person visibly appearing to be a White man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to show that he is a slave”).
77 Gobu v. Gobu, 1 NC 188 (NC 1802), 1802 WL 207, at *1 (1802).
78 Id. at 1.
79 Id.
80 Id.
81 Id.
The essential difficulty faced by the North Carolina court in *Gobu* existed throughout the antebellum South. In Virginia, the State Supreme court faced a similar conundrum in *Hudgins v. Wrights*. In *Hudgins*, three generations of women sued for their freedom, claiming to have descended, in the matrilineal line, from a free Indian woman named Butterwood Nan. Virginia’s common law presumption of slavery for Negroes was identical to the North Carolina rule. Thus, the status of the petitioners would turn on the Court’s determination of their race.

Unlike the petitioner in *Gobu*, who simply relied upon the uncertainty of his racial background to avoid being classified as a negro, the petitioners in *Hudgins* actively sought to authenticate racially as Indians. Petitioners presented themselves to the trial court for physical scrutiny. The trial court record did not describe the physiognomy of the grandmother, Butterwood Nan, but did note that “her daughter Hannah had long black hair [and] was of the right copper colour,” and that “the characteristic features [of the grand-daughter, including] the complexion, the hair and the eyes, were proven to have been the same as those of whites.”

In addition, petitioners called witnesses to testify as to their claimed status as Indians. Witnesses testified that Butterwood Nan was known in the community as an “Old Indian,” and that Hannah was “generally called an Indian by the neighbours,” and that some neighbors had suggested that Hannah “might recover her freedom if she sued for it.” Lending further credence to the testimony, each witness testified that they “had often seen Indians.” A final witness was called to testify that the father of Butterwood Nan was an Indian, although this witness did not testify as to the origins of the mother.

The trial court found that the genealogy of the women was “imperfectly stated,” but it nevertheless ordered the women freed. The ruling was based upon all the evidence presented, but the trial record makes particular mention of the trial judge’s personal observation that the youngest petitioner “was perfectly white,” and that there were “gradual shades of difference in colour between the grand-mother, mother, and grand-daughter (all of whom where before the court).” However, the trial court went on to note that “freedom is the birthright of every human being,” and declared as a general proposition that anyone claiming to hold another in slavery bears the burden of establishing the claim of ownership. This latter proposition was in stark contrast to the common law presumption of slavery for negroes, and was an arguably strong basis for appealing the decision. Yet, as Judge Tucker of the Virginia Supreme Court observed, it was the fact that the trial judge made the racial determination based “upon his own view” that “has been loudly complained of.”

Although he “profess[ed] not an intimate acquaintance with the natural history of the human species,” Judge Tucker nevertheless offered his own Jeffersonian take on authenticating...
the races. Unlike Jefferson, however, Judge Tucker did not examine the full range of observable traits—physiognomy, temperament, mental acuity, and the like. Instead, he fixed upon physiognomy. According to Judge Tucker, “[n]ature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful: a flat nose and woolly head of hair.”

Hair was a particularly strong indicator, according to Judge Tucker, because “it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans.”

Judge Tucker noted that “upon these distinctions, as connected with our laws, the burden of proof depends.” When attempting to authenticate race, “such evidence is both admissible and proper,” and it “may at sometimes be necessary for a Judge to decide upon his own view.” Satisfied with the physical examination undertaken by the lower court, and persuaded by the fact that “the witnesses concur in assigning to the hair of Hannah, the daughter of Butterwood Nan, the long, straight, black hair of the native aborigines of this country,” Judge Tucker “heartedly” concurred with the lower court’s pronouncement that petitioners were sufficiently authenticated as Indians—not negroes—and thus “absolutely free.”

Judge Roane, also sitting on the panel of judges presiding over the case, agreed with Judge Tucker’s assertion that physiognomic differences between the races are “visibly marked” and that the races “may be readily discriminated from each other by mere inspection only.” “But where an intermixture has taken place, Roane continued, “testimony must be resorted to” for purposes of authenticating race. Of particular importance was the testimony of the neighbors and their belief that petitioners were Indians. “This general reputation and opinion of the neighbourhood is certainly entitled to some credit.” Equally weighty in Judge Roane’s mind what the testimony regarding Hannah’s “almost continual claim as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject.” For Judge Roane, this witness testimony “confirm[ed] the other strong testimony as to Hannah’s appearance as an Indian.” He conceded the possibility that some prior female ancestor could have been a slave (witness testimony only showed that Butterwood Nan’s father was Indian). However, the evidentiary showing, coupled with “the liberality admitted in suits for freedom . . . justify [petitioners’] claim to freedom.”

Judge Roane’s reliance upon petitioners’ reputation in the community and temperament in addition to physiognomy reveals a surprising complexity to race authentication in the nineteenth century. The fact that petitioners performed as Indian within the community and claimed their right of freedom as Indians was of crucial to his analysis. The requisite

92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id. at *6.
99 Id.
100 Id. at *7.
101 Id. at *8.
physiognomy was a necessary, not sufficient criterion to establish one’s race. To be truly authenticated, one must satisfy racial performance expectations as well.

Thus, it is important to remember that racial authentication and law and policy directed at particular racial groups take shape against the backdrop of prevailing assumptions about what it means to perform as a member of a particular race. In the slavery context, the racial reputation of Indians was thought to be incompatible with slavery. Indians, though barbarous, were thought to be proud and freedom loving, preferring death to enslavement. But what happens when an individual thought to be a member of a particular group does not perform their race as expected? Does the lack of racial salience exempt that individual from law and policy shaped by racial reputation? Or does the rigor of race authentication give way to ideological ends? The example of the Cherokee, discussed below, provides an opening look at how the process of authenticating race can be manipulated to suit political ends.

2. The Cherokee

The Cherokee Nation presents a compelling example of how racial authentication was historically used to essentialize individuals for ideological ends. In the early 19th century, there was intense conflict over what the nation’s Indian policy. One possibility considered was civilization and assimilation of the Indian. Civilization and assimilation contemplated, among other things, the conversion of Indians to Christianity, Indian adoption of western attitudes, dispositions, and cultural practices, and the transition from hunter-gatherer societies into English-style farmers. The other possibility was removal of the Indians to more remote Western lands. Removalism was thought desirable for reasons of Manifest Destiny as well as for the survival of Indian ways. A non-trivial number of political elites supported the policy of Removalism. George Washington, reacting to the fact that the Indian nations fought alongside the British in the revolutionary war, suggested that they too should be “compelled to retire along with the British beyond the Lakes.” His view was equally informed by his personal disdain for Indians. He considered Indians to be a “savage” and “deluded” people, and thus proposed a “boundary line between them and use beyond which we will endeavor to restrain our people” from not crossing.

Thomas Jefferson also supported removal of the Indians. Consistent with his view that emancipated blacks should be removed beyond the reach of mixture with whites, Jefferson

102 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA, at cxxviii (Philadelphia & Savannah, 1858) (admitting that Indians were “morally heathen, and intellectually the inferior race” when compared to whites, but unfit for slavery).


104 Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 STAN. L. REV. 500, 507 (1969) (“Humanity and reason dictated removal, for west of the Mississippi they could govern themselves on their own land without the demoralizing influence of intruding whites.”); Mary Hershberger, Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s, 86 J. AM. HIST. 15, 16 (1999) (“[F]or their own survival, southeastern Indians had to move across the Mississippi away from white encroachment.”).


106 Id.
advocated removal of the Indians to areas “beyond the Mississippi.” Although Jefferson believed that forcible removal was appropriate, he believed the use of force unnecessary because “we presume that our strength and their weakness is now so visible that they must see we only have to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only.”

Despite notable removalists, the Federal government initially adopted the benevolent policy of “civilizing” the Cherokee. Indeed, early treaties between the United States and the Cherokee specifically provided an opportunity for Indians to obtain American citizenship. Surprisingly, the Cherokees accepted the assimilation model. They converted to Christianity in large numbers. They adopted English-style farming methods in lieu of hunting and gathering. They enacted a Cherokee Constitution modeled after the U.S. Constitution. They became English speakers, and some had intermarried with whites. Indeed, some owned plantations with black slaves working the land. In short, “they were putting down roots,” American style.

The successful civilization and assimilation of the Cherokee nevertheless drew criticism, particularly from white settlers resided most closely with the Cherokee. Georgia settlers, in particular, “looked with jealousy upon the lands which the natives still possess[ed].” Georgia settlers generally subscribed to the view that Indians were savages an incapable of civilization. But the Cherokee defied conventional racial performance expectations. They were “inauthentic” when measured against the socially constructed image of the Indian.

The Cherokee therefore presented an interesting test case for race authentication. As William McLaughlin wrote,

[The Cherokee] were the prime example of how a far a tribe of heathen hunters could progress under benevolent guidance within one generation . . . . If one needed proof of the potential of the Indian to become a white American in everything but the color of his skin, the Cherokees provided it. For the people of Georgia, the Cherokee were a test case precisely because they were so successful.

Georgia’s predisposition to dispossess the Cherokee of their land and expel them from the territory was premised upon the social meanings ascribed to the Indian race. But the observable characteristics of the Cherokee raised questions about the validity of these social meanings and the appropriateness of the policy of removal for assimilated tribes. Much like the presumption of slavery for negroes, oppressive treatment of the Cherokee was appropriate only if the Cherokee fit within the socially constructed Indian race. The Cherokee presented a “test case” because the inability to authenticate the Cherokee as Indian, in the conventional sense, arguably justified an exemption of the Cherokee from hostile treatment under law.

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107 Letter of February 27, 1803 From President Thomas Jefferson to William Henry Harrison, in 10 WRITINGS OF THOMAS JEFFERSON 369-71 (Andrew A. Lipscomb, ed. 1904).

108 Id.

109 See Treaty with the Cherokee, July 8, 1817, art. 8, 7 Stat. 1256; Treaty with the Cherokee, Feb. 27, 1819, art. 2, 7 Stat. 195, 196.


111 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOL. 1, CH. 18, at 351 (1994) (1835).

Georgia responded to this looming crisis of race authentication by enacting legal provisions intended to force the Cherokee to depart the lands rather than submit to retrograde law – to force them to uproot before “civilization permanently fixed them to the soil.” 113 In an effort to eliminate and delegitimate Cherokee self governance, Georgia enacted legal provisions that extended Georgia sovereignty over Cherokee lands, and nullified all laws and ordinances previously made by Cherokee. In addition, they passed laws claiming property rights in Cherokee lands, and then assigned those rights to various counties of Georgia. Georgia also declared it unlawful for Cherokee to assemble as a political community. Furthermore, Georgia required all whites to “clear” areas presently inhabited by Indians – a provision undoubtedly designed to forestall any efforts undertaken by white sympathizers. Finally, Georgia prohibited Indians from testifying as witnesses in a legal proceeding against whites – a provision that would prove most useful in legal efforts to dispossess Indians of their land. 114

These legal measures, designed to strip the Cherokee of the hallmarks of civilization, shed important light on the interplay of authentication and the social construction of race. In a sense, Georgia officials refused to “see” the Cherokee for what they had become, preferring instead to view them in accordance with their own external conception of what it meant to be Indian. Dispossession and removal policy could only be justified if the Cherokee could be authenticated as Indian. By denying the Cherokee the attributes of civilization, they might be more readily essentialized into the racially constructed category of Indian – a move that would, in turn, better justify further oppressive treatment.

The conflict between the Cherokee and the Georgia settlers came to a head in the case of Worcester v. Georgia. 115 Samuel Worcester, a white missionary from Vermont, was charged, convicted, and sentenced to four years hard labor for having violated the newly enacted provision that made it unlawful for a white man to reside within that part of the chartered limits of Georgia inhabited solely by Cherokee Indians. Worcester challenged his conviction on the ground that the Georgia law that he allegedly violated is unconstitutional. The case, ostensibly about the application of a criminal provision that applied to whites, brought to light the national conflict over Indian policy.

As a formal matter, the Supreme Court declared unconstitutional the Georgia criminal provision under which Worcester had been convicted. The Cherokee nation, according to the Court, was a distinct, “sovereign” community, and relations between the Cherokee people and the United States were governed exclusively by constitutional law, treaties, and federal law. Because Georgia’s criminal law as well as other state provisions directed at the Cherokee were in “direct hostility with those treaties” and Acts of Congress intended to civilize Cherokees, the conviction of Samuel Worcester was based upon the exercise of unconstitutional authority. 116

The legal victory, however, would be short lived. In 1829, there was a shift in national policy. President Andrew Johnson announced that he supported a policy of Indian removal, and announced his decision to do nothing to enforce the Court’s decision. 117 One year later,
Congress passes the Indian Removal Act. In support of the Act, President Jackson drafted a message to Congress in which he expressed deep sympathy towards the plight of southern states – listing Georgia and Alabama – and suggested that states should be allowed to extend their authority to govern Indian Nations.

The Removal Act was motivated by both benevolence and racist assumptions. Congress sincerely believed that removal was necessary in order to guarantee Indian survival. Many held the view that settlers would kill them through encroachment. At the same time, removal was preferable because Indians were deemed too savage to assimilate. The assumption was that the Cherokee would quickly revert to their Indian ways. At the time, however, Indians were not a monolithic community, but “spoke myriad languages; possessed a wide variety of cultures; displayed a broad diversity of social, economic and political organization; and had no conception of themselves as a single ‘race,’ group, or people.” Commenting on the prospect of introducing civilized Indians like the Cherokee into Western lands, Tocqueville observed that “Indian entrance into those wilds will be opposed by hostile hoards.” He went on to suggest that Indians who had traded the hunter-gatherer lifestyle for farming and a more conventional American life may have “lost the energy of barbarians, but have not yet acquired the resources of civilization to resist their attacks.” The struggle between the Cherokees and Georgia climaxed in 1838 with the forcible removal of more than 16,000 Cherokees over a Trail of Tears to what became the state of Oklahoma – which, to this day, remains the largest concentration of Cherokee according to tribal records.

The Cherokee contested the prevailing social construction of Indians by exuding behavior and cultural practices that were uncomfortably similar to whites. Nevertheless, the dominant ideology of white supremacy and racial purity led to the re-construction and authentication of the Cherokee in the image of the noble savage so that society might justifiably subordinate the Cherokee and other civilized tribes in a manner consistent with the treatment of the Indian race more generally. Racial authentication, which began as a quasi-scientific inquiry into the physiognomy and character of races, had begun to evolve into a mechanism for shunting people into categories for oppressive treatment without regard for observable traits and behavioral practices. This evolved notion of racial authentication would soon achieve its most forceful expression in laws directed at the Chinese.

3. The Chinese

The Chinese example presents a variant on the problem presented by the Cherokee. In the nineteenth century, the dominant focus of racial authentication in connection with American

118 4 Stat. 411-412 (May 28, 1830).
119 President Andrew Jackson, First Annual Message (1829), in 3 A Compilation of the Messages and Papers of the Presidents 1019-1022 (1897).
120 Jedidiah Morse, A Report to the Secretary of War of the United States, on Indian Affairs 79-83 (1822).
121 General G.A. Custer, My Life on the Plains: Or Personal Experience with the Indians 11-12 (1874) (“Civilization may and should do much for him, but it can never civilize him.”) (emphasis added).
123 Tocqueville, supra note ___ at 352; see also Morse, supra note ___ at 1022 (noting the risks of removal of “these Indians far away from their present homes . . . into the wilderness, among strangers, possible hostile . . .”).
124 Tocqueville, supra note 352.
125 Rennard Strickland, Fire and the Spirits – Cherokee Laws from Clan to Court 65-67 (1975).
law rested upon whites, blacks, and Indians. There was little, if any, meaningful law directed at the Chinese. However, the dominant ideology of white supremacy rejected any notion of equality among whites and the Chinese. Thus, the essential question presented by the Chinese was how best to slot them into the prevailing legal orthodoxy that contemplated differential treatment for whites, blacks and Indians. To accomplish this task, the Chinese would have to be constructed and authenticated as a race worthy of social stigma and marginalization on par with blacks and Indians.

The Case of People v. Hall provides a particularly poignant example of how this was done. In People v. Hall, the California Supreme Court was asked to review the validity of a murder conviction of a white citizen of California. George Hall, a white man, had been convicted based upon the testimony of a Chinese witness. At the time, California had two laws on its books that limited the admissibility of testimony from persons of certain races when one of the parties was white. In civil cases, Section 394 excluded all testimony from Indians and Negroes. For criminal cases, Section 14 excluded testimony from blacks, Mulattos and Indians.

Judge Murray, writing for the California Supreme Court, held that the criminal code provision contemplates the exclusion of testimony from Chinese persons – despite the absence of any clear mention of Chinese in either the civil or criminal statutes. According to the Court, the terms “negro”, “mulatto”, “Indian” and “black person” were generic terms that should be interpreted broadly. By contrast, white was understood to have a fairly specific meaning – it was believed to be a racial category that included members of the Caucasian race and excluding all others. Thus, the term “Indian” might be reasonably interpreted to contemplate the entire “Mongolian race” – including the Chinese – or, alternatively, the generic terms “black” and “mulatto,” taken together, could be read to encompass every race other than whites (presumably, including Indians, and by extension, Mongolians).

The manner in which the Court reached this conclusion sheds important light both on the mechanics of racial authentication and its normative thrust. The Court employed four very different types of arguments. The first argument advanced by the Court was distinctly ethnographic. According to the Court, in the dim reaches of antiquity, Asians crossed the Bering Straights and populated this continent. Evidence of this, according to the Court, was revealed by the fact that Asians and “American Aborigines” shared certain physical characteristics such as skull and pelvis, general posture, hair, and eyes. Thus, according to the Court, one might reasonably conclude that the Chinese were, in fact, Indians for purposes of racial classification in America.

The problems with this mode of authentication were particularly obvious. For instance, the Court did not specify which Asians crossed the Bering Straits. Furthermore, implicit in this was the presumption that all Asians are the same. Moreover, what might be said about Asians that did not cross the Behring Straits? Were they to be authenticated as Indian as well?

126 People v. Hall, 4 Cal. 399 (1854).
127 Id.
128 Id.
129 Id. at 404.
130 Id.
131 Id.
132 Id. at 401.
133 Id.
Undeterred, the Court offered a normative argument for why the Chinese ought to be authenticated as Indians for purposes of racial classification. According to the Court, the term Indian was employed by Columbus to describe American Aborigines, who he had mistaken for East Asians/Indians.\textsuperscript{134} From that point forward, the court asserted that most Americans did not meaningfully distinguish between Native Americans and Asiatics. Both, the court contended, were thought to be part of the Mongolian type of human species\textsuperscript{135} – an empirical proposition that was refuted by 75 years of race science and prevailing social practices of everyday people who had no apparent difficulty in distinguishing the Chinese from Indians.

The Court then advanced formal legal arguments in support of its conclusion. First, the Court argued for a generic interpretation of the term Indian. According to the court, the term Indian must be understood in its generic rather than specific sense because of the rule of statutory construction \textit{in pari materia} – words dealing with like subject matter should be read together for the sake of consistency. The Court considered the text of Section 14 (the criminal provision) – “No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against, a white man.”\textsuperscript{136} The court reasoned that the terms “black” and “white” were indisputably generic because if the terms were understood in a more specific sense, “anomalous” consequences would ensue.\textsuperscript{137} A European white man, according to the Court, would not be “shielded from the testimony of the degraded and demoralized caste.”\textsuperscript{138} Similarly, an African would not be precluded from testifying against a white person – an interpretation, according to the court, that would be “an insult the good sense of the legislature.”\textsuperscript{139}

At the same time, the Court maintained that the term “white” \textit{ex vi termini} (“by the very meaning of the term”) excludes all others.\textsuperscript{140} Thus, even if one were unconvinced that the term Indian encompasses all Asians, including the Chinese, the rule of construction directed the Court to construe the term “black” in Sect. 14 in contradistinction to the term “white,” thus encompassing all that is not Caucasian.\textsuperscript{141} Put differently, the Court interprets the term black to include every group that is not white – Indians, Asians, and presumably the Chinese. Thus, the prohibition on testimony by blacks not only entailed a prohibition on testimony from a Chinese person, but rendered the enumeration of Indians and mulattos in the statutes surplusage.

The Court’s ethnographic and formal legal arguments to authenticate the Chinese as Indian or, alternatively, black, pushed the limits of plausibility. What would motivate a Court to engage in such tortured reasoning? The normative thrust is set forth in the closing paragraphs of the Court’s opinion, where it made clear its intention to place strict barriers between the rights and privileges afforded whites and those afforded to all others. “[T]he same rule which would admit them to testify,” the Court observed, “would admit them to all the equal rights of

\textsuperscript{134} \textit{Id.} at 400.
\textsuperscript{135} \textit{Id.} at 401-02. The wisdom of this criterion of authentication is similarly questionable, as it would seem odd to hinge contemporary racial categorization upon an historical error of impression.
\textsuperscript{136} \textit{Id.} at 402.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 403. One particular complication not identified by the Court is raised by the term mulatto. Historically, the term mulatto applied to people of mixed negro and white ancestry. Of course, the Court might very well have concluded that this term ought to be read generically as well, encompassing any mix of black and white, along with any mix of white and Indian or black and Indian. But if mulatto is understood as a specific term, this would have complicated the application of its rule of construction because two of the terms would have been generic, but one specific and thereby cast doubt on whether the fourth term – Indian – should be interpreted generically.
\textsuperscript{140} \textit{Id.} at 404.
\textsuperscript{141} \textit{Id.}
citizenship.” Equal citizenship for the Chinese, according to the Court, was “an actual and present danger.”

The Court was equally motivated by a belief in the natural inferiority of the Chinese. Justice Murray described Chinese participants in the legal process as an “anomalous spectacle of a distinct people . . . who nature marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown.” He went on to note that “nature has placed an impassable difference between the Chinese and whites,” and that they had no business “participating with us in administering the affairs of our government.” If it had ever been anticipated that this class of people were not embraced in the prohibition, then “such specific words would have been employed as would have put the matter beyond any reasonable controversy.”

Thus, the Court purported to resolve the question of how the Chinese should be slotted into the racial legal order. In the pursuit of racial and legal determinacy, the Chinese could be authenticated as either Indian or black, but certainly not white. The Chinese community in California was predictably outraged by the decision in People v. Hall. Lumping the Chinese in with blacks, Mulattos and Indians for purposes of invidious racial treatment was nontrivial. George Hall, after all, had been convicted of killing a Chinese man in front a number of Chinese witnesses. The Court’s ruling not only rendered the Chinese powerless to employ legal system to protect themselves, but it also green-lighted terror against Chinese in their own communities. Indeed, the places where Chinese expect greatest security – at home, among other Chinese – was ironically, the place least protected by law.

Interestingly, their outrage was not directly at the racially oppressive treatment per se, but at the failure of the Court to observe crucial differences between the Chinese and other subordinate races. In an open letter to then Government Bigler, prepared in 1855, Lai Chun-chuen, a prominent San Francisco merchant wrote:

[Lately], your honorable people have established a new practice. They have come to the conclusion that we Chinese are the same as Indians and Negroes, and your courts will not allow us to bear witness. And yet these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and caves.

He continued:

The Chinese, by contrast, have a record of thousands of years of honor and civilization. The decision to bar Chinese testimony by equating us with blacks and Indians could not have been the result of enlightened intelligence and enlarged liberality.
Lai Chun Chen was attempting to authenticate the Chinese as a separate and distinct race. His letter not only pointed out the absurdity of the California Supreme Court ruling, but revealed the prevailing mode of race authentication to be a sham protocol employed to achieve political ends. Lai Chun Chen’s letter, however, would yield only a pyrrhic victory. In 1863, the California legislature would vote to amend both the criminal and statutes to put the matter beyond dispute: “No ... Mongolian or Chinese shall be permitted to give evidence in favor of or against any white person.”

IV. RACE AUTHENTICATION IN THE MODERN ERA

By the close of the nineteenth century, race authentication had become thoroughly appropriated as a means of facilitating racial oppression. The social meanings ascribed to subordinate races had grown increasingly negative, and law and policy has grown correspondingly harsh. Courts and policy makers relied upon racial authentication to affirm race as a meaningful analytical category and validate the negative and often acontextual social meanings ascribed to race in order to justify the administration of harsh legal measures.

But race authentication would soon evolve into an instrument of progressive reform. During the 1920s and 1930s, blacks would begin to assert control over their own racial identity – to racially authenticate on their own terms. Their self-proclaimed racial narrative would stand in stark contrast to the profoundly negative imagery associated with blacks that dominated American society. Race authentication, when harnessed by racial minorities themselves, would be converted from a tool of oppression into a means of human liberation, community building, and political activism.

A. Race Authentication in Segregation, Immigration, and Naturalization Policy

For the remainder of the nineteenth and much of the early twentieth century, the struggle for racial progress centered on defining the status of the Negro as an American citizen, securing for him the full range of political rights accorded to all citizens, and demarcating a pathway to social equality for blacks. Each step along this progression was undertaken in the face of deep and sustained white resistance. In the wake of the Civil War and ratification of the 13th Amendment, legal and political elites were faced with the daunting task of delineating a path of transition for blacks from slavery to freedom. Although it was clear that blacks would no longer be enslaved, the status that blacks would assume was far less certain. As sociologist E. W. Gilliam observed in 1883, “no two free races, remaining distinctly apart, can advance side by side, without struggle for supremacy.”

This early twentieth century struggle to secure racial progress in the face of staunch and often violent opposition is commonly referred to as the Nadir, or low point in American race relations. It is the low point because it defined a period in American history when blacks were

150 The California Supreme Court, in the interim, had extend the ban on Chinese testimony from criminal case to civil cases. See Speer v. See Yup Co. (13 Cal. 73 1859).
rendered most vulnerable to widespread oppression at the hand of state officials and white private actors. Opposition to Negro advancement took many forms during this period. Opposition among intellectual elites, grounded largely in assumptions of biological inferiority of blacks, fueled lowbrow sentiments of racial animus and expanded the scholarly appeal of the burgeoning Eugenics movement.\textsuperscript{153} Opposition among the masses was tragically manifested in widespread lynchings throughout the south and the west,\textsuperscript{154} race riots in urban areas,\textsuperscript{155} and the extreme elaboration of de jure segregation throughout the nation.\textsuperscript{156} Indeed, many of the structural manifestations of anti-black sentiment – de jure and de facto segregation, fear of equal citizenship, and wholesale rejection of political equality – were sustained by beliefs in the biological inferiority of blacks as well as anxieties regarding race mixing.\textsuperscript{157}

But the essential conflict described by Gilliam was not limited to blacks. \textit{Plessy v. Ferguson} had established that de jure segregation laws were not instances of racial discrimination, but innocuous regulatory distinctions to be applied in accordance with

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Eventually these brutal acts [of lynching] degenerated simply into a method to keep African-Americans in their “place,” even to the extent of picking out the occasional sacrificial lamb whose killing, racists knew, would terrify other blacks and tend to even further docilize them. \ldots [P]ressure exerted by the Klan and other white supremacists kept all but a relative handful of opponents from challenging these tactics.
\end{quotation}

\textit{Id.}

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\textsuperscript{154} For a discussion of the tragic practice of Negro lynching in early American history, see \textsc{Jerrold M. Packard}, \textsc{American Nightmare: The History of Jim Crow} 132 (2002) (noting that, during the Jim Crow era, “the racial atmosphere . . . was so warped that murdering blacks became almost a socially acceptable tool for embedding white supremacy in the region’s social fabric”); and \textsc{Stewart E. Tolnay} & \textsc{E. M. Beck}, \textsc{A Festival of Violence: An Analysis of Southern Lynchings} 55–82, 131 (1995). According to Tolnay and Beck:
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\textsuperscript{156} For a discussion of the explosion in segregation laws across the country following the Court’s decision in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), see \textsc{The Origins of Segregation} (Joel Williamson ed., 1968); \textsc{C. Vann Woodward}, \textsc{The Strange Career of Jim Crow} 97–109 (3d rev. ed. 1974) (noting that the spread of Jim Crow laws both before and after \textit{Plessy} had the effect of “constantly pushing the Negro farther down”); \textsc{C. Vann Woodward}, \textsc{Origins of the New South} 1877–1913, at 211–12 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1971) (“It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a black man working for a black man’s wages.”). \textit{See also} \textsc{Richard H. Fallon, Jr.}, \textsc{Implementing the Constitution} 57 (2001) (noting that “in the wake of \textit{Plessy}, legally mandated race-based segregation had suffused the social and political fabric of many states, especially in the South”). \textit{But see} \textsc{Michael Klareman}, \textsc{From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality} 48 (2003) (concluding that “[t]he spread of segregation to new social contexts is also more plausibly attributable to factors other than \textit{Plessy}” and noting that “white southerners generally codified that racial preferences first and tested judicial receptivity later”).
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\textsuperscript{157} See \textsc{Herbert Hovenkamp}, \textsc{Social Science and Segregation Before Brown}, 1985 DUKE L.J. 624, 651–56 (1985) (exploring the scientific and social scientific racial inferiority theories of the late nineteenth and early twentieth centuries that would create anxieties regarding racial mixing and prompt the passage of strict segregation legislation).
\end{quotation}
established usages, customs, and traditions of the people, with a view to the promotion of their comfort and the preservation of the public peace and good order.”

But as Justice Harlan intimated in his dissenting opinion in *Plessy*, other racial groups, such as the Chinese, might be more deserving of racial repression. Indeed, prevailing anti-Negro sentiment would quickly give way to increasing xenophobia as white society grew increasingly anxious about the expanding population of Asians in America.

Lothrop Stoddard’s *Rising Tide of Color Against White World Supremacy* was emblematic of this growing anti-Asian sentiment. According to Stoddard, whites had achieved marvelous heights of civilization, and that their accomplishments were due to superior heredity and maintenance of racial values. Race was foundational in his view. “Civilization is the body,” he wrote, but “race is the soul.” “Let the soul vanish, and the body moulders into the inanimate dust from which it came.”

Stoddard believed that race lent “specialized capacities” to people, such as the capacity for civilization in whites. These traits, however, were highly “unstable.” Racial purity was essential to retaining the potency of these specialized capacities. More importantly, preventing the dilution of white blood was, in his view, essential to avoid generalized mediocrity and the concomitant decline of civilization. Otherwise, according to Stoddard, “[t]he white race with its millions of years of human evolution might soon be irretrievably lost, swamped by the triumph of the colored races.” Hence the need for thoroughgoing regulation of intermarriage, intermixing, and the like.

Unlike many of his contemporaries, who fixed upon the risks associated with miscegenation between blacks and whites, Stoddard believed the greatest threat to white civilization was the influx of Asiatic blood. Thus, Stoddard argued that special measures must be taken to ensure the purity of white blood and white civilization. Chief among these was his recommendation that whites withdraw from Asia and enforce strong prohibitions on the migration of Asians to white lands.

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158 *Plessy*, *supra* note ___ at 550.
159 One of Justice Harlan’s arguments against the segregation ordinance in Louisiana was that it prevented blacks and whites from occupying the same car, but made no mention of segregating the Chinese:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.* at 20.
165 *Id.*
166 *Id.*
167 Stoddard also argued for limits on the migration of “lower white” human types to forestall further deterioration.
It was against this backdrop of anti-Asian sentiment that the Supreme Court confronted a question not unlike the issue raised in People v. Hall – whether a Mississippi law requiring that black and white children attend segregated schools should be applied to Chinese children, and if so, how it should be done.\footnote{Gong Lum v. Rice, 275 U.S. 78 (1927).} Section 207 of the Mississippi state constitution provided in relevant part that “Separate schools shall be maintained for children of the white and colored races.”\footnote{Sect. 207 of the Mississippi State Constitution (1890).} At the time, the term “colored” was generally understood to refer to blacks and mulattos.\footnote{State v. Treadaway, 126 La. 300, 322, 52 So. 500, 508, 139 Am. St. Rep. 514, at page 531 (20 Ann. Cas. 1297) (holding that the term “colored persons” under Louisiana statutes and decisions was generally limited to negroes and those having negro blood).} Gong Lum, a Chinese resident of Mississippi, sought to enroll his daughter, Martha, in the local school reserved for whites.\footnote{Rice, 275 U.S. at 79.} Interestingly, Gong Lum did not challenge the doctrine of separate but equal laid down by Plessy, but instead challenged the criteria applied by Mississippi that resulted in his daughter being authenticated as “colored” for purposes of public schooling.

Gong Lum’s desire for an exception that would allow his daughter to attend the white school was, in all likelihood, driven by practical considerations, such as having his child attend the better funded school, and to improve his daughter’s chances to associate and possibly assimilate into the dominant (as opposed to the marginal) American culture. However, the implications of allowing such an exception for white society were tremendous. To allow inclusion of Asians within the categorical scheme of whiteness – even for the limited purpose of public education – contemplated unfathomable equality. It would not only devalue the privilege of whiteness, but would run up against prevailing notions of racial and cultural superiority. It also threatened to expose the lie of separate but equal, for if the white and colored schools were indeed equal, Gong Lum would be indifferent as to which school his daughter attended.

Given the stakes of the dispute, Court’s decision to allow state officials to treat the Chinese as “colored” for purposes of oppressive state law is unsurprising. What is surprising, however, is the lack of any meaningful discussion about what it means to be either Chinese or colored under Mississippi law. Unlike nineteenth century courts, which forged headlong into the realm of racial authenticity, the Court in Gong Lum proved far more circumspect.\footnote{The lower court in Gong Lum did, however, indulge this question, concluding that the term “colored” was “not necessarily limited to those having an admixture of negro blood in their veins,” and could be understood to embrace all non-white races. Rice v. Gong Lum, 104 So. 105, 110 (Miss. 1925), aff’d 275 U.S. 78 (1927).} Rather than address this novel issue directly, the Court simply asserted that Gong Lum’s challenge “is the same question which has been many times decided to be within the constitutional power of the state legislature.”\footnote{Id. at 86.} That question was not the specific question presented by Gong Lum – namely, what were the characteristics that the Chinese shared with “colored” such that they might be authenticated as “colored” under Mississippi law – but a reframed issue of whether states had the power to impose reasonable regulations that relied upon race distinctions. This question, by contrast, had been addressed and answered affirmatively in Plessy, where the Court found that such laws do not implicate any federally protected right.

The strong implication of the Court’s ruling in Gong Lum, however, was that it was indeed permissible for Mississippi, or any other state for that matter, to authenticate the Chinese as colored for purposes of state law – something that did not sit well with the Chinese of
Mississippi. As one commentator noted, “a stunned Chinese community tried to make themselves more acceptable to the white community. The Chinese ceased all social contact with blacks and ostracized individual Chinese who continued to maintain social relations, including marriages, with blacks.”

The Anti-Asian sentiment animating perverse modes of racial authentication that lumped the Chinese in with blacks, Indians, and coloreds for purposes of invidious treatment was not simply an offshoot of segregation policy. Indeed, by the time Gong Lum was decided, anti-Asian sentiment had already become an entrenched feature of national policy. Much like oppressive law and policy directed at blacks and Indians, early American policy toward the Chinese was shaped by the manner in which the Chinese— as a race— where authenticated in the hearts and minds of white society.

Much of the hostility toward the Chinese was designed to discourage immigration. People v. Hall exemplified the prevailing view that Chinese migrants deserved no better treatment than blacks or Indians. However, it is also worth pointing out that the Chinese and other foreign workers (usually Mexican and Latino Americans) were specially taxed in order to further discourage migration. In response the tax and other legislative initiatives intended to marginalize the Chinese, the government of China asked Anson Burlingame, then U.S. minister to Peking, to conduct a goodwill mission to the United States. The mission resulted in the Burlingame Treaty of 1868, which provided in relevant part that US citizens visiting and residing in China, and Chinese citizens visiting or residing in US should enjoy the same privileges and immunities, as might be enjoyed by citizens of the favored nation. The underlying purpose was to encourage California in particular to cease subjecting the Chinese in California to ill treatment.

The popular response was overwhelming negative. Hatred of the Chinese spread throughout California and spawned organized anti-Chinese hate groups. For example, the Anti-Chinese Union of San Francisco pledged “to unite, centralize, and direct the anti-Chinese strength of our Country.” Each member pledged (1) to uphold the Constitution of the Union, (2) not to employ Chinese laborers, and (3) not to purchase goods from the employer of Chinese.

Organized white labor groups also turned profoundly anti-Chinese. For example, the California Working Man’s party declared:

We have made no secret of our intentions. Before you and before the world we declare that the Chinaman must leave our shores. . . . . We declare we cannot hope to drive the Chinaman away by working cheaper than he does. None but an enemy would expect it of us. None but a degraded coward and slave would make

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175 “An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California,” imposed a capitation tax of $2.50 per month on all Chinese residents, except those who operated businesses, had licenses to work in the mines, or were engaged in the production or manufacture of sugar, rice, coffee, or tea. Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed by Act of May 16, 1939, ch. 154, 1939 Cal. Stat. 1274, 1376).
177 JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 405 (2d ed. 2007).
178 Id.
the effort. To an American, death is preferable to life on par with the Chinaman.\textsuperscript{179}

Not surprisingly, California moved to stem the tide of Chinese immigration. In 1879, California revised its state Constitution to impose “conditions” upon the Chinese. The revised state Constitution prohibited California Corporations from hiring Chinese laborers, prohibited Chinese from working on behalf of the state, invalidated all contracts for Chinese labor, and empowered local jurisdictions to take all actions (necessary and proper) to remove Chinese from within their borders.\textsuperscript{180} The revised constitution, however, was challenged on the ground that it violated both the rights of Chinese workers and white employers to contract for employment, and ultimately those provisions were struck down.\textsuperscript{181}

In response, California looked to federal law to accomplish the same ends. The results were twofold. First, the Burlingame Treaty was revised so as to allow the suspension of immigration of Chinese labor to the United States.\textsuperscript{182} Second, Congress passed “An Act to Execute Certain Treaty Stipulations Relating to Chinese”, which would become known as the Chinese Exclusion Act.\textsuperscript{183}

This act was the first federal immigration statute to single out an ethnic group name for invidious treatment, and represented a dramatic reversal in the historic American policy of open immigration. As an initial matter, Congress placed a moratorium on Chinese immigration for ten years. Further, Captains of vessels bringing Chinese in violation of the Act could be fined not more than $500 for each Chinese person on board. Chinese laborers who wished to travel home to China to visit families were required to register and carry proper documentation at all times. Finally, Congress prohibited all states from granting U.S. citizenship to Chinese migrants. According to Congress, such measures were necessary because, “in the opinion of the Government of the United States, the coming of the Chinese Laborers to this country endangers the good order of certain localities”\textsuperscript{184} – presumably, diminished wages or the loss of jobs for white laborers, and the fact that anger and dissention posed a threat to public order.

Following upon on the Chinese Exclusion Act, Congress passed the Scott Act of 1888,\textsuperscript{185} which made it impossible for any Chinese laborer to leave the United States and later return to work in future. Most Chinese laborers came to America to work, with the intention of taking that wealth and returning home. Under the Scott Act, Chinese laborers were forced to choose between abandoning their families in China or risk permanent exclusion from the wealth-generating jobs in the United States. Californians celebrated this most forceful exclusion of Chinese.

However, the Scott Act proved problematic because it abrogated directly provisions of the Burlingame Treaty. Recall that the Burlingame Treaty provided for parity in terms of the privileges and immunities of Chinese and American citizens. The Chinese Exclusion Act called for a suspension of immigration, not an absolute prohibition as was the case under the Scott Act. Thus, a question arose – whether the power to regulate immigration resides within the executive

\textsuperscript{179} KEVIN STARR, ENDANGERED DREAMS: THE GREAT DEPRESSION IN CALIFORNIA 11 (1997).
\textsuperscript{180} Cal. Const. Art XIX (repealed 1872).
\textsuperscript{181} Id.
\textsuperscript{182} Treaty of Trade, Consuls, and Emigration, U.S.-China, July 28, 1868, 16 Stat. 739, 740.
\textsuperscript{183} Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).
\textsuperscript{184} Id.
\textsuperscript{185} Scott Act of 1888, ch. 1064, § 2, 25 Stat. 504 (repealed 1943).
branch (under the Burlingame Treaty) or Congress (under the Chinese Exclusion Act and the Scott Act).

The Supreme Court ultimately resolved this issue in *Chae Chan Ping v. United States* by siding with Congress, holding that Congress enjoyed plenary power to regulate the status of Chinese laborers (and other aliens) regardless of extant treaty provisions. The Court reasoned that Congress had the power to protect the security of a nation in times of war – presumably to declare war – and that this same power, less potent, exists to respond to perceived threats to the nation.

What is interesting about the opinion is the manner in which the Court constructs and authenticates the Chinese as a national threat. Justice Field, writing for the majority, legitimates popular fears of an oriental invasion. Of particular concern was the inability of white laborers to compete with Chinese workers. The Chinese, according to Justice Field, were “industrious and frugal.” Their “expenses were small” and they were “content with the simplest fare”, such as would not suffice “for our laborers and artisans.” Thus, “the competition between them and our people was . . . altogether in their favor.”

Justice Field also discussed the perceived unwillingness of the Chinese to assimilate into American society. The Chinese, according to Justice Field, “remained strangers in this land, residing apart by themselves, and adhering to customs and usages of their own country.” He went on to observe that “it seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.” Thus, Justice Field concluded that it was reasonable to think that “our country would be overrun by them unless prompt action was taken to restrict their immigration.”

The notion that the Chinese were perpetual foreigners on American soil was of central importance to Justice Field. He went to great lengths to distinguish the Chinese as outsiders, evidenced by his frequent use of the term “our” – “our laborers and artisans,” “our people,” and “our country.” But his observation of the Chinese as “isolated” was remarkably acontextual. He attributed the isolation of the Chinese to their inherent inability to assimilate. However, he made no mention of oppressive state and federal legislation – laws that prohibited the Chinese from participating in the working of government, burdened them with discriminatory practices, prohibited them from naturalizing, and generally declared the Chinese a menace to society. When viewed in its proper context, the “inability” to assimilate was not a trait inherent in the Chinese, but a conditioned response generated by law itself.

*Chae Chan Ping* exposed the pernicious use of race authentication to serve the xenophobic ends of anti-Asian immigration policy. This pernicious side of race authentication would also present itself in the naturalization context. Two early naturalization decisions – *Ozawa v. United States* and *United States v. Thind* – provide a particularly useful illustration.

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187. *Id.* at 606.
188. *Id.* at 595.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
In *United States v. Ozawa*, a Japanese man – born in Japan – applied to the district court of Hawaii to be admitted as a citizen. Under federal law, naturalization was limited to whites and persons of African descent. However, a 1906 revision to the original Naturalization Act of 1790 contained a discussion of two additional requirements – English language proficiency and residency. Ozawa believed that the discussion of these requirements modified the racial restriction on naturalization, or alternatively, that an exception might be appropriate in his particular case.

The Court examined the statutes, and determined that the racial restriction remained in place. Thus, Ozawa could only be naturalized if he were white. But what exactly did it mean to be white? Although the Court had previously sought to authenticate other racial groups, it had never undertaken an effort to authenticate whiteness.

Ozawa sought to authenticate himself as white by demonstrating his high degree of assimilation into American society and eschewal of Japanese culture. He had resided in Hawaii for over twenty years. Both he and his children were educated in the United States. He had attended American churches and spoke English in his home. Ozawa was, by all indications, highly assimilated. At trial, his attorney emphasized “the whiteness of Ozawa’s skin.”

The Court conceded that Ozawa was well qualified for citizenship in terms of character and education. However, skin color and assimilation were not the hallmarks of whiteness. According to the Court, “white” is defined as “Caucasian” and is not a matter of culture. The physical anthropological category Caucasian simply did not include the “cultivated Japanese” plaintiff Ozawa.

Thus, the rule established by Ozawa, decided Nov. 13, 1922, is that naturalization under the 1906 statute was limited to white persons – defined as Caucasians – and persons of African nativity. But that rule would be quickly re-interpreted just a few months later in *United States v. Thind*. Thind involved a petition for citizenship filed by an Indian man born in India. Thind, however, claimed to be a descendant of the Aryan race and therefore Caucasian under the rule announced by the Court. According to Thind, the genealogy of Aryan of India can be traced to the same source as the Aryan of Europe. Indeed, under the caste system, Thind and other Aryan Indians are at the top of the racial pecking order, and intermarriage with lesser stock of Indians was strongly discouraged for similar reasons of racial purity and supremacy.

The Court conceded, the term Caucasian – which excluded Ozawa – included “the Hindu” – that “it may be true that the blond Scandinavian and the brown Hindu have a common

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196 261 U.S. 204 (1923).
197 Naturalization Act of 1790, 1 Stat. 103, Ch. 3.
199 Ozawa, 260 U.S. at 192.
200 Id. at 189.
201 Id. at 189. Ozawa’s lawyers argued that “the Japanese are of a lighter color than other Eastern Asiatics . . . showing the transparent pink tint which whites assume as their own privilege.” Brief for Petitioner, Ozawa v. United States, 260 U.S. 178 (1922).
202 Ozawa, 260 U.S. at 189.
203 Id. at 198. However, the Court was quick to point out that “[t]here is not implied – in the legislation, or our interpretation of it – any suggestion of individual unworthiness or racial inferiority.” Id. at 198.
204 Thind, 261 U.S. at 206.
205 Id. at 210.
206 Id.
207 Id. at 212.
ancestor in the dim reaches of antiquity.” However, the Court nevertheless refused to allow Thind to naturalize. According to the Court, the statutory reference to “whites” was given a scientific interpretation – Caucasian – that was “too scientific” and could not have been comprehended by the drafters. Instead of applying the “Caucasian” rule of whiteness, the Court sought to authenticate whiteness based a decidedly unscientific measure – what the Framers understood and common people knew white to mean. Thus, the issue, as described by the Court, was “whether we can satisfy the common understanding that they (Asian Indians and the blond Scandinavian) are now the same or sufficiently the same such that common men, using common speech would classify them together as white persons.”

Applying this standard, Thind could not be authenticated as white because white, as commonly understood, did not contemplate the Indian, although it did appear to include Eastern, Southern, and Middle Europeans, Slavic, and Mediterranean types. According to the Court, “[i]t is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.”

But what about the Court’s decision in Ozawa, that defined white as ethnographically Caucasian? The Court rationalized its prior ruling, pointing out that the term white and Caucasian may be synonymous, but one still must establish something greater than merely an ethnographic connection. But what must be established? The Court had rejected skin color and cultural assimilation in Ozawa. What else could there be? The Court declined to specify the missing ingredient, leaving ideology and intuition rather than specific criteria to guide the process of authentication. “What we suggest,” mused the Court, “is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.”

In the wake of Ozawa and Thind, it was clear that race authentication was little more than a tool employed by members of white society to subjugate the masses of non-Anglo Americans. What began as an effort to validate race as a socially meaningful concept and to reliably and predictably sort individuals into socially constructed categories of race had evolved into a brute mechanism to entrench white supremacy. Racial authentication, which once provided some modicum of clarity, now functioned as a distorted ideological prism through which society gazed to discern race and direct the administration of oppressive law. But this would soon change, as African Americans began to seize control over their own racial identity, and project onto the world their own authentic vision of what it means to be “black.”

B. A Turning Point in Race Authentication – The Harlem Renaissance and the Shift Toward Racial Salience

The Harlem Renaissance marked an important transition point in the evolution of racial authentication, for it was during this period in which black Americans embraced racial authentication for the explicit purpose of human liberation and racial empowerment. Racial

\[\text{Footnotes:} 208 \text{ Id. at 209.} \\
209 \text{Id.} \\
210 \text{Id.} \\
211 \text{Id. at 213-14.} \\
212 \text{Id. at 215.} \\
213 \text{Id.} \]
authentication, for so long employed by whites in service of racial oppression, would be redeployed by blacks to validate a self-determined conception of racial identity that emphasized the richness of the black experience. This shift in the normative valence of racial authentication also gave rise to a transformation of the meaning of racial authenticity itself. Race authentication, previously used a threshold sorting mechanism, was now situated in a deeper cultural context. Race, infused with culture, meant that each racial category could be understood to possess a depth of social meaning. Accordingly, race authentication took on new significance. It could be used, as it always had been, as a tool to aid in superficial sorting. But it could also be used to discern one’s racial salience – the extent to which one’s personal identity was shaped by the habits, culture, and expressions of a particular racial group.

Racial authenticity was the defining feature of the Harlem Renaissance. The Harlem Renaissance, also commonly referred to as the New Negro Movement, The New Negro Renaissance, and the Negro Renaissance, was centered in the Harlem neighborhood of New York City. Although it was primarily a literary movement, the Harlem Renaissance influenced the full range of African American music, theater, arts and politics. The movement emerged near the end of World War I in 1918, on the heels of the great African American migration to the North and subsequent opening up of new educational and employment opportunities. As educated and socially conscious blacks began to settle in New York City, Harlem became the new intellectual and cultural center of black America.

In the early 1920s three works signaled the arrival of this new creative and energetic moment in African American culture. Claude McKay’s volume of poetry, *Harlem Shadows*, became one of the first works by a black writer to be published by a mainstream, national publisher, the Harcourt, Brace and Company. Cane, the acclaimed 1923 experimental novel that combined poetry and prose by Jean Toomer, presented a moving depiction of black life in the rural South and urban North. Finally, *There Is Confusion*, the first novel by writer and editor Jessie Fausset, presented a stunning portrait of middle-class life among black Americans from a woman’s perspective.

The fledgling movement would soon capture the attention of major sponsors and publishers. On March 21, 1924, Charles S. Johnson of the National Urban League hosted a dinner to recognize the new literary talent in the black community and to introduce the young writers to New York’s white literary establishment. On the heels of this dinner, The *Survey Graphic*, a magazine of social analysis and criticism that was interested in promoting intellectual diversity and cultural pluralism, produced a Harlem issue. Featuring the works of black writers and edited by black literary scholar Alain Leroy Locke, the March 1925 issue of the *Survey Graphic* announced and defined the aesthetic of black literature and art. However, it was the publication of *Nigger Heaven* in 1926 by white novelist Carl Van Vechten that solidified the movement. The book, presented as a sympathetic exposé of Harlem life, proved immensely popular, particularly among whites eager to gain a glimpse of “Negro life.” Although the book offended some members of the black community, its coverage of both the elite and the baser side of Harlem helped create a “Negro vogue” that drew thousands of sophisticated New Yorkers, black and white, to Harlem’s exotic and exciting nightlife and stimulated a national

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215 Jeanne Toomer, *Cane* (1923).
market for African American literature and music. Finally, in the autumn of 1926, a group of young black writers produced Fire!!, their own literary magazine. With Fire!! a new generation of young writers and artists, including Langston Hughes, Wallace Thurman, and Zora Neale Hurston assumed stewardship of the literary Renaissance.219

The diverse literary expression of the Harlem Renaissance ranged from Langston Hughes’s explicit incorporation of the syncopated rhythms of African American popular music into his poems of ghetto life, as in “The Weary Blues,”220 to Claude McKay’s use of “traditional” poetic forms such as the sonnet to structure decidedly non-traditional poetic assaults on racial violence, as in “If We Must Die.”221 McKay also presented glimpses of the “glamour and the grit” of Harlem life in Harlem Shadows. Others, such as Countee Cullen, used both African and European images to explore the African roots of black American life. For example, in the poem “Heritage,” Cullen discusses being both a Christian and an African, yet not belonging fully to either tradition.222 Women artists, like their male counterparts, also sought to assert their perspective on black life. Quicksand, a 1928 novel by novelist Nella Larsen, offered a powerful psychological examination of an African American woman’s loss of identity,223 while Zora Neale Hurston’s Their Eyes Were Watching God, published nearly a decade later, used folk life of the black rural south to drive a remarkable narrative of race and gender in which a woman finds her true identity.224

Diversity and experimentation also flourished in the fine arts. The influence of the era was reflected in the marriage of blues and ragtime by pianist Jelly Roll Morton, the instrumentation of bandleader Louis Armstrong, and the orchestration of composer Duke Ellington. “Primitive” style and references common to Negro culture appeared in the blues singing of Bessie Smith as well as the paintings and illustrations of artist Aaron Douglas.

The Harlem Renaissance represented the first serious attempt by artists to bring the lived experiences of black people to the forefront of American cultural consciousness. Their work collectively shined a spotlight on the vibrant racial tradition that had largely been ignored by the great masses of Americans. Despite their relatively small numbers, the Harlem Renaissance artists served a primary role in reshaping prevailing attitudes, assumptions and beliefs about blacks in American life. As cultural critic Rudolph Fisher exclaimed in 1927, “the Negro’s stock is going up, and everybody is buying.”225

One of the principle aspirations of the Harlem Renaissance was to acknowledge and validate the distinctive African American cultural heritage. Many artists, including Claude McKay and Langston Hughes, drew their inspiration from the poor blacks, and were often derided by cultural elites as “sewer dwellers” and “members of the debauched tenth.” Yet the idea that one can and should draw inspiration from the bottom resonated many late 19th/early 20th century blacks, whose embrace of accommodationism and pursuit of an independent and self-directed black community life was premised upon the twin beliefs that there was nothing shameful about the lives of ordinary black people, and that African American culture was a reservoir of rich, transformative possibilities.

220 LANGSTON HUGHES, THE WEARY BLUES (1926)
221 Claude McKay, If We Must Die, in SELECTED POEMS BY CLAUDE MCKAY (1953).
222 Countee Cullen, Heritage in COUNTEE CULLEN, ON THESE I STAND (1925)
223 NELLA LARSEN, QUICKSAND (1928).
224 ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD (1937).
The Harlem Renaissance also sought to promote the idea that blacks should take pride in their contributions to American culture. This basic view is perhaps best exemplified by the work of James Weldon Johnson, whose works included “O Black and Unknown Bards,” which identified and praised largely unknown creators of black folk music,\textsuperscript{226} Fifty Years, which chronicled black history during the 50 years following Emancipation,\textsuperscript{227} and Black Manhattan, which presented a history of black culture life in New York City.\textsuperscript{228} A passage from Johnson’s “O Black and Unknown Bards” captures this sentiment most effectively:

There is a wide wonder in it all,
That from degraded rest and servile toil
The fiery spirit of the seer should call
These simple children of the sun and soil.
O black slave signers, gone, forgot, unfamed,
You – you, alone, of all the long, long line
Of those who’ve sung untaught, unknown, unnamed,
Have stretched out, upward, seeking the divine.\textsuperscript{229}

The artists of the Harlem Renaissance also demonstrated a new spirit of self-determination and racial solidarity. Despite substantial patronage from whites, Renaissance artist remained focused on presenting black life, as they saw it, sourced from the lives of the black masses and not the thin stratum of the black cultural elites. Their depiction of ordinary black life implicated not only white racial oppression, but exploitation by black elites as well. They had, in many ways, carved out cultural space for themselves, and worked to define and control this space for themselves and future artists. In this sense, the approach of Renaissance artists was not altogether different from that undertaken by Booker T. Washington’s Tuskegee machine, which viewed the creation of an infrastructure for blacks to lead self-directed lives as the touchstone of racial empowerment in American life. For Washington, the creation of black-operated institutions ensured that blacks would retain both control over and accountability to its members. Harlem Renaissance artists were of like mind, for they too sought to create a movement of their own in order to maintain creative control of their art, and ensure that they remained accountable, first and foremost, to other affiliated artists. In a very real sense, Renaissance artists functioned both as preservationists of black culture, but also race authenticators insofar as they purported to depict the most salient of features of the black experience.

Indeed, it was the suggestion that Renaissance artists embodied the authentic black experience that fueled many of their critics. Perhaps the strongest set of criticisms were levied upon the images of the “New Negro” projected by Alain Locke and other artists. Black critics and commentators conceded that the image of blacks could be profitably transformed through the arts, but were particularly wary of the risks of stereotyping. It was one thing to elevate underrepresented aspects of black life. It was quite another to valorize and depict elements of the “lowly life” to appeal to the fetishes and exotic stereotypes held by white America. Some

\textsuperscript{226} James Weldon Johnson, \textit{O Black and Unknown Bards} (1908), in \textit{The BOOK OF AMERICAN NEGRO POETRY} (James Weldon Johnson, ed. 1922).
\textsuperscript{227} JAMES WELDON JOHNSON, \textit{FIFTY YEARS} (1913).
\textsuperscript{228} JAMES WELDON JOHNSON, \textit{BLACK MANHATTAN} (1930).
\textsuperscript{229} Johnson, Bards, \textit{supra} note \_ at \_. 
critics maintained that Renaissance art did little to transform white public opinion about blacks, and simply exchanged the image of slave cabin for that of a cabaret. Indeed, Sterling Brown, himself a Renaissance artist, was particularly appalled by what he viewed as the exploitation of black culture and the trafficking in “caricatured stereotype.”230

Kelly Miller, a leading black intellectual and dean of Howard University, amplified Brown’s argument. Miller himself has spent a substantial portion of his career working to discount prevailing stereotypes of blacks as lazy, irresponsible and dishonest. He initially extolled the transformative possibilities of popular culture to improve race relations, noting that it proved “an exceptional way . . . to explore the mass mind.”231 Yet he also criticized Renaissance artists for, in the words of Henry Louis Suggs, “perpetuating the image of the Negro as a comic figure through their use of vaudeville and jazz.”232

Langston Hughes offered an impassioned defense of the images used by Harlem artists in his famous essay “The Negro Artist and the Racial Mountain”:

We young Negro artists, who create now intend to express our individual dark-skinned selves without fear or shame. If white people are pleased, we are glad. If they are not, it doesn’t matter. We know we are beautiful. And ugly too. The tom-tom cries and the tom-tom laughs. If colored people are pleased we are glad. If they are not, their displeasure doesn’t matter either. We build our temple for tomorrow, strong as we know how, and we stand on the top of the mountain, free within ourselves.233

Hughes’ vivid assertion of Negro artistic autonomy provided dramatic validation for the movement. For many critics, however, Hughes’ strategic invocation of race pride and self-expression rang hollow. The problem was not that Hughes was a Negro artists, but that his art was too Negro expressive. To paraphrase conservative Countee Cullen, Hughes’ mistake was to throw open “every door of the racial entourage, to the wholesale gaze of the world at large,” in violation of the black middle class “code” of decency.234 The thrust of Cullen’s criticism was amplified by Allison Davis, who lamented that “[o]ur ‘intellectuals’ . . . have capitalized the sensational aspects of Negro life, at the expense of general truth and sound judgment . . . . Our poets and writers of fiction have failed to interpret [the] broader human nature in Negroes, and found it relatively easy to disguise their lack of higher imagination by concentrating upon immediate and crude emotion.”235

Others were equally skeptical of the Harlem artists’ claim that art produced by Negroes was racially distinctive or authentic in any meaningful sense. This argument was put most forcefully by George S. Schuyler, a man who would become the dominant voice of black conservatism in the middle of the twentieth century. In an article entitled “Negro-Art Hokum,” Schuyler argued that the category of Negro Art was, at bottom, an act of self-deception.

233 Langston Hughes, The NegroArtist and the Racial Mountain, in 122 NATION (June 1926).
According to Schuyler, there is nothing “expressive of the Negro soul” in the work of black artists whose way of life was not so different from other Americans.\textsuperscript{236} Schuyler argued,

He is not living in a different world as some whites and few Negroes would have us believe. When the jangling of his Connecticut alarm clock gets him out of his Grand Rapids bed to a breakfast similar to that eaten by his white brother across the street . . . it is sheer nonsense to talk about ‘racial differences’ between the American black and the American white man.\textsuperscript{237}

Negro art, he maintained, may very well exist, but not in America. “[I]t has been, is, and will be among the numerous black nations of Africa; but to suggest the possibility of any such development among the ten million colored people of this republic is self-evident foolishness.”\textsuperscript{238}

Jazz music was subject to similar criticism. Black conservative elites, such as educator Carter G. Woodson, summarily declared that “jazz is not real music,” but merely yet another example of the low and frivolous creations of the new Negro.\textsuperscript{239} As conservative playwright Benjamin Brawley pointed out, jazz could not be understood as “art” precisely because it “annihilated form” and emphasized a “low and ‘exotic’ life.”\textsuperscript{240} To be sure, black conservatives were not alone in their criticism of jazz. Indeed, the ascension of jazz drew fire from music traditionalists more broadly, regardless of ideological affiliation. The significance of the black conservative critique, however, lies not so much in the critique of the form, but of the larger culture that nurtured and sustained jazz. Validation of jazz necessarily entailed acknowledgement of inspirations of jazz and its association with cabaret life and alcohol and drug consumption – features that many critics viewed as “inauthentic” and improper representations of black life.

The redeployment of race authentication within the artistic community, then, proved to be a source of human liberation and empower as well as a site of internal division. Blacks, eager to reconstruct their public racial image on their own terms found themselves wrangling over what it meant to be “truly” black. This essential conflict over racial authenticity, though situated in the arts, would soon spill over into politics and law.

C. Race Authentication in Progressive Racial Politics

If the Harlem Renaissance marked the transition point for racial authentication in popular culture, the Black Power movement represented its arrival in politics. In Greenwood, Mississippi, Stokely Carmichael would announce SNCC’s new slogan of “Black Power,” and launch a movement that would merge racial authentication with political protest. In a hastily planned speech, Carmichael began by establishing his reputation and credibility among the locals, pointing out his previous organizing efforts and personal relationships with members of the community. Gaining momentum and sensing the urgency of the crowd, he shifted gears and declared,

\textsuperscript{236} George S. Schuyler, \textit{The Negro-Art Hokum}, 122 \textit{Nation} 662-63 (June 16, 1926).
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} JAMES O. YOUNG, \textit{BLACK WRITERS OF THE THIRTIES}, 64, 151 (1973).
\textsuperscript{240} \textit{Id.} at 38 (from BENJAMIN BRAWLEY, NEGRO BUILDERS AND HEROES (1937)).
This is the twenty-seventh time that I’ve been arrested. I ain’t going to jail no more. The only way we gonna stop them white men from whuppin’ us is to take over. What we gonna start sayin’ now is Black Power!  

Carmichael continued, “The white folks in the state of Mississippi ain’t nothing but a bunch of racists . . . . What do we want?” The crowd enthusiastically replied, “Black Power!”  

But what exactly did Carmichael mean when he invoked “Black Power”? His vision would coalesce in a position paper on basis Black Power, first published in the New York Times in August 1966. The paper sought to explain why SNCC needed to change course and break with the civil rights establishment’s liberal policy. For SNCC, the essential flaw with prevailing integrative civil rights strategy was that it denied blacks the opportunity to liberate themselves in accordance with their own views of what racial progress entailed. Blacks had been duped into thinking that the liberal legal strategy of securing civil rights and promoting integration was tantamount to racial empowerment. As explained in the paper, “[i]n the beginning of the movement, we had fallen into a trap whereby we thought that our problems revolved around the right to eat at certain lunch counters or the right to vote or to organize our communities. We have seen, however, that the problem is much deeper.”  

The deeper problem, according to SNCC, was the profound sense of cultural, political, and economic disempowerment occasioned by white supremacy. Blacks needed to close ranks and seize control of their own destiny. An “all-black project is needed in order for the people to free themselves,” he remarked. “If we are to proceed toward true liberation, we must cut ourselves off from white people. We must form our own institutions, credit unions, co-ops, political parties, write our own histories.” The vision of Black Power required that blacks reject the mainstream American culture, and fashion an alternative space in which blacks could lead self-directed lives. “We reject the American dream as defined by white people,” he argued, “and must work to construct and American reality defined by Afro-Americans.”  

Thus, race authentication had become, in Carmichael’s mind, a litmus test for progressive racial politics. Politics needed to sourced from and intimately tied to the racial character of its prime beneficiaries. Racial authentication was also viewed as a requirement to participate. Up to this point, SNCC had been an integrated political entity, and Carmichael had worked alongside white members in earlier efforts. Post-Black Power, white members were deemed suspect. The myth of Negro inferiority and dependence was, in his view, deeply ingrained in white American culture. He believed that even whites sympathetic to the cause of black liberation “[have] these concepts in his mind about black people if only subconsciously” because

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242 Id.
243 Id.
244 SNCC Position Paper: The Basis of Black Power, available at the Sixties Project, www2.iath.virginia.edu/sixties/html_docs/resources/primary/manifestos/sncc_black_power.html. Although the paper as attributed specifically to Carmichael, then president of SNCC, at least one historian has suggested that it was written by “renegade members of SNCC’s Atlanta Project.” JOSEPH, supra note ___ at 157.
245 Id.
246 Id.
247 Id.
248 Id.
“the whole society has geared his subconscious in that direction.”249 As a result, white people could not fully understand or appreciate racial oppression. Nor could they understand what blacks truly desired by way of racial empowerment. According to Carmichael, “white people coming into the movement cannot relate to the black experience, cannot relate to the word ‘black,’ cannot relate to the ‘nitty gritty,’ cannot relate to the experience that brought such a word into being.”250

Equally problematic was the notion that white inclusion at the policymaking level reinforced prevailing stereotypes about the inability of blacks to lead their own cause. According to Carmichael, white participation “means in the eyes of the black community that whites are the “brains” behind the movement and blacks cannot function without whites.”251 This only serves to perpetuate existing attitudes within the existing society, i.e., blacks are “dumb,” “unable to take care of business,” etc. Whites are “smart,” the “brains” behind everything.”252

Most importantly, however, white participation also interfered with the ability of blacks to speak and think freely, and determine the course of their own destiny. “Blacks,” Carmichael revealed, “feel intimidated by the presence of whites, because of their knowledge of the power that whites have over their lives. One white person can come into a meeting of black people and change the complexion of that meeting, whereas one black person would not change the complexion of that meeting unless he was an obvious Uncle Tom.”253 Moreover, Carmichael pointed out that the intimidating effect experienced by blacks in mixed company was often “in direct proportion to the amount of degradation that black people have suffered at the hands of white people.”254

For Carmichael, it was imperative that blacks seize the opportunity to organize themselves free from white interference – that a “climate [be] created whereby blacks can express themselves.”255 Carmichael therefore called for the mass expulsion of whites from SNCC so that blacks might be in a better position to engage in self-definition and self-direction of the movement for racial empowerment. Carmichael proposed that SNCC should be staffed, controlled, and perhaps most importantly, financed by blacks. Financial independent was crucial, in Carmichael’s view, to avoid “the tentacles of the white power complex that controls this country.”256

Carmichael did identify a role for sympathetic whites, however. Whites, he argued, could participate on a “voluntary basis,” or perhaps the movement could “contract work out to them.”257 But they were expressly precluded from participation “on a policy-making level.”258 Whites who come into the black community with ideas of change, according to Carmichael, seemed “to want to absolve the power structure of its responsibility of what it is doing . . . which is the worst kind of paternalism.”259 Instead, Carmichael suggested that, in the spirit of “coalition” politics, whites seek to organize members of the white community.

249 Id.
250 Id.
251 Id.
252 Id.
253 Id.
254 Id.
255 Id.
256 Id.
257 Id.
258 Id.
259 Id.
[W]hite people who desire change in this country should go where that problem (of racism) is most manifest. The problem is not in the black community. The white people should go into white communities where whites have created power for the express [purpose] of denying blacks human dignity and self-determination.\textsuperscript{260}

Carmichael commented that “[t]here can be no talk of “hooking up” unless black people organize blacks and white people organize whites.”\textsuperscript{261} Once this occurred, then “perhaps at some later date – and if we are going in the same direction – talks about exchange of personnel, coalition, and other meaningful alliances can be discussed.”\textsuperscript{262} Carmichael advocated the immediate “[r]e-evaluation of the white and black roles” so that “whites no longer designate roles that black people play but rather black people define white people’s roles.”\textsuperscript{263} Anticipating the allegation that his black nationalism was unadulterated racism, Carmichael observed that “[t]he charge may be made that we are “racists,” but whites who are sensitive to our problems will realize that we must determine our own destiny.”\textsuperscript{264}

Carmichael would later elaborate on these points in \textit{Black Power: The Politics of Liberation in America}, co-authored with Charles Hamilton and published in 1967. According to its authors, “this book is about why, where, and what manner black people must get themselves together.”\textsuperscript{265} In \textit{Black Power}, Carmichael and Hamilton sought to situate the concept of Black Power in a large framework of political action. They advanced the idea of “black consciousness,” arguing that the essential task was for blacks to assert their own humanity and engage in aggressive self definition instead of simply adopting societal views of blacks. They distinguished between individual racists acts and institutional ones – the collective acts of racial oppression carried out by white racist institutions and cultural practices – argued that the trust of black political strength ought to be directed at the latter. They rejected integration as political and cultural suicide, and argued for a “politics of modernization” that entailed questioning old values and institutions of society, searching for new and different forms of political structure to solve political and economic problems, and broadening the base of political participation to include more people in the decision-making process.\textsuperscript{266} Once again, responding to anticipated charges of racism, the authors defiantly declared, “in the end, we cannot and shall not offer any guarantees that Black Power, if achieved, would be non-racist . . . . [That] the final truth is that white society is not entitled to reassurances, even if it were possible to offer them.”\textsuperscript{267}

Carmichael’s dramatic assertion of Black Power reverberated throughout the black community. His claim that blacks should seek economic independence – that “[w]e must form our own institutions, credit unions, co-ops” – inspired Roy Innis of the Congress for Racial Equality (CORE) to propose a new “social contract” in which he argued for a new black capitalism that would facilitate “the creation an acquisition of capital instruments by means of

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\textsuperscript{260} Id.  \\
\textsuperscript{261} Id.  \\
\textsuperscript{262} Id.  \\
\textsuperscript{263} Id.  \\
\textsuperscript{264} Id.  \\
\textsuperscript{265} STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 3 (1967).  \\
\textsuperscript{266} Id. at 44.  \\
\textsuperscript{267} Id. at 49.
\end{flushright}
which we can maximize our economic interest.”\textsuperscript{268} Carmichael’s exhortation that “we must write our own histories” inspired broad based race consciousness within education, leading to reform at the primary and secondary school level and the creation of Black Studies programs on college campuses throughout the country. In 1969, Professor Nathan Hare published “Questions and Answers about Black Studies” in the\textit{Massachusetts Review}, in which he proposed a curriculum and addressed concerns about forming such programs.\textsuperscript{269} Artists, eager to assert the notion that black culture and Black Power were one and the same, promoted the Black Arts aesthetic in which literature, art, and musical creation were understood as organically connected to the lives and traditions of black people. Their art embodied Black Power in cultural form, invalidated European and American claims of artistic superiority and reaffirmed the essential beauty of black culture.

The Black Power movement signaled the arrival of a form of progressive politics centered on group racial identity. Carmichael imagined in new democratic regime of pluralistic association, in which blacks as a racial-political monolith would engage the politic process for the explicit purpose of seeking group empowerment. The political agenda of empowerment would be deeply informed by the racial identity and lived experiences of the group members.

Of central importance was the idea of group pride. Whereas racial identity was previously understood as a marker of oppression, Carmichael envisioned a world in which race – authenticated by members of the group – was emblematic of virtuous difference worth of acknowledgment and respect. Authenticating oneself as black was now a conduit both for the advancement of personal dignity and political empowerment, and this development would become a defining feature of racial politics and race relations for decades to come.\textsuperscript{270}

\section*{V. Race Authentication in the Post-Civil Rights Era}

In the wake of the Black Power movement, racial authenticity took on profound significance in American society as minority groups sought to define their own racial identities, and put these newly defined identities to use in both personal and political expression. The call for racial authenticity would ring loudly in intellectual circles, in popular culture, and in our private lives. But it could also be heard in government, as policy makers and judges, tasked with implementing progressive racial reform, would be compelled to authenticate race, albeit this time for purposes of empowerment rather than oppression.

\subsection*{A. Race Authentication in Intellectual Circles, Popular Culture, and Our Private Lives}

\begin{thebibliography}{99}
\bibitem{270}\textit{But see} Martin Luther King, Jr., \textit{Why We Can't Wait} (1964), reprinted in \textit{A Testament of Hope: The Essential Writings and Speeches of Martin Luther King}, Jr. 538 (James M. Washington, ed., 1991) (“The Negro in Birmingham, like the Negro elsewhere in this nation, had been skillfully brainwashed to the point where he accepted the white man's theory that he, as a Negro, was inferior. He wanted to believe that he was the equal of any man; but he didn't know where to begin or how to resist the influences that had conditioned him to take the least line of resistance and go along with the white man's views.”); Kwame Ture (Stokely Carmichael) & Charles V. Hamilton, \textit{Black Power: The Politics of Liberation} 29 (Rev. Vintage Ed. 1992) (“From the time black people were introduced into this country, their condition has fostered human indignity and the denial of respect. Born into this society today, black people begin to doubt themselves, their worth as human beings. Self-respect becomes almost impossible.”).
\end{thebibliography}
Carmichael’s basic approach, which infused racial authenticity into progressive politics, grew popular in progressive intellectual circles and would eventually be expanded into what we generally regard as identity politics today – the strategic invocation of group identity to organize and facilitate group empowerment. Historically marginalized racial and ethnic groups, such as Native Americans and Jews developed their own versions of identity politics. Women would soon embrace identity politics, as would the gay rights movement. For each group, empowerment would come not through assimilation or transcendence of difference, but through reification of group identity and the promotion of equality among socially and culturally differentiated groups.

Identity politics would gain traction in the law with the advent of the antisubordination principle. The classic statement of the antisubordination principle was articulated by Professor Owen Fiss, who argued that the Equal Protection Clause prohibits a law or official practice that “aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group.” Antisubordinationists argue that the interpretation and application of laws designed to secure equality – and racial equality in particular – must be informed by the reality of societal group oppression. The antisubordination principle demands that courts look beyond the “formalities of

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271 See EVA MARIE GARROUTTE, REAL INDIANS: IDENTITY AND SURVIVAL OF NATIVE AMERICA 54 (2003) (noting that, among Native Americans, having survived the European invasion “is an extraordinary achievement, and the language of blood quantum [ie. full-blooded] gives people a well-deserved means to express it.”); Rennard Strickland and William M. Strickland, Beyond the Trail of Tears: One Hundred Fifty Years of Cherokee Survival, in CHEROKEE REMOVAL: BEFORE AND AFTER 112 (1970) (noting that Cherokee Nation survives as the second largest Indian tribe in the United States and observing that “[t]oday, the tribe has no doubt that in another 150 years, basic Cherokee values, deeply rooted in tribal ways, will have survived”).

272 See LEONARD FEIN, WHERE ARE WE: THE INNER LIFE OF AMERICA’S JEWS 72 (1988) (exhorting Holocaust survivors to remember that “[o]ur cautionary tale is more likely to be heard, attended, if it is seen not as special pleading but as testimony” and observing that “[w]e, the living, the survivors, and their kin, are witnesses, not victims.”); RICH COHEN, TOUGH JEWS 192 (1998) (presenting a fictional Jewish character’s angry reflection that “for people like me, who were born long after Germany was defeated, the worst part of the Holocaust was never the dead bodies; it was the way Jewish victims were portrayed [as] waiting to be shot, with already dead eyes [without] even a faint suggestion of personality . . . .”).

273 Martha Minow, Not Only for Myself: Identity Politics and Law, 75 OR. L. REV. 647, 648 (1996) (defining identity politics as “mobilization around gender, racial, and similar group-based categories in order to shape or alter the exercise of power to benefit group members.”) (emphasis added).


276 Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107, 157 (1976). Other notable constitutional law scholars subsequently offered similar views. See Akhil Reed Amar, The Supreme Court, 1999 Term--Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26, 64 (2000) (observing that “the Fourteenth Amendment framers clearly aimed to prohibit [the Black Codes] as a paradigm case of impermissible legislation”); Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution, 65 FORDHAM L. REV. 1269, 1281 (1997) (“The clearest and most indisputable purpose of the Fourteenth Amendment was to provide constitutional authority for the Civil Rights Act of 1866, which outlawed the Black Codes.”); Cass Sunstein, The Anticaste Principle, 92 MICH. L. REV. 2410, 2429 (1994) (observing that “[i]nstead of asking ‘Are blacks or women similarly situated to whites or men, and if so have they been treated differently?’ we should ask ‘Does the law or practice in question contribute to the maintenance of second-class citizenship, or lower-caste status, for blacks or women?’”).
race” and consider the concrete effects of government policy on the substantive condition of the disadvantaged. As Professor Charles Lawrence explained:

[T]here is another way to think about the problem of race and racism and the project of racism’s eradication. This is to think of racial equality as a substantive societal condition rather than an individual right. The substantive approach sees the disestablishment of ideologies and systems of racial subordination as indispensable and prerequisite to individual human dignity and equality.

Professor Kimberle Crenshaw would expand on this critical insight, observing that “[t]he struggle of blacks, like that of all subordinated groups, is a struggle for inclusion, an attempt to manipulate elements of the dominant ideology to transform the experience of domination [and] create a new status quo through the ideological and political tools that are available.” For these progressive legal scholars, equal protection of the laws “means the eradication of social, economic, and private, as well as legal, hierarchies that damage.”

Thus, antisubordinationists routinely call upon theorists and policy makers to consider the plight of the subordinated, or in the words of Mari Matsuda, “look to the bottom,” when developing theories of racial justice. The overarching goal of antisubordinationists is to eradicate racism while simultaneously promoting the virtues of race. The antisubordination principle calls for the routine condemnation of explicit and implicit attempts to perpetuate racial caste. It enables us to identify and critique institutional structures that perpetuate racial inequality.

At the same time, the antisubordination principle calls upon us to develop and implement means to secure substantive racial justice – that is, to promote policies, initiatives and norms that are self-consciously employed to achieve real progressive changes in the material conditions of subordinated racial minorities. Antidiscrimination law and other policies that promote formal equality and equal opportunity are certainly crucial elements to the racial justice equation. Substantive racial justice goes further insofar as it places greater emphasis on material and redistributive approaches directed at concrete manifestations of deep-seated subordination, such as chronic disparities in wealth, health, employment, and education.

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279 Charles R. Lawrence, III, Foreword Race, Multiculturalism, and the Jurisprudence of Transformation, 47 STAN. L. REV. 819, 824-25 (1995). See also Christopher A. Bracey, Adjudication, Antisubordination, and the Jazz Connection, 54 ALA. L. REV. 853, 862 (2003) (“Constitutional adjudication that strives to realize democracy, then, encourages courts to embrace the antisubordination principle when deciding cases that pit minority rights and interests against majority rule.”).
282 Mari Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (asking scholars to focus on the subordinated when developing theories of racial justice)
284 See Robert S. Chang, Critiquing “Race” and Its Uses: Critical Race Theory's Uncompleted Argument, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87, 95 (Francisco Valdes et al. eds., 2002) (“[A]fter formal equal treatment has been secured, the terrain shifts ... [so that] [t]oday, in the era of colorblind jurisprudence and the new racialism, social construction must be argued to establish that individuals and institutions
By the 1980s, progressive law reformers had thoroughly embraced the fetish for racial authenticity. “Real” racial reform focused on the plight of the underclass, who were generally regarded as the most authentic and thoroughgoing victims of racial injustice. At the same time, this fixation on authentic racial experience exploded within popular culture, with the arrival of hip hop.

The phenomenal rise of hip hop culture exemplified this fetish for authenticity, as poor and urban youth began to express themselves culturally and artistically in defiance of dominant social values and middle class propriety. “Keep it real” emerged as a mantra, signaling one’s intention to be true to oneself, one’s values, and importantly one’s community. Fronting – the practice of inhibiting oneself or pretending to be something other than one’s genuine self – was frowned upon. In hip hop circles, keeping it real carried a distinct racial component – maintaining one’s pride of a and fidelity to the race, and refuse to “sell out” in order to satisfy prevailing societal expectations.

Early forms of underground hip hop are celebrated, with some commentators likening it to innovators of jazz and blues who “with little music education and few instruments . . . found a way to create a new sound [and] used their voices, hands, and feet to make a joyful noise and tell their story.” The authentic accounts of race and place in American life captured the minds and hearts of youth throughout the 80s and 90s and exerted a profound influence on all aspects of the culture – from language to music to dance and attire.

Hip hop culture quickly moved from the underground to mainstream, and began to exert the hegemonic force of a movement. Hip hop was no longer viewed the voice from the periphery of the black community, but the quintessential expression of the black experience. At the same time, there was a growing perception that hip hop culture had migrated away from its noble roots of gritty urban reporting and had become nothing more than ritual glorifications of the thug life and short term gratification. According to Juan Williams, today’s hip hop is “unthinking social commentary,” and the rap business does little more than “satisfy white America’s desire to see Jim Crow jump in blackface minstrel shows.”

Hip hop culture, then, ushered in a renewed debate over what it meant to be authentically black. For Williams and other children of the civil rights era, black identity was forged in the crucible of the struggle for to secure civil rights and promote an image of blacks as dignified and of equal worth to whites. As Williams explains, “[t]otally lost on the hip-hop crowd is the idea that this generation of black people having an identity far deeper than the latest overpriced T-shirt from a hip-hop clothing company.” The deeper, more authentic racial identity, according to Williams, “is a part of the arc of struggle for equal rights, education, and opportunity in America.” The emaciated image of black authenticity depicted in hip hop culture ignores this important legacy of education, discipline and sacrifice. According to Williams, “[t]he only real black man or woman in rap is a victim, whose street credibility comes from being a victim, disrespected, and on the way to jail.”

have acted in concert to create differences in the material conditions of racial minorities and that this requires or justifies remedies that necessarily entail racially different treatment.”

286 Id. at 127, 134.
287 Id. at 141.
288 Id.
289 Id.
Williams is not alone in his perception of the harm inflicted upon black racial identity by hip hop culture. Conservative critic Thomas Sowell similarly dismisses hip hop as “thuggish gutter words” spoken by artists who valorize a “brutal hoodlum lifestyle” that echoes “violence, arrogance, lose sexuality, and self-dramatization.” But Sowell also identifies a deeper problem: namely, that hip hop artists project an image of the “ghetto black” that is, in turn, used as an identity litmus test. This effectively confines the identity of blacks to a stereotype, and creates strong disincentives for individual blacks to deviate from the racial script. Those blacks confined to the stereotype, according to Sowell, are cut off from those who had advanced beyond it, and are thereby deprived of “examples, knowledge, and experience that could have been useful to those less fortunate.” At the same time, those blacks that had moved beyond the stereotype feel the need to emulate “ghetto” cultural practices, “perhaps using ghetto language, in order to prove their ‘identity’ within their own race.” John McWhorter, a conservative black social critic shares Sowell’s criticism, observing that rap’s core message seems to encourage a young black man to nurture “a sense of himself as an embattled alien in his own land. It is difficult to see how this can lead to anything but dissention and anomie.”

The fetish for authenticity in hip hop culture has since moved away from thug imagery and toward greater introspection and self-reflection, exemplified by the rise in popularity of consciousness rap artist such as Common, Kanye West, and Drake. However, in pop music more generally, authenticity remains ever present. Recording artist and actress Jennifer Lopez established a successful music and film career in the late nineties/early 00s’ by carving out a place in pop culture that straddled the line between her ‘gritty’ Hispanic roots and glamorous celebrity image. Although Lopez cut her teeth playing beloved Latina icon Selena in a well-received biopic, she crafted her public persona around a more caricatured version of a Latin-American woman (she is Puerto Rican, but raised in the Bronx). Lopez cultivated an image as a Hispanic siren, showcasing her curvaceous figure and playing up her connections to the Bronx. Lopez developed a reputation as a diva, baubles of conspicuous consumption on prominent display, but tried to simultaneously maintain her image as a down-home Bronx girl. The most emblematic display of Lopez’s rich girl/homegirl dichotomy was seen in her song “Jenny From the Block,” in which she exhorted the listening public not to “be fooled by the rocks that [she] got,” reminding them she was “still Jenny from the block” (alluding to her Bronx upbringing).

Similarly, recording artist Mariah Carey, whose early career was characterized by sentimental ballads and, according to one commentator, was “marketed as the white Whitney Houston,” rebounded from a public meltdown in 2001 with her 2005 album The Emancipation of Mimi, which was heavily influenced by rap and hip hop. The release of this album led to speculation that Mariah Carey, a self-described person of mixed race, was attempting to authenticate and capitalize on her previously suppressed racial and ethnic background. Early efforts by Maria Carey to authenticate as “black” or at least identify with this component of her identity occasionally generated a cynical response, such that expressed by Sandra Bernhard in her one-woman show I’m Still Here... Damn It!: “Now she’s trying to backtrack on our asses,

290 THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS 55, 58 (2005).
291 Id. at 58-59.
292 Id. at 58.
293 WILLIAMS, supra note ___ at 142 (quoting John McWhorter).
296 Caryn James, Upward Mobility and Downright Lies, NEW YORK TIMES Jan 12, 2003.
getting’ real niggerish up there at the Royalton Hotel suite, with Puff Daddy and all the greasy chain-wearing black men, ‘Oooh, Daddy… I got a little bit of black in me too. I didn’t tell you that?’

Sri Lankan born, London based rapper MIA (Maya Arupragalsam) distinguished herself from legions of other somewhat successful British/non-American rappers like Lady Sovereign and the Streets both through the merit of her music-making and her ability to successfully present herself in the image of a refugee/terrorist/gangster. MIA’s father was allegedly a cofounder of the Tamil militant group EROS (Eelam Revolutionary Organization of Students), trained with the P.L.O. in Lebanon and spearheaded a movement to create an independent Tamil state in the north and east of the country. Relying upon her alleged militant father’s handed down credibility, and her Sri Lankan heritage as a badge of exoticism, MIA has successfully leveraged the fetish for authenticity into commercial success in a field in which “[b]eing authentic and having credibility with American hip-hop fans is where some European rappers fall short.”

Of course, racial authenticity is not merely an artifact of political theory or entertainment. It is imbedded deeply within our culture as a way of life. Our personal identity – the social essence of who we are – is a negotiated identity forged in the swirling cauldron of dreams and aspirations as well as profound social pressure, expectation, and opportunities nurtured and sustained by institutional arrangements and everyday life. In a society in which so much turns upon race, most of us have either sought to authenticate our race or had our authenticity questioned by others.

But what exactly is being authenticated when we authenticate race today? In the post civil rights era, racial authentication is a personal confession of one’s professed connection to a particular racial community. On its most basic level, it is purely ethnographic – a simple claim of ownership to the pedigree of the racial group. For the person who seeks to authenticate, it is a unilateral exercise in self-sorting into a prevailing set of racial categories. This sorting is superficial, though not inconsequential.

But on a deeper level, racial authentication signals one’s claim to the reservoir of experience that defines the history of that group. To declare oneself a member of a race is to testify to the fact that one has internalized the social knowledge and cultural habits of the group. But authenticating race is more than simply knowing what it means to be of a particular race. Rather, it signals the integration of what one knows into the fiber of one’s being.

The social meaning of what we seek to authenticate provides crucial insight into why we chose to authenticate as well. As an initial matter, many of us may choose to racially authenticate because, for better or worse, race has become a constituent element of our personal identity. We authenticate our race and call upon others to do the same because we think racial designations reveal something meaningful about who we are as individuals and our relationship to the world around us. This is particularly relevant to racial minorities, who have historically been marginalized on the basis of race. In a world in which race so often signals oppression,

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298 Id.
299 Lynn Hirschberg, MIA Agitprop Pop, NEW YORK TIMES May 25, 2010.
300 Winter Miller, Can Lady Sov, a Brash British Rap Star, Find Her American Audience?, NEW YORK TIMES, Nov. 1 2006 (discussing the difficulties faced by UK rapper Lady Sovereign in penetrating the US music market).
301 PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY AND THE EVASION OF POLITICS 43 (2000) (observing that an individual’s claim to a particular race is “a matter of individual psychology, of an individual's highly subjective feelings of attachment to some group, its culture or language, or perhaps its historical experience.”).
where one’s race is often linked with victimization, racial authentication works to convey a host of otherwise unarticulated attitudes, assumptions, and beliefs.

Race authentication is also a conduit for interpersonal connection. It is a means of creating a sense of community or existential kinship. Human beings are social beings, and many of us thrive off of personal connections to other people. Race, in this sense, is just one of the many ways in which people might be drawn together. In the context of identity politics, racial authentication can be used to forge political alliances. In a complex world steeped in political correctness, it is notoriously difficult for an elected official to signal fidelity to a racial group without risking backlash. Authenticating one’s race creates the possibility of high bandwidth, yet silent, communication within a racial community. As Dr. Martin Luther King, Jr. once observed, “Negroes are almost instinctively cohesive. We band together readily, and against white hostility, and have an intense and wholesome loyalty to each other . . . . Solidarity is a reality of Negro life, as it has always been among the oppressed.”

Race authentication, then, also serves a gatekeeping function for racial groups as they actively police their community boundaries. Race authentication as policing is expressed in the form of disdain for individuals that demonstrate weak racial salience. Terms like “oreo,” “apple,” and “banana” denote individuals perceived as superficially black, Indian, and Asian, but whose personal identity is more saliently Anglo American. Similarly, the term “sellout” denotes anyone of weak racial salience. Generally speaking, individuals who lack an authentic racial identity are denied full membership within the racial community, and experience little if any reciprocal racial kinship. For politicians, the absence of authenticity invariably results in the withdrawal of presumptive support by the racial group.

Of course, racial authentication may serve as a means of securing benefits and opportunities beyond politics. Individuals who sufficiently authenticate their race and demonstrate a connection between their race and the differential treatment they may have received enjoy the benefit of legal protection and redress afforded by antidiscrimination law. Prospective employees may seek to authenticate their race on resumes, applications, and during the interview process in order to appeal to employers that value diversity within their organization. Students may choose to authenticate their race in personal statements and applications when seeking admission to educational institutions or scholarships.

Of particular importance is the idea of racial salience. Authenticity of race is measured against some benchmark impression of what it means to be a member of a particular race. In this sense, racial authentication is less about rough sorting based upon color or phenotype, and more focused on the extent to which one’s personal identity is saturated by race. In this way, race authenticators can be understood to fetishize a “real” but largely unarticulated core of authentic racial identity. Proximity to the core is paramount, for the virtues of race, be they status, benefit, or kinship, shall be reserved for the most racially salient – those select individuals whose racial credentials and bona fides are beyond dispute.

Thus, performance is critical to racial authentication. The world comes to know each of us through our identity performance – that is, through performing our personal identity, we declare who we are to those around us, and lay claim to a social, political and economic space to call our own. In authenticating race, performance – reflected in the demeanor, life experience, community ties, culture, politics, and normative commitments of the race claimant – is the proving grounds for race.

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Thus, racial authentication in the post-civil rights era is markedly different than its previous iterations. Historically used as a tool for oppression, today’s race authentication is means for personal and group empowerment. It remains a device used for sorting people into socially constructed categories, and imposes a hierarchical relationship among the sorted. But that hierarchy is now constructed within racial groups, with the most authentic residing at the top and individuals with weak racial salience residing at the bottom of the internal pecking order.

B. Race Authentication in Affirmative Action Policy, Anti-discrimination Law, and the Census

But does race authentication in the post-civil rights era function the same way in the practical application of the law? As it turns out, race authentication takes on various degrees of importance depending upon the context in which race arises. Racial authenticity – and in particular, racial salience – matters most in those instances where law bestows direct benefits based upon one’s race. In the affirmative action context, where one’s race provides access to controversial and immediately recognizable benefits, race authentication and issues of racial salience figure most prominently. In the less controversial realm of antidiscrimination law, where access to legal remedies is contingent upon a showing of both racial difference and unequal treatment, race authentication and issues of racial salience play an important but somewhat diminished role. By contrast, in the census context, where race is largely a matter of personal expression with little direct or readily ascertainable consequence (at least from the layperson’s perspective), authenticating one’s race is simply a matter of individual sorting with little if any reference to racial salience. However, even in the census context, the fetish for racial authenticity remains, most powerfully revealed in specific measures directed at the counting and classification of persons of mixed race.

1. Affirmative Action Policy

From its inception, affirmative action was recognized as a remedial materialist response to concerns about wealth and income inequality. Race preferences in an employment setting were thought to provide access to income producing jobs. Race preferences in education were understood to provide access to educational opportunities that have historically served a gatekeeping function to professional success. Affirmative action policy also served a symbolic moral purpose, offering a collective expression of public atonement for racial injuries both past and present.

Early affirmative action policy presupposed that racial minorities were comparatively deserving of a preference vis-à-vis their white counterparts. But this presupposition turned on the extent to which race could be equated with victimhood and oppression. Indeed, the validity of affirmative action measures – that is, providing benefits on the basis of race – was dependent upon a showing that victimhood was an essential component of minority racial identity. Thus, the debate over the comparative deservedness of designated recipients of race preferences, at its core, is a debate over the authenticity of affirmative action beneficiaries. Certain judges have questioned whether victimhood is a constituent element of racial identity. But even for those judges who accept the idea that victimhood and race are correlated, they nonetheless express doubts as to the authenticity of affirmative action beneficiaries – that is, whether they truly represent the “authentic” victims of racial injustice.
The debate over the comparative deservedness of designated recipients of race preferences figured prominently in the exchange between Justice Stewart and Justice Stevens in *Fullilove v. Klutznick*, a case in which the Court upheld a Public Works program that required at least ten percent of federal funds granted for local public works projects to be used by state and local grant recipients to obtain services or supplies from minority-owned businesses. According to Stewart, disadvantages rooted in a history of racial oppression did not necessarily make African Americans worthy beneficiaries of special consideration in federally funded public works projects. “No race,” according to Stewart, “has a monopoly on social, educational, or economic disadvantage, and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection.”

Stevens disagreed with Stewart’s suggestion that history of oppression was insufficient to justify a race preference. The problem, in Stevens’ view, was that Congress had not provided sufficient evidence to explain why the program was limited to certain groups, and why it defined the preference the way it had. “[I]f Congress is to authorize a recovery for a class of similarly situated victims of a past wrong,” wrote Stevens, “it has an obligation to distribute that recovery among the members of the injured class in an even-handed way.” Stevens continued, “in such a case the amount of the award should bear some rational relationship to the extent of the harm it is intended to cure.”

Stevens further criticized the plan for failing to explain, among other things, why certain racial and ethnic groups were being treated similarly, despite differing histories of racial subordination. The statute upheld by the Court granted equal preference to “citizens who are ‘Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.’” Quite obviously,” Stevens remarked, “the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.” He elaborated:

Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our history, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude. Although “the Negro was dragged to this country in chains to be sold in slavery,” the “Spanish-speaking” subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America’s resources before the ancestors of most American citizens arrived. There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of these subclasses is equally entitled to reparations from the United States Government.

Stevens also questioned whether beneficiaries under the program were among those generally thought to be most deserving of the race preference. For Stevens, the limited race preference in *Fullilove* did not do enough to uproot the layers of racial oppression because members of a minority who are most disadvantaged are least likely to get the benefit, but most

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304 Id. at 537.
305 Id.
306 Id. at 523
307 Id.
308 Id. at 537–38 (Stevens, J., dissenting).
likely to be still suffering the consequences of the past wrong. According to Stevens, “[a] random distribution to a favored few is a poor form of compensation for an injury shared by many.”  

At the same time, Stevens suggested that the remedy was too broad, benefitting firms that did not deserve a preference. Stevens believed that a race preference is not narrowly tailored as long as it includes minority firms that were not hurt by discrimination—for instance, firms that were formed after the statute was passed to take advantage of the grant, firms that could not compete due to reasons unrelated to race, or firms that had competed successfully before the statute.  

In addition, Justice Stevens observed that some of the obstacles faced by minority firms were not unique to minorities. According to Stevens, some of the difficulties cited in the legislative history—“unfamiliarity with bidding procedures followed by procurement officers” and “difficulties in obtaining financing”—were hurdles that all new firms faced. For Stevens, it was “essential to draw a distinction between obstacles placed in the path of minority business enterprises by others and characteristics of those firms that may impair their ability to compete.”

Where Stevens seemed open to interrogating and authenticating the racial bona fides of minorities seeking preferential treatment, Stewart, for his part, viewed the task of racial authentication with particular disdain—especially given the necessity of linking race to victimhood. Indeed, he likened the federal codification of the race preference challenged in Fullilove to the passage of odious Jim Crow legislation half a decade earlier. According to Stewart, “[O]ur statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white.”

Forging too powerful a link between race and victimhood also fueled concerns that racial minorities may prove unable to make use of the benefit. These concerns were amplified by Justice O’Connor in City of Richmond v. J.A. Croson Co., where she openly doubted whether minority contractors to were in a position to avail themselves of the preference. According to O’Connor, Richmond’s argument for the plan would have been strengthened if it could prove that there was a “significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” As O’Connor noted, one cannot look to general population for evidence of discrimination:

When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. . . . [I]t is a ‘completely unrealistic’ assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.

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309 Id. at 538–39.
310 Id. at 540–41.
311 Id. at 543.
312 Id. at 544.
315 Id. at 501, 507.
Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.

Stevens likewise criticized the City of Richmond for engaging in “the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.”316 And just as he had argued in Fullilove, Stevens suggested that a set-aside only served to benefit the least deserving individuals. As Stevens wrote, it is “minority firms that have survived in the competitive struggle, rather than those that have perished, [that] are most likely to benefit from an ordinance of this kind.”317

As opposition mounted to the use of affirmative action to make up for past racial transgressions, proponents of race preferences offered a new and more constitutionally defensible justification – the diversity rationale. Under this view, the benefits of affirmative action flowed not just to the individual receiving the preference, but to society as a whole. Thus, race preferences took on an increasingly socio-cultural dimension. Affirmative action policy could be understood as not only deepening our understanding and approach to racial difference, but also to signal inclusion in society, wealth, and nation building.

Reframing the affirmative action debate in terms of diversity avoided the primary constitutional objection raised by courts. At the same time, however, it gave rise to a new call for racial authentication. The internal conflict raging within communities of color over who was real and who was an imposter did not pass unnoticed by opponents of affirmative action. If preferences were to be bestowed upon diverse individuals, was race a relevant criterion for diversity? And if so, how exactly did a person’s race make them different?

This issue took center stage in Metro Broadcasting, Inc. v. FCC,318 where Justice O’Connor openly questioned the link between the race of station owner and the content of their broadcast. As O’Connor explained:

The FCC justifies its conclusion that insufficiently diverse viewpoints are broadcast by reference to the percentage of minority-owned stations. This assumption is correct only to the extent that minority-owned stations provide the desired additional views, and that stations owned by individuals not favored by the preferences cannot, or at least do not, broadcast underrepresented programming.319

In O’Connor’s view, minority-owned stations were in no better position to advance diversity of viewpoints than those owned by nonminorities. O’Connor believed that all firms were essentially driven by market concerns, and thus each would approach the issue of diverse programming in the same way. According to this view, there is no reason to prefer minority ownership because it rests on the dubious assumption that “preferences linked to race are so strong that they will dictate the owner’s behavior in operating the station, overcoming the owner’s personal inclinations and regard for the market.”320

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316 Id. at 515.
317 Id.
319 Id. at 618–19.
320 Id. at 619.
The struggle over the link between diversity and deservedness of a race preference also figured prominently in university admissions. In *Hopwood v. Texas*, the United States Court of Appeals for the Fifth Circuit rejected the link between race and diversity. According to the *Hopwood* court, “[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different.” The court continued, “[s]uch a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.”

In the court’s view, diversity takes many forms. “To foster such diversity,” the court maintained, “state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.” Furthermore, to the extent that the university wished to make use of the proxy, the court warned that the use should be extremely modest—that it must carefully limit the “plus” given to applicants to remedy that harm.

Judge Daniel Boggs’s lower court opinion in the *Grutter v. Bollinger* case echoed many of these sentiments. Boggs chastised the Michigan Law School’s consideration of race as a criterion of merit and racial difference:

Mentioning status as an under-represented minority in the same breath, the Law School generalizes, in the abstract, that it would also give a preference to an applicant with “an Olympic gold medal, a Ph.D in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnam boat person.” Yet to equate bare racial status with the experiential gains of these generally remarkable (and exceedingly rare) achievements demonstrates that the Law School’s desired diversity is unrelated to the experiences of its applicants.

For Boggs, using race as a criterion of merit and authentic difference produced glaring absurdities. “When it comes to a choice between admitting a conventionally liberal (or conventionally conservative) black student who is the child of lawyer parents living in Grosse Pointe, [Michigan] just like the previous ten white admittees,” lamented Boggs, “the black student will be given a diversity preference that would not be given to a white or Asian student, her unique experience notwithstanding.”

As these examples illustrate, one’s perception of the validity of affirmative action is powerfully shaped by the social meanings we ascribe to race (victimhood and difference) and the extent to which individual beneficiaries can be understood as authentic representatives insofar as they exude the salient characteristics of these socially constructed racial groups. In this way, the ongoing debate over the propriety of race preferences continues to reflect our fetish for racial authenticity. One might be inclined to attribute authenticity-based opposition to affirmative action policy to the fact that such policies afford direct benefits rather than burdens on the basis of race. Such a view is entirely consistent with the manner in which we authenticate race in our

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321 *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).
322 *Id.* at 945.
323 *Id.*
324 *Id.* at 947.
325 *Id.* at 950.
327 *Id.* at 790–91.
private lives. But even in less controversial settings, where race affords less of a direct benefit, race authentication remains a relevant part of the legal landscape.

2. Antidiscrimination Law

Unlike affirmative action, which in a technical sense is discrimination in favor of a particular person because of their race, antidiscrimination law is rooted in the concept of racial equality. The Civil Rights Act of 1866,\textsuperscript{328} passed shortly after the Civil War, represents the first of these measures. The 1866 Act was designed to bestow full citizenship upon free and newly emancipated blacks and establish civic equality among all American citizens. The Act specifically sought to eliminate the pervasive use of Black Codes, which were enacted following the ratification of the Thirteenth Amendment in order to regulate the free and newly emancipated black population in a manner that perpetuated patterns of subjugation as the slavery regime had done previously. The Act summarily declared that all citizens of the United States:

\begin{quote}
shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.\textsuperscript{329}
\end{quote}

The touchstone of equality, embodied in the 1866 Act, would be constitutionalized initially with the ratification of the Fourteenth Amendment,\textsuperscript{330} and extended to reach into other areas of political and social life with the ratification of the Fifteenth Amendment and the passage of the federal and state legislation from the mid-twentieth century onward.\textsuperscript{331}

Although antidiscrimination law has expanded to address inequality of all sorts, the achievement of social, political, and economic equality for historically marginalized racial groups remains its defining characteristic. In the typical antidiscrimination law context, an individual claims to have been singled out for unequal treatment on the basis of her race. In order to make this claim, however, she must be able to establish herself as racially distinctive, and isolate race as the reason for her differential treatment. Put differently, in order to secure the protection of antidiscrimination law, she must authenticate herself as a member of a group that the law is designed to protect.

In most instances, authenticating one’s race for purposes of antidiscrimination law provides no meaningful barrier to recovery. However, the cases of \textit{Saint Francis v. Al Khazraji} and \textit{Ohemeng v. Delaware State College} illustrate that questions of racial authenticity do arise, and that judges continue to struggle with how best to authenticate individuals as members of socially constructed racial groups. In \textit{Saint Francis College v. Al Khazraji},\textsuperscript{332} an Iraqi-born

\textsuperscript{328} The Civil Rights Act of 1866, ch. 31, Sect. 1, 14 Stat. 27 (1866).
\textsuperscript{329} Id.
\textsuperscript{330} U.S. Const. amend. XIV (granting citizenship and a basic set of civil rights to all Americans).
\textsuperscript{331} “[T]he very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.” Griggs, 401 U.S. at 434 (citing 110 Cong. Rec. 7247 (statement of Senators Clark and Case).
\textsuperscript{332} 481 U.S. 604 (1987).
associate professor claimed that he was denied tenure at St. Francis College because of his Arab ancestry. He initially filed his claim under Title VII of the Civil Rights Act of 1964, but later amended his complaint to include claims under 42 USC Sections 1981 and 1983 – statutory provisions derived from the Civil Rights Act of 1866.\(^333\) The trial court dismissed Al Khazraji’s Title VII claims on statute of limitations grounds, and dismissed his Section 1983 claim on the merits because Saint Francis College, a private institution, was not a state actor and thus not subject to Section 1983.\(^334\)

The lower court then turned to the merits of Al Khazraji’s Section 1981 claim. 42 U.S.C. §1981 states that “all persons” shall have the same right “to make and enforce contracts as is enjoyed by white citizens.”\(^335\) This provision has generally been read to prohibit racial discrimination in the formation of contracts. Thus, to support such a claim, a plaintiff must allege that he is a member of a racial minority, and that he was discriminated against on the basis of his race in the formation of a contract.

Al Khazraji maintained that the College had denied his tenure application because he was an Arab.\(^336\) The Supreme Court was therefore called upon to determine whether an Arab, classified as a Caucasian under commonly accepted racial criteria, could charge racial discrimination under the U.S. Code. The lower court had construed Al Khazraji’s complaint as asserting only discrimination on the basis of national origin and religion, not race. Based upon this reasoning, it concluded as a matter of law, that Section 1981 did not reach claims of discrimination based upon Arabian ancestry.\(^337\)

The Supreme Court, however, disagreed. Justice White made three key determinations. First, he found that Congress had intended for its antidiscrimination legislation to encompass citizens who would be considered Caucasian under today’s understanding of race.\(^338\) In order to determine the scope of protection offered by Section 1981, Justice White reasoned that one must first determine what groups constituted racial groups at the time of its passage.\(^339\) Because Section 1981 was originally passed as part of the Civil Rights Act of 1866, nineteenth century racial classifications were controlling. Looking back to the nineteenth century, Justice White concluded that race was used far more flexibly to denote “ethnic groups,” “families of common ancestry, and “people belonging to the same stock.”\(^340\) Under this view, Germans, Swedes, Hebrews and Arabs – all currently classified as Caucasian – were understood to comprise separate races. Given this broader understanding of race that pervaded nineteenth century society, Justice White observed that “[w]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”\(^341\)

Of course, constructing race in this manner brought the question of racial authentication to the fore. In order to receive protection, one must establish that one is a racial minority. How was this to be done? In the nineteenth century, race was authenticated primarily through physical characteristics, and secondarily through observable behavioral traits, temperament, and

\(^{333}\) Id. at 606.
\(^{334}\) Id.
\(^{336}\) 481 U.S. at 610.
\(^{337}\) Id. at 608.
\(^{338}\) Id. at 610.
\(^{339}\) Id. at 611-12.
\(^{340}\) Id.
\(^{341}\) Id. at 612.
reputation. Would twentieth century courts be called upon to authenticate race in a similar manner?

On this point, Justice White’s opinion lacked the clarity of his earlier discussion of race. Initially, he appeared to reject the notion of race authentication through examination of physical characteristics. According to Justice White, “[t]he particular traits which have generally been chosen to characterize races have been criticized as having little biological significance.” He seemed to agree with these critics and their conclusion that “racial classifications are for the most part sociopolitical rather than biological in nature.”342 Later in his opinion, however, Justice White seemed less inclined to back away from race as a scientific category that can be authenticated through observable physical traits. As Justice White wrote, “[t]he Court of Appeals was thus quite right in holding that Section 1981 ‘at a minimum,’ reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.’”343 But by the close of the opinion, Justice White, returned to his originally stated views that such visible differences were not necessary. “[A] distinctive physiognomy,” he concluded, “is not essential to qualify for 1981 protection.”344

How then is race to be authenticated for purposes of Section 1981? According to Justice White, Al Khazraji may sue for race discrimination under Section 1981 if he can prove that “he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion.”345 Thus, race authentication presented a relatively modest hurdle, for authenticity could be achieved simply by establishing one’s ancestry.

The logic of St Francis College, however, did not necessarily extend to blacks. In Ohemeng v. Delaware State College,346 the Court dismissed a similar race discrimination claim brought by a associate professor who claimed that he was terminated on account of his African ancestry. Ohemeng was a black naturalized American citizen who emigrated from Ghana to the United States in 1959.347 Much like Al Khazraji, Ohemeng filed both Title VII and Section 1981 race discrimination lawsuits claiming that he was discriminated against because he was born African. Whereas the Supreme Court in Al Khazraji proved willing to treat Arabs as a distinct race for purposes of Section 1981, the court in Ohemeng reached the opposite conclusion for individuals of African ancestry, concluding that Ohemeng had failed to establish that he “belonged to a distinct subset of the Negroid race having distinct ancestry or distinct ethnic characteristics.”348

Thus, authenticating race for purposes of antidiscrimination law proves to be largely a matter of sorting individuals into socially constructed racial categories or their functional equivalent. Unlike the affirmative action context, authentication of race in the antidiscrimination law context is achieved without much regard for whether such one possesses a high degree of racial salience. In the census context, discussed below, race authentication is even less dependent upon a showing of racial salience. Yet our fetish for racial authenticity is nonetheless reflected in our current uneasiness about how best to account for census respondents who declare a multiracial identity.

342 Id. at 610 n.4.
343 Id. at 612.
344 Id.
345 Id.
346 676 F.Supp. 65 (1988)
347 Id. at 66 n2.
348 Id. at 69.
3. The Census

The collection of data on racial demographics has been an important feature of the U.S. decennial census since its inception in 1790. In the early years, the census recorded only “Whites” and “Negroes.” The first expansion of racial categories in the census appeared in 1850, when the category “Negro” was split into two separate categories of “Mulatto” and “Black.” In 1860, Indian and Chinese categories were added, and in 1870, the category of Japanese was established.

Since the turn of the twentieth century, at least twenty-six different race related terms have been utilized to categorize the U.S. population. Following the enactment of the 1964 and 1965 Civil Rights Acts, the newly created Equal Employment Opportunity Commission required employers to report on the number of “Negro, Oriental, American Indian, and Spanish American” people they employed. Collection and synthesis of this data proved increasingly unwieldy by the 1970s. In 1977, responding to the need to standardize this sort of data collection, the Federal Office of Management and Budget established a policy to collect racial data by five mutually exclusive racial categories on federal and state forms: white, black, Asian/Pacific Islander, American Indian/Alaskan Native, and Hispanic. OMB Directive 15 remains the supreme authority for racial classifications in the United States, and applies to all governmental agencies, including the Census Bureau. Thus, all gathering of racial and ethnic statistics are to conform to this mandate.

The expansion in collection of racial data was initially opposed by the NAACP based upon a fear that such data would be put to malicious use. These concerns were quickly ameliorated, however, as racial and ethnic data collected by the census became essential in implementing court decisions involving civil rights as well as in allocating government resources to meet the needs of various racial groups that have suffered discrimination. The 1990 Census lists various “federal legislative uses of . . . census data including: (1) establishment of guidelines for federal affirmative action plans; (2) review of state redistricting plans; (3) assistance to minority businesses in low-income areas [pursuant to minority business development programs];

349 See Kenneth E. Payson, Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People, 84 CAL. L. REV. 1233, 1252 (1996)
354 Reva Siegel has documented the shift in attitude of the NAACP, which, as late as 1962, had opposed the collection of racial data with regard to crime and illegitimate births but was willing to withhold criticism of racial data that depicted the socioeconomic difficulties faced by African-Americans. Not surprisingly, as racial data from the census became increasingly important for the enforcement of civil rights statutes, the NAACP began supporting its collection. See Reva Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 HARV. L. REV. 1470, 1515 n.158 (2004); see also Jack Balkin & Reva Siegel, Principles, Practices, and Social Movements, 154 U. PA. L. REV. 927, 941 (2006).
and (4) enforcement of federal antidiscrimination statutes.” \(^{355}\) At least ten different federal agencies use census data and each year, “more than $100 billion in federal funds are allocated based on census data.” \(^{356}\) Racial and ethnic data influence education grants, public health programs, mortgage lending, low-income housing tax credits, voting rights, Equal Credit Opportunity Act enforcement, employment rights, food stamp and veteran benefit apportionment, and monitoring and enforcement of desegregation plans in public schools. \(^{357}\) Federal and state organizations use demographics provided by the census to determine the resources necessary for respective geographic regions as well as funding of civil rights advocacy groups. \(^{358}\)

Since the 1960s, however, three important demographic trends have changed the face of America and its race relations. First, the percentage of people of color has increased. Second, the percentage of people of color who are not black has increased. Third, the number of people who consider themselves multiracial has increased. Of these three, the rise of the multiracial population has presented the greatest challenge to our system of racial authentication in the census context.

The 2000 Census was the first attempt to count multiracial Americans. The 2000 census form allowed respondents to mark one or more of 15 boxes representing six races and subcategories and “some other” race, a designation intended to capture responses such as “mulatto,” “Creole,” and “Mestizo.” \(^{359}\) Respondents were also able to “write in” their own categories. \(^{360}\) In all, as many as 63 racial possibilities are possible, excluding an ethnicity modifier and “write ins”, as people could classify themselves in any combination of 15 categories. This racial classification scheme was carried over for the 2010 Census. \(^{361}\)

But how exactly is one’s race authenticated for purposes of Census data collection? During the nineteenth century, a person’s race for census purposes was not based upon self-identification, but instead was established by a Census-taker’s “visual inspection.” \(^{362}\) By the mid-twentieth century, the system had migrated away from visual inspection and generally relied upon self identification. Today, self-identification of race on census forms is the norm. \(^{363}\) Thus, one might be inclined to view the Census as the one of the few moments in American life in


356 Mezey, supra note __, at 1745


359 Reynolds Farley, Identifying With Multiple Races: A Social Movement that Succeeded but Failed?, in THE CHANGING TERRAIN OF RACE AND ETHNICITY 132 and Fig. 5.1 (Maria Krysan and Amanda E. Lewis, ed. 2004)

360 Id.

361 See 2010 Census Form, supra note __ at 1.


which one’s claim to racial authenticity, and thereby inclusion in a racial grouping however defined, is not contested by outsiders.

However, it is important to remember that even the modern Census carries with it certain vestiges of our racial past and, in particular, our historic propensity toward monoracialism. During the formative years of OMB 15, the operating presumption was that people of mixed races nonetheless could be identified monoracially. As consequence, respondents whose self-identified race did not fit neat within the prescribed categories confounded the data collectors and threatened to undermine the goal of standardizing racial data. The response of the drafters of OMB 15 was to prescribe a rule of guidance for racial reassignment of people who failed to classify themselves within the prescribed categories.

The rule provided, in relevant part, that “[t]he category which most closely reflects the individual’s recognition in his community should be used for purposes of reporting on persons who are of mixed racial and/or ethnic origins.” Notably absent was a working definition of the term “community.” At the time, however, blacks represented the largest racial minority group in the United States, constituting nearly 90 percent of the non-white population. Thus, the overwhelming majority of mixed race persons were of black and white ancestry. This fact, coupled with the well settled acceptance of the one-drop rule in both the black and white community meant that, as a practical matter, people of mixed white and black ancestry, could be reliably re-assigned as “black” by any community standard.

However, changes in racial demographics during the intervening years would render this rule deeply anachronistic. Today, blacks make up less than one half of the non-white population of the United States, with Latinos now representing the largest group of non-whites. Outmarriage rates among all racial minorities has continued to grow. Moreover, the one drop rule used for classifying persons of black and white ancestry is generally understood to be inapplicable to the offspring of unions between non-blacks and whites. At the same time, unions between mixed raced individuals continue to yield second and third generation multiracial children of increasingly complex racial heritage.

Not surprisingly, in the 1990, nearly 10 million respondents used the “Other” race category. Of these, 8 million elected to write in a specific response. Approximately 253,000 indicated mixed racial parentage such as “Black-White,” “White-Chinese,” “Multiracial,” or

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364 Administrative Office of Management and Budget (OMB) Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874 (July 9, 1997) (noting that the government “does not tell an individual who he or she is, or specify how an individual should classify himself or herself.”).


366 U.S. Census Bureau, U.S. Dept of Commerce, Minority Population Tops 100 Million (2007), http://www.census.gov/Press-Release/www/releases/archives/population/010048.html (finding Hispanics, who could be of any race, as the largest minority group, which includes people who identified themselves as Latino or Spanish).


368 See DAVIS, supra note __ at 13 (1991) (suggesting that the one-drop rule does not apply to any other racial or ethnic group in the U.S. and appears to exist only in America.)

369 Payson, supra note __ at 1258 (observing that “after nearly a century of minimal Black/white mixing, there is an emerging generation of ‘new mulattoes’ among whom are not only individuals with one black and one White parent, but individuals with one black and one non-black/non-White parent as well (e.g., black/Asian”).

“Interracial.”  

In lieu of applying the community recognition rule, the Census Bureau adopted a policy of simply re-assigning the multiracial person to the first racial category listed. Thus, if a respondent who wrote in “white/black,” they were classified as white, while someone writing “black/white” was classified as black. In all cases, respondents who identified with more than one racial group were reassigned to a single race.

Write-in responses presented other problems as well. Many of the responses, such as “South African,” “Moslem,” or “American,” had no clear racial meaning under the prevailing categorical scheme. Other respondents submitted the names of ethnic groups in response to the “other race” question, including “Irish,” “Arab,” “Iranian,” and “Jamaican.” In both situations, the Census Bureau violated the norm of self-identification of race and reassigned all of them into the four Directive No. 15 categories of “white,” “black,” “Asian or Pacific Islander,” or “American Indian or Alaskan Native.” This process of re-assigning multiracial individuals into a single-race categories was perhaps reflective of the bureaucratic push to systematize the collected racial data to the greatest extent possible. However, it also arguably reflected a certain uneasiness about recognizing multiracial identities and the normative implications of validating such identities socially meaningful.

Many of these concerns were ostensibly ameliorated by the post-2000 Census policy of allowing individuals to select multiple racial categories. However, the goal of standardizing racial data along monoracial lines remains part of the census landscape. In early 2000, the OMB published a bulletin providing guidance to the heads of executive departments and establishments charged with civil rights monitoring and enforcement on how to best aggregate racial census data. The Bulletin specifically recommends that respondents who checked one minority race and “white” should be included in tabulations of the minority race for monitoring purposes. Although implemented with an eye toward maintaining and monitoring compliance with “the laws that offer protections for those who have historically experienced discrimination,” this “straightforward and easy to implement” guidance reveals an ongoing fetish with racial categorization and concomitant uneasiness about recognizing multiracial identities as authentic.

VI. THE FUTURE OF RACE AUTHENTICATION – PITFALLS AND POSSIBILITIES

As the foregoing discussion makes clear, race authentication remains an indelible feature of law and culture. The triumph of multiculturalism and identity politics had ensured that race

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371 Payson, supra note __ at 1261.
372 Skerry, supra note __ at 50.
373 Id.
374 Id.
375 Id.
377 Id.
will remain at the center of American life for the foreseeable future. Our fetish for authentic race will remain for as long as we continue to invest social power in the concept of race. But does the “good” of racial authentication outweigh any potential harm occasioned by its practice? What are the normative implications of questioning the racial authenticity of political figures like President Obama or former RNC chairman Michael Steele? What is the significance of using salience of racial identity as a prerequisite for inclusion within social groups? In short, is this fetish for racial authenticity good for race relations?

One way to get at this question is to pause and reflect upon the virtues and vices of authenticating race. Today, race authentication serves as an important means of to express personal identity. We are all driven to forge an authentic personal identity – to discover ourselves and locate the social, political, and economic space to call our own – within the swirling cauldron of experiences, obligations, opportunities, and dreams nurtured and sustained by institutional arrangements and everyday life. Race has become naturalized within the American landscape, and for many of us, race becomes a defining feature of our personal identity. To racially authenticate oneself is both a declaration of one’s own personal identity and a signal to others of one’s desire to be known in a distinctive way.

Similarly, the call for racial authentication by others can represent a desire to forge deep, interpersonal connections. In an increasingly vapid and artificial world, race authentication can be understood as a means of moving beyond the superficial in order to construct a sense of community and connectedness. This community enhancing quality may be of particular relevance to racial minorities with a shared history of racial oppression. Racial authentication provides a means of constructing community and group identity from the ashes of oppression. Moreover, this greater sense of kinship may serve to satisfy the need for trust and sanctuary in a world perceived as racially hostile.

Finally, racial authentication facilitates coordination among racial groups in service of a common empowerment agenda. Because race often serves as a proxy for social and cultural knowledge as well as experience and ideology, race authentication serves to validate and expedite the formation of group responses to racial discrimination and oppression.

At the same time, our fetish for authenticating race produces a number of notable negative consequences. Perhaps the biggest problem created by our fetish for authenticity in race is that it reinforces the salience of the color line in American society. Nothing has proven more corrosive to American society than the ritual distinction and discrimination against people on the basis of race. The requirement that racial identity be authenticated through performance and demonstrations of racial salience reinforces the idea that people can and should make distinctions based upon race. Given the history of race in American society, there is little reason to believe that authenticity-based distinctions in the post-civil rights era will be wholly stripped of the sort of catastrophic implications that characterized race distinctions in the past.

A second, and related problem, is that racial authentication may encourage exaggeration of racial identity and promote racial stereotyping. The fetish for the real, in the racial context, is a fetish for conformity to some set of socially constructed performative expectations. But the social meaning of race is a complex set of characteristics that are neither wholly defined by the racial group nor fixed over time. Indeed, racial identity is multi-layered and heavily nuanced. Many characteristics that one might ascribe to race are neither easily performed nor ascertained. Thus, to satisfy racial performance expectations, one may be prone to emphasize the most readily observable markers of race, resulting in a crabbed and provincial performance of racial identity...
that can be readily grasped and, by extension, a deeply essentialized understanding of what it means to be of a particular race.

The risk of essentialism posed by racial authentication is a demonstrable threat to a deepened sense of individual self-determination. In a society in which community, existential kinship, political alliances, and social sanctuary are often conditioned upon the salience of one’s race, individuals who possess a comparatively weak racial identity may face a tragic dilemma of conformity or ostracism. There is a cruel irony that is revealed here. Racial authentication in the post-civil rights era is often championed as a means of forging political alliances in order to confront racial oppression by dominant society. In this sense, racial authentication provides a critical means of addressing what might be called first order oppression. Yet, racial authentication also creates the foundation for second order racial oppression – oppression within racial groups – as the progressive social power invested in race (community, kinship, privilege, benefits) is made contingent upon the salience of one’s racial identity.

Second order oppression nurtured by the fetish for racial authenticity not only affects monoracial Americans, but extends to multiracial Americans as well because our fetish for authenticity accepts the premise of monoracialism that has shaped American race relations from the beginning. Thus, the biracial woman is not asked to authenticate as biracial, but required to demonstrate her racial bona fides to one race or the other. Racial authentication demands that multiracial Americans choose their single, authentic, racial identity and perform accordingly.

However, the consequences for multiracial Americans are distinct. As some commentators have suggested, multiracial Americans not only experience racial discrimination differently than monoracial Americans, but many experience forms of racial discrimination that are uniquely multiracial in character. The fetish for monoracial authentication, useful in mobilizing people and establishing a political agenda for group empowerment, has the concomitant effect of stifling an organized and meaningful response to unique forms of multiracial oppression.

Given the problems associated with our fetish for racial authenticity, what should be done? One response is to simply get out of the business of racial authentication. This approach, however, comes at a tremendous personal and political price. On a personal level, the refusal to indulge in authenticating race would undermine the formation of personal identity among racial minorities. At the same time, a grand eschewal of racial authentication ignores the legacy of racial suffering that informs group racial identity, and subverts to joy of racial kinship born derived from community alliances built upon racial affiliation. On a political level, the rejection of racial authentication would undermine efforts to mobilize on the basis of group racial empowerment and further undermine efforts to identify and eradicate racial oppression through law.

At the same time, failure to police racial boundaries in a world in which race does bestow benefits can lead to exploitation of race for purposes of personal gain. Our fetish for racial authenticity reflects a deep disdain for situational race – that is, the strategic embrace of racial

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identity depending upon context. For example, in the educational context, individuals may seek to authenticate themselves as a racial minority in order to appear more “diverse” for purposes of admissions. In this instance, race authentication serves a critical role in maintaining the integrity of racial identity and diversity programs built upon racial identity by preventing unjust windfalls for unintended beneficiaries.

The fetish for racial authenticity, then, will remain with us so long as the concept of race retains social power within the American cultural context. The world in which we do not seek to authenticate race is a world in which race is stripped of its personal and political implications. It is a world in which race, divorced from its catastrophic history and progressive normative thrust, functions largely as a gauzy and superficial aesthetic. It is not a world that is blind to race, but one in which race is rendered impotent, with the social meaning and cultural weight of fashion. That such a world is presumptively viewed as unrealizable and arguably undesirable is both a reflection of our collective deficit of political imagination and indicative of our singular attachment to race. The fetish for race authentication, then, will remain with us until we are intellectually and personally prepared to move beyond race as we know it.

VII. CONCLUSION

Americans invoke racial categories with regularity. When we do so, we have an intuitive sense of who belongs to what group, even if we cannot exactly articulate the basis for our distinctions. We do this, despite our collective appreciation of the tragic history of race in this country, and with the knowledge that even our seemingly innocuous classifications have important personal and political consequences. We are, in this sense, captured by our racial inheritance. As James Baldwin famously lamented, “it is exceedingly difficult for most of us to discard the assumptions of the society in which we were born, in which we live, to which we owe our identities; ... virtually impossible, if not completely impossible, to envision the future, except in those terms which we think we already know.”

Our prevailing fetish for racial authenticity and the manner in which we have come to know and authenticate race today does not exist in isolation, but rather is the culmination of centuries of thought practices designed to validate race as a meaningful analytical concept and reliably sort individuals into constructed categories. In this article, I have endeavored to trace the evolution of racial authentication from its inception to the present in order shed light on this contemporary practice so that we might better evaluate whether the push for authentic race does more harm than good.

There is, of course, no easy or definitive answer to this question. The idea of authentic race may be useful insofar as it works to promote the racially progressive ideal of empowering

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381 See, e.g., Amy Harmon, Seeking Ancestry in DNA Ties Uncovered by Tests, THE NEW YORK TIMES, Apr. 12, 2006 (describing the use of DNA testing to uncover racial ancestry for college applicants seeking preference or financial aid for racial minorities); Lulu Zhou, Native Americans Question Admissions, THE HARVARD CRIMSON ONLINE, Feb. 10, 2005 (available at http://www.thecrimson.com/article/2005/2/10/native-americans-question-admissions-some-fear/) (noting that Harvard University, unlike some other leading colleges and universities, does not require proof of tribal status for applicants who claim Native American status for purposes of admissions). In the 1990 census, the number of people that identified as “American Indian” was nearly double the number of individuals on the Bureau of Indian Affairs tribal rolls. SKERRY, supra note __ at 52.

cultural diversity. But it is nevertheless critically flawed, for it requires a reconstruction of race that mirrors in its exclusivity of definition and impact the kind of essentialism and oppression that progressive racial reform was originally intended to overcome. Commenting upon the authentic, fundamental difference of women, Judith Butler wrote:

The question of being a woman is more difficult than it perhaps originally appeared, for we refer not only to women as a social category, but also as a felt sense of self, a cultural conditioned or constructed subjective identity. The descriptions of women’s oppression, their historical situation or cultural perspective has seemed, to some, to require that women themselves will not only recognize the rightness of feminist claims made in their behalf, but that, together, they will discovery a common identity . . . . But does feminist theory need to rely on what is fundamentally or distinctively to be a “woman”?383

As a theoretical matter, one might similarly question the necessity of racial authenticity in order to advance a progressive racial agenda. But in the real world, where so much continues to ride upon race and ethnicity, there is little doubt that our prevailing appetite for authenticity of race, for better or worse, will continue to prove both insatiable and unrelenting.

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