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Is Obama Black: The Pseudo-Legal Definition of the Black Race: A Proposal for Regulatory Clarification Generated from a Historical Socio-Political Perspective.

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IS OBAMA BLACK? THE PSEUDO-LEGAL DEFINITION OF THE BLACK RACE: A PROPOSAL FOR REGULATORY CLARIFICATION GENERATED FROM A HISTORICAL SOCIO-POLITICAL PERSPECTIVE

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ABSTRACT

Barack Obama's successful run for President of the United States exposed many intriguing sociological and political issues in American society, not least of which was the question of race. Obama was the offspring of a mother of White European ancestry and a father of African ancestry. Obama is considered "Black," though some would argue he could have been called "White" just as justifiably. The public discourse surrounding the election of President Obama highlights the need for clarification. In this Article, we explore the past to provide a foundational perspective. In proposing a somewhat unconventional definition, we seek to contain within the confines of its meaning the full essence of what it means to be "Black" in present-day America, brought about by the historical sociopolitical realities that spawned its existence. Thus, by electing a capacious signifier, we show how the purposes of the contemporary regulatory structure can best be benefitted. An expositional and graphical presentation places in illustrative and visual format the practical application of what is proposed.

I. INTRODUCTION

On July 9, 2008, Reverend Jesse Jackson was caught on tape making a vulgar comment that used colorful language to express his displeasure with then-presidential candidate Barack Obama.[1] Jackson's comment stemmed, in part, from an ongoing discussion about Obama's "Black-

1. *Jesse Jackson Apologizes for Crude Obama Remarks*, FOX NEWS, July 9, 2008, http://www.foxnews.com/politics/elections/2008/07/09/jesse-jackson-apologizes-for-obama-remarks/ (reporting Jackson's remark about Barack Obama during an interview with *FOX News*). Jackson believed that his microphone was turned off at the time. *Id.* According to *FOX News*:

ness."[2] Reverend Jackson's uncertainty about Obama's racial commitments—he accused Obama of "talking down to [B]lack people"[3]—was part of a discourse of accusations in the public media (not to mention in Black barbershops) that perhaps Obama was not "[B]lack enough."[4] The question this evokes (and the title of this Article) has less to do with Obama's racial commitments and more to do with how we understand the concept of race and racial categories in this country. It seems to us that if race is indeed "constructed," then specifying who is and who is not "Black" should depend on an understanding of race as a capacious signifier that derives its meaning from cultural, political, and social factors—not merely from the fact of one's skin color.

Barack Obama has repeatedly confirmed his status as a Black man, having proclaimed himself the first African-American president of the *Harvard Law Review* and referring to himself as only the third African-American since Reconstruction to serve in the United States Senate.[5] Throughout much of his adult life, he attended what he describes as a "Black" church.[6] Though Obama's view of his race is clear, the views of the public seem decidedly diverse. For example, *Ebony*, one of the oldest and most successful African-American magazines, described President

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Jackson was speaking to a fellow guest at the time about Obama's speeches in [B]lack churches and his support for faith-based charities. Jackson added before going live, "I want to cut [Obama's] nuts off."

His microphone picked up the remarks.

Id. Rev. Jackson apologized for his inappropriate comment at a news conference later that night. *Id.*

2. *Id.* In a written statement, Jackson said that he was trying to highlight the need for Obama to discuss not only the obligations of Black males, but also to address larger issues of "moral responsibility of government and the public policy for problems in the Black community." *Id.* Obama's campaign stated that he would continue to speak out on those broader issues of responsibility and that he accepted Jackson's apology. *Id.*

3. *Id.* Reverend Jackson explained that his comments about Obama were part of a larger dialogue regarding "urban disparities." *Id.* As a counterpoint, President Obama's then-spokesperson explained that Obama made a concerted effort during his campaign to speak at length regarding parental responsibility. *Id.* In particular, Obama opined on the importance of Black fathers being active in their children's lives. *Id.*

4. *See* Ta-Nehisi Paul Coates, *Is Obama Black Enough?*, TIME, Feb. 1, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1584736,00.html (criticizing pundits who argued that Obama had less support from Black voters because he was considered a "good [B]lack" as opposed to a "bad [B]lack"). Coates argues that Obama settled the debate over his ethnicity long ago, when he explained that when he goes outside to hail a cab the drivers were not likely to say, "Oh, there's a mixed race guy," as he is immediately identified as Black. *Id.*

5. BARACK OBAMA, DREAMS FROM MY FATHER, at vii, ix (rev. ed. 2004).

6. Senator Barack Obama, Sen. Obama Delivers Remarks on Race Issues in Philadelphia, Pennsylvania (Mar. 18, 2008) (transcript available at 2008 WL 716506) (discussing in detail then-Senator Obama's experience at Trinity United Church of Christ).

Obama as a model of "[B]lack cool," placing him on its August 2008 cover featuring "The 25 Coolest Brothers of All Time."[7] In 2008, Barack Obama became the first African-American president of the United States.[8]

This view of Obama is but one side of America's position on Obama's race. Many have decried the proclamation of the United States' forty-fourth President as "Black" or "African-American," and refuse to accept him as such.[9] Among those who refuse to accept Barack Obama as the first "Black" President of the United States, there is disagreement as to why he is not. Some have rejected Obama's Blackness outright, declaring him multi-racial and not African-American.[10] In 2008, Endy M. Bayuni of the *Jakarta Post* boldly asserted, "I don't mean to spoil the party, but here is the bad news for African-Americans: Obama is not [B]lack."[11] Members of a biracial support group called Swirl expressed support for Obama's choice to identify as Black, but recognized the importance of his acknowledgement of his White ancestry as well.[12] A contributor to the

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7. William Jelani Cobb, *The Genius of Cool; The 25 Coolest Brothers of All Time*, EBONY, Aug. 2008, at 68. Obama is, *Ebony* states, a model of "[B]lack cool" because of his quick-witted nature, truthful candor, concise articulation, and integrity. *Id.*

8. Alex Johnson, *Obama Elected 44th President*, MSNBC, Nov. 5, 2008, http://www.msnbc.msn.com/id/27531033. The percentage of American voters who participated in this historic election was higher than it had been in "at least a generation and perhaps since 1908." *Id.* Obama won decisively among African-American voters, received a strong showing from female and Latino voters, and won by a margin of two to one among voters aged thirty and younger. *Id.* Election experts said almost 140 million Americans participated in the election and many "minority, immigrant and younger Americans" were voting for the first time. *Id.*

9. *See, e.g.*, Endy M. Bayuni, Op-Ed., *Is Obama Black or White?*, JAKARTA POST, Nov. 7, 2008, at 6, *available at* 2008 WLNR 21262287 (claiming that President Obama is not, in fact, Black).

10. *See, e.g., id.* (challenging the use of the word "Black" to describe Obama due to his mixed race and his childhood spent as a member of a White family).

11. *Id.* (decrying the practice of calling Obama Black as an obstacle to transcending racial stereotypes). Bayuni argues that calling President Obama the first Black president unnecessarily perpetuates racial divisions. *Id.* In fact, Bayuni believes that calling Obama Black is "a sad reminder that racism is still embedded in [Americans'] mentality." *Id.* The author argues that when a person who is the child of mixed-race parents is "treated as a Negro," there exists racial prejudice stemming from a concept of racial hierarchy. *Id.*

12. Jason Carroll, *Behind the Scenes: Is Barack Obama Black or Biracial?*, CNN, June 9, 2008, http://www.cnn.com/2008/POLITICS/06/09/btsc.obama.race/ (acknowledging the struggle that multi-racial persons face in defining their own race and their identification with Barack Obama's predicament in defining his). More than six million Americans identified themselves as "multiracial" in the 2000 Census—the first census in which Americans had the opportunity to identify as such. *Id.* Obama's mixed ethnicity includes him in this category. *Id.* One member of Swirl explained that the "debate over Obama's racial identity is very familiar" and that she has "been dealing with this issue her whole life." *Id.* Carroll argues that labeling Obama Black disregards "a vital and legitimate side of his

Washington Post stated, "Unless the one-drop rule still applies, our President-elect is not [B]lack. We call him that—he calls himself that—because we use dated language and logic."[13] Short of conducting an extensive survey, which is well outside the scope of this Article, one could never know the true, overall sentiment of the public about Barack Obama's race and the "one-drop rule." But there appears to be more ambivalence among Americans about Obama's race than his simple description of himself as African-American would lead one to believe.

In this Article, we strive to develop a universally acceptable definition of a concept that some find antiquated—race—and seek to discourage repostulating the existence of race and axiomatically identifying distinct racial groupings. Modern-day anthropologists scoff at the notion that one can "biologize" race by attempting to apply a valid scientific genetic construct to diverse groupings of people with little genetic commonality,[14] and we do not necessarily disagree. What this Article proffers is that, for better or worse, race remains an important concept in this country today.[15] We explore, as many others have done, the historical socio-politi-

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life." *Id.* The author discusses the view of Obama as a "post-racial" candidate, one who transcends labels and appeals not only to Black and White citizens, but to all races. *Id.*; *see also* DAVID MENDELL, OBAMA: FROM PROMISE TO POWER 6 (2007). Mendell explains:

> [Obama] is not of the same specific ancestry as most [B]lacks in the United States, nor has he lived the typical [B]lack experience in America. Yet he is accepted by most as a brother, in large part because his physical appearance is decidedly African and his wife and children are [African-American]. He was raised by a [W]hite family and educated in elite [W]hite institutions, giving him nonthreatening appeal and instant credibility with the [W]hite cognoscenti.

DAVID MENDELL, OBAMA: FROM PROMISE TO POWER 6 (2007).

13. Marie Arana, Op-Ed., *He's Not Black*, WASH. POST, Nov. 30, 2008, at B01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802219.html. "After more than [three hundred] years and much difficult history, we hew to the old racist rule: Part-[B]lack is all [B]lack. Fifty percent equals a hundred. There's no in-between." *Id.* Explaining that skin color is "an unreliable marker," the author believes that racial labels "validate the separation of races." *Id.*

14. *See* AM. ANTHROPOLOGICAL ASSOC., STATEMENT ON "RACE" (1998), http://www.understandingrace.org/about/statement.html (asserting that race is actually based on ideology and culture more than biological or physiological differences). The American Anthropological Association (AAA) claims that race means more than physical differences. *Id.* In fact, the overwhelming majority of physical variation lies within racial groups. *Id.* Accordingly, "any attempt to establish lines of division among biological populations [is] both arbitrary and subjective." *Id.*

15. Were it not so, would it be a news story fit for publication in a recent *Washington Post* article that Disney has just created its first ever Black Disney princess? *See* Neely Tucker, *A Fairy Tale Beginning*, WASH. POST, Apr. 19, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/16/AR2009041603139.html (reporting that Tiana, the princess featured in Disney's newest movie, *The Princess and the Frog*, symbolizes a major step towards positive perception of African-Americans because of Disney's "pervasive influence" in American culture). The *Post* states: "The implied

cal context for the development of this phenomenon known as race, with our attentions strictly focused upon what is currently termed the "Black" or "African-American" race.[16] Scholars have proposed solutions to categorically accommodate the reality of the ever-increasing numbers of mixed-race peoples,[17] and others essentially argue for the abolition of racial categories altogether.[18] We do not join in either approach other than to propose a definition of race that embodies the socio-political realities that generate its meaning.

Defining race may be useful in a regulatory context for the myriad of state and federal laws in which race is categorized and may also be used as a guidepost for the judiciary when faced with this issue. In proffering a definition of what it is to be "Black," we do imply that there is a need for continued categorization for the benefit of those who may be in need of the protections race affords. But we do not support continued categorization in order to minimize the desire for more precise "identification" by those who would prefer a multiracial choice—although admittedly a corrolary. Certainly, to be deemed "Colored" or "Negro" in the history of this country could result in severe penalties, from being held in bondage, imprisoned, denied basic rights, or even killed. Our country has rid itself of many vestiges of racial persecution, with anti-miscegenation laws having been the most tenacious holdouts.[19] What exist in this country today

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message of Tiana, that [B]lack American girls can be as elegant as Snow White herself, is a milestone in the national imagery, according to a range of scholars and cultural historians." *Id.*

16. The terms "African-American," "Black," "Negro," and "Colored" may be used more or less interchangeably throughout this Article, as these terms (and negative connotative derivations thereof, which merit no mention) have been variously used throughout history.

17. *E.g.*, Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 2–3 (1991) (arguing that the continued application of "color-blind constitutionalism" encourages White racial domination); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1203–05 (1997) (calling for a rejection of the "one drop rule" of race in the United States Census by embracing a multiracial category). Though the United States Census did implement a policy in which people of mixed race could check multiple boxes on the 2000 Census, there does not exist a separate "multiracial" category. U.S. CENSUS BUREAU, U.S. CENSUS 2000 FORM D-2, http://www.census.gov/dmd/www/pdf/d02p.pdf.

18. *E.g.*, Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1093–94 (2004) (arguing that the concept of race "perpetuates prejudices and misconceptions," justifies the unequal treatment of people, and leads to violence). Race, Hoffman proclaims, is a false concept. *Id.* at 1098. Hoffman argues that ethnic and cultural identities, "central to many people's understanding of themselves," should replace the term "race" in future statutes. *Id.* at 1100.

19. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1175–79 (1997) (noting

are laws that are designed to protect and benefit African-Americans, reflecting a shift in focus from legal penalties to legal benefits.

We examine these laws to note the modern-day efforts to define who is Black or African-American. Our explorations into the past are done to ensure that any modern-day construction of Blackness accommodates the realities of the historical context and to clarify the origins of readers' pre-existing concepts of Blackness.

In sum, our task is threefold: 1) to explore the history of the Black race in America in its defining moments; 2) to review existing relevant laws and jurisprudence with its presuppositions that there is a group of people who are known in our present culture as Black or African-American; and 3) to propose a basis for defining who is "Black" or "African-American."

II. The Historical Socio-Political Context

A. *In the Beginning, There Was Slavery*

With one short, yet profound sentence, a Virginia court stated in 1656 that a "Mulatto [is] held to be a slave."[20] That sentence is the entirety of the court's opinion, and no more is known about the facts of that case.[21] However, the court made it clear that a significant amount of so-called "White blood" was not enough to protect a person's freedom if he or she had any "Black blood" at all.[22] This model of Black-White socio-legal interaction has produced angst and dread in the African-American community for over 350 years.[23] Although the notion of race itself has often

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the various laws in place since the founding of the colonies regarding interracial birth and marriage).

20. *Id.* at 1174 (footnote omitted). "The legal treatment of Mulattoes as Blacks, with all of the attached legal disabilities, may have begun as early as the seventeenth century." *Id.*

21. *Id.* ("Although the opinion consists of a single sentence, and we know of no supporting record to illuminate the facts of the case, its logic constructs the American view of racial mixture between Black and White that has endured for over three hundred years.").

22. *Id.* at 1174–75.

23. *See id.* at 1174–87 (explaining the historical impact of this case on laws and practices concerning Mulattoes and African-Americans in the United States). As Hickman explains:

> The rule of [defining mixed-race persons by the race that is considered inferior] thus had its origins with the arrival of European and African people on this continent. During the ensuing three hundred years, [this rule] drew broad boundaries around the African-American race, including within these boundaries the offspring of Europeans and Native Americans, and it bound this race firmly together as a people.

Id. at 1187.

been debated and disputed,[24] the reality of race as a determinant of social and political position has been with us since the first slaves set foot on American soil. What was sociologically known as "hypodescent" and informally known as the "one drop rule" required not only that anyone with an African ancestor be deemed Black, but also, more insidiously, any person who is part Black must be subject to the detriments of that classification—i.e., inferiority and even slavery.[25]

The importance of the legal construct of race in early America cannot be overstated—it often meant the difference between life and death.[26] An 1831 Ohio case, *Gray v. State*, illuminates the difficulty courts encountered in determining an individual's race.[27] In that case, the prosecution called a Negro to testify as a witness against Ms. Gray, who was indicted for robbery.[28] The Negro witness placed Gray at the scene of the robbery, though Ohio then had a statute that prohibited Blacks and Mulattoes from testifying against Whites.[29] Because Ms. Gray was a very fair-skinned woman who easily could have "passed" for White, an issue arose as to whether Ms. Gray was White or Mulatto.[30] Ohio had no statute that defined Mulatto, but the court did state that the definition of Mulatto was well known.[31] Gray claimed to be an octoroon, or of one-eighth African blood.[32] By observing the color of the defendant's skin alone, which was closer to White than Mulatto, the court found that Ms. Gray was White.[33] The court made this determination while admitting "the difficulty of defining and ascertaining the degree of duskiness" needed to identify a person's proper race.[34] This approach left each defendant's fate in the hands of the subjective whim of the judge, though the Ohio Supreme Court later adopted the "more White blood than Black blood" rule, wherein persons of mixed blood were successful in being classified as White if they

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24. *See, e.g.*, D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 439–40 (1993) (arguing that "race is not so much a category but a practice: *people are raced*" (emphasis in original) (footnote omitted)).

25. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997) (defining the term "hypodescent" and how it has been used in American history as a tool to justify racial inferiority).

26. *See, e.g.*, Thurman v. State, 18 Ala. 276, 278 (1850) (considering the race of the defendant, a multiracial man, as a central issue in determining whether or not he would receive death if convicted of raping a White woman).

27. 4 Ohio 353, 353 (1831).

28. *Id.*

29. *Id.* at 354.

30. *Id.*

31. *Id.*

32. *Gray*, 4 Ohio at 353.

33. *Id.* at 354.

34. *Id.*

could prove that they had more White than Black blood.[35] A person who was fifty percent Black and fifty percent White would be considered Black.[36]

Thurman v. State, an 1850 Alabama Supreme Court case, further demonstrates the complexity of circumscribing a person's race.[37] Thurman was an individual of dubious racial composition, who was accused of raping a White woman.[38] Alabama then had in effect a statute that stated, "Every slave, free [N]egro, or Mulatto, who shall commit, or attempt to commit the crime of rape on a [W]hite woman, and be thereof convicted, shall suffer death," but the state had no statute that defined "Mulatto."[39] The prosecution accused Thurman of being a Mulatto, essentially defining Mulatto as any person with White and Negro blood.[40] The court determined that the word "Mulatto" had a specific and defined meaning: that is, the offspring of the union of a Negro and a White. Although Thurman had "kinky hair and yellow skin," the court would not acknowledge such evidence as sufficient to sort out the ambiguity of Thurman's racial mixture.[41] In reversing Thurman's conviction, the court concluded that it was the purview of the legislature to tighten the definition of Mulatto.[42] The Alabama legislature quickly took the court's advice and, in 1852, passed a law that defined Mulatto as anyone having one-eighth or more African blood.[43]

The freedom of Gray and the life of Thurman hinged upon the nebulous definition of race.[44] There was no valid objective standard for determining race; it only mattered what a particular court decided in any particular case. Gray and Thurman fared well, but in many other cases, the opposite occurred.[45] The concept that one drop of "Black blood"

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35. Anderson v. Millikin, 9 Ohio St. 568, 572 (1859) (stating that persons with more than one-half "White blood" would be considered "White").

36. *Id.*

37. 18 Ala. 276, 278 (1850).

38. *Id.* at 277–78.

39. *Id.* at 278–80.

40. *Id.* at 277.

41. *Id.* at 278.

42. *Thurman*, 18 Ala. at 279.

43. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 374 (1994).

44. *Thurman*, 18 Ala. at 278; Gray v. State, 4 Ohio 353, 353 (1831).

45. *See, e.g.*, Daniel v. Guy, 19 Ark. 121, 134 (1857) (finding that if a person appeared to be Black, there was a rebuttable presumption that he was a slave); *see also* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1225–31 (1997) (analyzing the historical and practical realities of courts using fractional statutes, or those that define racial identity by fractional ancestry, to determine the race of mixed-race individuals). When the task of proving one's

made one "Black" and, ipso facto, inferior, underpinned the rationale for slavery, segregation, and later, both explicit and implicit discrimination.[46]

B. *The Legal Construction of Race in the Reconstruction*[47] *and Jim Crow*[48] *Eras*

Although President Abraham Lincoln was opposed to slavery, he entered his presidency willing to settle for keeping slavery from expanding to the territories; the Southern states, however, would not be appeased.[49] On September 22, 1862, in order to punish and destabilize states that were rising against the Union, Lincoln issued the Emancipation Proclamation, which declared that slaves in certain states and parts of states that were in rebellion against the Union would be freed on January 1, 1863.[50] At that time, Blacks comprised a majority of the populations of Louisiana, Mississippi, and South Carolina; over forty percent of the populations of Alabama, Florida, Georgia, and Virginia; and more than thirty-three percent of the population of North Carolina, a fact of political significance.[51] After the passage of the Civil War amendments, Blacks were poised to enjoy freedom, citizenship, and political power. When Congress required the former Confederate states to form new governments and hold political conventions, the stage was set for Blacks to exercise these newfound liberties.[52] White Republicans, both Northerners (some-

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race was not an issue, however, the fractional statutes were strictly applied, and those deemed non-White were frequently denied substantial rights. *Id.* at 1228.

46. Wendell L. Griffen, *Race, Law and Culture: A Call to New Thinking, Leadership, and Action*, 21 U. ARK. LITTLE ROCK L. REV. 901, 913–17 (1999).

47. Reconstruction lasted from the end of the Civil War in 1865 until the removal of Northern federal troops from the South in 1877. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at xxv (2002).

48. The Jim Crow era lasted from the time of the removal of Northern federal troops from the South in 1877 until the passage of the Civil Rights Act of 1964. *Id.* at 586.

49. Kevin D. Brown & Vinay Sitapi, *Lessons Learned from Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 HARV. BLACKLETTER L.J. 3, 10–11 (2008).

50. Abraham Lincoln, Emancipation Proclamation (Sept. 22, 1862) (transcript available at http://ritter.tea.state.tx.us/ssc/primary_resources/pdf/Emancipation_Proclamation.pdf).

51. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 80–81 (2008).

52. *See* W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 43 (2004) ("The entire post-Civil War legislative agenda, which consisted of the passage of civil rights statutes and proposed constitutional amendments, was the result of a massive change in the political landscape accompanying the victory by the North over the South.").

times called "carpetbaggers")[53] and Southerners (often known as "scalawags"),[54] were a powerful force in the South.[55] With Blacks gaining the right to vote and at least seventy percent of Black voters turning out for elections, Blacks became formidable Republican allies.[56] The coalition of White and Black Republicans took control of congressional delegations, state legislatures, and county and city governments in the South.[57]

Life appeared hopeful for Blacks in the Southern states, but the Democratic Whites struck back.[58] First, federal troops sent to oversee Reconstruction at the end of the Civil War pulled out of the Southern states in 1877.[59] Democratic Whites regained control of the Southern states using both physical intimidation (murders, lynching, and beatings) and political intimidation (poll taxes and outright election fraud).[60] As a result, by 1880 all Southern states were again Democratic.[61]

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53. A carpetbagger was "a Northern officeholder in the South during the period of [R]econstruction after the Civil War who took advantage of the unsettled conditions." WEBSTER'S DELUXE UNABRIDGED DICTIONARY 276 (2d ed. 1983). Used contemptuously, the term "referr[ed] to the fact that such men usually carried all their belongings in a single carpetbag." *Id.*

54. A scalawag was "a [W]hite Southerner who was a Republican during the Reconstruction following the Civil War." *Id.* at 1614. The term was used disparagingly by Southern Democrats. *Id.*

55. W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations,* 48 How. L.J. 1, 43 (2004).

56. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 314 (1988). While Blacks voted in massive numbers, Southern White voters were apathetic or hoped that, by refraining from voting, they would prevent the success of attempts to amend the Constitution to better protect racial minorities. *Id.* Through the support of African-Americans, White Republican candidates thrived. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty,* 43 HARV. C.R.-C.L. L. REV. 65, 82 (2008).

57. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty,* 43 HARV. C.R.-C.L. L. REV. 65, 82–83 (2008).

58. *Id.* at 87–90 (describing the brutal tactics used by White Southerners to retake political power from Blacks).

59. W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations,* 48 How. L.J. 1, 47 (2004). As a result, "[t]he South almost immediately began a vicious process of suppressing the social and civil rights of the [B]lack population . . . ." *Id.* (footnote omitted).

60. *Id.* at 74–75. "Between 1878 and 1898, [W]hites lynched approximately 10,000 persons, most of whom were [B]lack. Additionally, during this era, states systematically disenfranchised [B]lacks through violence, massacres, and a variety of legal devices such as literacy tests, property tests, poll taxes, understanding clauses, and grandfather clauses." *Id.* at 74 (footnotes omitted).

61. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 83–85, 90 (2008).

1. The *Slaughter-House Cases* and *Cruikshank*

United States Supreme Court decisions that defined the power relationship between the federal and state governments also caused the gains Blacks made in the South to wane. The most significant of these decisions were the *Slaughter-House Cases*[62] and *United States v. Cruikshank*.[63]

The *Slaughter-House Cases* was a "watershed" decision.[64] It defined the post-Civil War power relationship between the federal and state governments in favor of the states.[65] Even though the case arose in a race-neutral context, it impacted the race question by placing the basic civil rights of Blacks in the hands of the individual states.[66] Thus, the White political apparatuses of the individual states were enabled to both define and curtail the civil rights of Blacks.[67]

The *Slaughter-House Cases* arose when Louisiana attempted to incorporate the major slaughterhouses of New Orleans.[68] Local butchers, forced to slaughter their own livestock at the state-owned slaughterhouse, alleged that this statute violated the Thirteenth and Fourteenth Amendments of the federal Constitution by creating "an involuntary servitude," by abridging "the privileges and immunities of citizens of the United

62. 83 U.S. (16 Wall.) 36 (1873).

63. 92 U.S. 542 (1876).

64. Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 151 (1993) (arguing that the *Slaughter-House Cases* represented the Supreme Court's rejection of federal civil rights laws). The Court abolished the political idea that the Department of Justice would enforce the "rights of Americans in the South during Reconstruction." *Id.*

65. *See Slaughter-House Cases*, 83 U.S. at 43 (holding that the rights guaranteed by the Thirteenth and Fourteenth Amendments only applied to federal, but not state, citizenship).

66. *See id.* The *Slaughter-House Cases* emerged from a contentious piece of Louisiana legislation that incorporated the major slaughterhouses of New Orleans in order for the city to exert tighter regulatory control over the disposal of carcasses. *Id.* at 83 (Field, J., dissenting). The owners of the affected slaughterhouses contended that the act denied them equal protection as lawful business owners. *Id.* at 86. The Court concluded that the newly adopted Fourteenth Amendment's Privileges and Immunities Clause did not create a cause of action for state citizens who were denied equal protection rights by the states. *Id.* at 43 (majority opinion). Thus, as Justice Field explained in his dissenting opinion,

> The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the [f]ederal Constitution protect the citizens of the United States against the deprivation of their common rights by [s]tate legislation.

Id. at 89 (Field, J., dissenting).

67. *See id.* at 43 (declining to apply the protections of the Civil War amendments to a denial of state citizens' equal protection rights).

68. *Id.* at 59–60.

States," by denying them "equal protection of the laws," and by depriving "them of their property without due process of law."[69]

While the factual basis of the *Slaughter-House Cases* had nothing directly to do with the civil rights of Blacks, the Court's conclusion in these consolidated cases substantially impacted the evolution of Blacks' civil rights.[70] In a battle of states rights versus federal rights, this case decided who would govern the individual civil rights of a state's citizens—the state governments or the federal government.[71] Clearly recognizing that its decision would have monumental implications for the outcome of that battle, the Court stated:

> We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearings upon the relations of the United States, and the several [s]tates to each other and to the citizens of the [s]tates and of the United States, have been before this court during the official life of any of its present members.[72]

The Court's decision ultimately put the states firmly in control of their own citizens' civil rights.[73]

For Black people, perhaps the most compelling aspect of the Court's analysis was its construction of the Fourteenth Amendment, which states that citizens by birth or naturalization "are citizens of the United States and of the [s]tate wherein they reside."[74] The Court held that a person is a citizen of the United States and separately a citizen of the state in which

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69. *Id.* at 66.

70. *See Slaughter-House Cases,* 83 U.S. at 89 (Field, J., dissenting) (arguing that the Court's decision limiting the scope of the Thirteenth and Fourteenth Amendments to preclude application to state citizens would have far-reaching consequences for all locally disenfranchised Americans); *see also* Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 151 (1993) (discussing the practical import of the *Slaughter-House Cases* for Black Americans after the Civil War). The author asserts:

> Politically, [the *Slaughter-House Cases*] abolished the constitutional theory on which the Justice Department depended in its enforcement of the fundamental rights of Americans in the South during Reconstruction. The Court thus provided legal sanction for the Grant administration's retreat in 1873 from its civil rights enforcement efforts. The Court's decision annulled a revolution in American constitutionalism.

Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 151 (1993).

71. *See Slaughter-House Cases*, 83 U.S. at 67 ("This Court is thus called upon for the first time to give construction to [the Thirteenth and Fourteenth Amendments].").

72. *Id.*

73. *Id.* at 83.

74. *Id.* (citing U.S. CONST. amend. XIV, § 1).

he or she resides.[75] Further, state citizenship gives a person rights and responsibilities distinct from those derived from United States citizenship.[76] The dichotomy between United States citizenship and state citizenship is the heart of the matter in the *Slaughter-House Cases*, as it determines whether the federal government has the power to regulate the civil rights of state citizens.[77] The dilemma for Blacks was that, under the *Slaughter-House Cases* rule, the states could effectively define and administer state citizens' civil rights.[78] Moreover, the states were empowered to prohibit the federal government from interfering with state administration of civil rights law as applied to state citizens.[79] It was, thus, up to the states to determine the civil rights of state citizens.[80]

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75. *Id.* at 74.

76. *Slaughter-House Cases*, 83 U.S. at 74.

77. *Id.* To clarify the dichotomy between United States citizenship and citizenship of a particular state, the Court quoted the definition of "privileges and immunities" from *Corfield v. Coryell*:

> The inquiry . . . is, what are the privileges and immunities of citizens of the several [s]tates? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several [s]tates which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.

Id. at 76 (quoting 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230)). Thus, the Court found that the states have the power to limit or expand those fundamental rights, so long as the limitation or expansion also applies to the citizens of other states within their jurisdictions. *Id.* at 77.

78. *Id.* at 74.

79. *Id.* at 79–83.

80. *Id.* at 82. Since the *Slaughter-House Cases* were brought under the federal Constitution, the question became whether the Privileges and Immunities Clause protects a federal citizen from discrimination under state law. *Id.* The Court answered that it does not, stating:

> Under the pressure of all the excited feeling growing out of the [Civil War], our statemen have still believed that the existence of the [s]tate with powers for domestic and local government, *including the regulation of civil rights*—the rights of person and of property—was essential to the perfect working of our complex form of government . . . .

Id. (emphasis added). With this statement, the Court effectively limited the administration and policing of individual civil rights activities to the state and local governments and declared that these individual civil rights activities logically and historically belonged to the state and local governments. *See id.*

If the dual nature of citizenship espoused in the *Slaughter-House Cases* was not prominently obvious, it became demonstrably unambiguous in *United States v. Cruikshank*, decided in 1876.[81] This case completely gutted the Enforcement Act of 1870[82] and the Civil Rights (Ku Klux Klan) Act of 1871,[83] both of which were enacted to give substance to the rights of Blacks under the Thirteenth and Fourteenth Amendments.[84]

In what has been called the bloodiest riot in Reconstruction history, over one hundred Blacks were murdered by a mob of Whites in Colfax, Louisiana in 1872.[85] Nine White members of this mob were charged, pursuant to the Enforcement Act of 1870, with attempting to prevent or hinder the Black victims from voting.[86] Three of the nine defendants were convicted of intimidation and murder.[87]

From these convictions and appeal, we get *Cruikshank*.[88] The appeal of the three convicted defendants was based upon the argument that the charges in the indictment should have been brought under state law, as any rights that may have been violated were state, not federal, rights.[89] In *Cruikshank*, the U.S. Supreme Court reinforced the concept of dual citizenship described in the *Slaughter-House Cases*.[90]

The Court proceeded to show how the very rights guaranteed by the Constitution—the right to peaceably assemble, the right to bear arms, the right to due process of law, the right to equal protection of the law, the

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81. *See* 92 U.S. 542, 551 (1875) (declining to incorporate the Bill of Rights to the states).

82. ch. 114, 116 Stat. 140 (1870) (requiring equal freedoms and equal punishments for Whites and Blacks).

83. ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2006)) (providing a civil remedy to Blacks terrorized by the Ku Klux Klan in the years following passage of the Civil War amendments). The act states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any [s]tate . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

84. *See* Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the* Civil Rights Cases, 41 HARV. C.R.-C.L. L. REV. 481, 483 (2006) (arguing that Supreme Court decisions during this era repealed anti-discrimination legislation and effectively ended Reconstruction in the South).

85. James Filkins, Note, Tarpley v. Keistler*: Patronage, Petition, and the* Noerr-Pennington *Doctrine*, 50 DEPAUL L. REV. 265, 280 n.131 (2000).

86. *Id.*

87. *Id.*

88. United States v. Cruikshank, 92 U.S. 542, 559 (1875) (overturning the convictions).

89. *Id.* at 548–49.

90. *Id.* at 550.

right to vote in a state election, and the right not to be intimidated for voting in a state election—were state rights in which the federal government had no authority to interfere so long as any abridgment of those rights was committed by individuals acting in an individual capacity.[91] The Court stated that the federal government may intervene to enforce the Thirteenth and Fourteenth Amendments in the states only when the states or their agents either directly or indirectly violate a U.S. citizen's rights under those amendments.[92] But such facts were not present in *Cruikshank*, which involved only individual, rather than state, conduct.[93] For Blacks, *Cruikshank* was the baby birthed from the holding and rationale of the *Slaughter-House Cases.* The impact upon Blacks[94] was to strip them of vital federal civil rights and protections approximately one year prior to the departure of Northern federal troops from the South.[95] The political, social, and economic writing was on the wall for Blacks, not only in the South, but in all of America.

2. *Pace v. Alabama*

One of the first post-Reconstruction cases involving state efforts to curtail the citizenship rights of Blacks was *Pace v. Alabama*, an 1883 case in which an African-American man and his wife, a White woman, were charged under a statute that prohibited Negro and White persons from cohabiting, whether or not they were married.[96] Both Pace and his wife were convicted under this statute, and each was sentenced to two years in the penitentiary.[97] Because a cohabitating but unmarried couple of the same race would face only a small fine and up to six months in the county jail, Pace alleged a violation of his equal protection rights.[98] But the Court held that there was no violation of the Fourteenth Amendment

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91. *Id.* at 551–57.

92. *Id.* at 549–51.

93. *Cruikshank*, 92 U.S. at 548.

94. While this Article concerns African-Americans, the *Cruikshank* holding affected the rights of all minorities.

95. Dewey M. Clayton, *A Funny Thing Happened on the Way to the Voting Precinct: A Brief History of Disenfranchisement in America*, 34 BLACK SCHOLAR, Sept. 2004, at 43.

96. 106 U.S. 583, 585 (1883), *overruled by* McLaughlin v. Florida, 379 U.S. 184 (1964).

97. Pace v. Alabama, 69 Ala. 231, 231 (1881), *aff'd*, 106 U.S. 583 (1883), *overruled by* McLaughlin v. Florida, 379 U.S. 184 (1964). The Supreme Court of Alabama found no important distinction between the use of the phrases "live in adultery" or "fornication with each other." *Id.* Instead, the court found the defendants' races, combined with the type of offense, to be determinative in establishing the punishment. *Id.*

98. *Id.*

because both Pace and his wife were convicted of the same crime and sentenced to the same amount of time.[99]

Not only did the Court choose to ignore the validity of Pace's equal protection argument, but, more derisively, it also overlooked the Alabama Supreme Court's virulently racist explanation for upholding this blatantly discriminatory law:

> The evil tendency of the crime of living in adultery or fornication is greater when it is committed between persons of the two races, than between persons of the same race. Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.[100]

As a result of this decision, the state courts were now free to blatantly deny equal protection to Blacks.[101]

3. Anti-Miscegenation Laws

Miscegenation, the antiquated term meaning mixing of the races,[102] began shortly after Africans landed on the North American shores.[103] Records show that while mingling and mixing of the races was officially frowned upon, it was also widely practiced in the New World.[104] The prevention of the commingling of the races was a way of protecting not only the White psyche, but also the property and privilege upon which the underpinnings of the White socio-political machine depended.[105] After the South lost the Civil War, the emancipation of Blacks—and the

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99. *Pace*, 106 U.S. at 585 ("Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race.").

100. *Pace*, 69 Ala. at 231.

101. It is sad to note that this case was not questioned until 1964, when it was finally overruled by *McLaughlin v. Florida*. *See* 379 U.S. 184, 188 (1964) ("*Pace* represents a limited view of the Equal Protection Clause, which has not withstood analysis in the subsequent decisions of this Court.").

102. *See* BLACK'S LAW DICTIONARY 1019 (8th ed. 2004) (defining "miscegenation" as "[a] marriage between persons of different races, formerly considered illegal in some jurisdictions").

103. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1171 (1997).

104. *Id.*

105. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1720–21 (1993) ("[T]he line between [W]hite and Black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification, and it determined the allocation of the benefits and burdens of this form of property.").

ascension of Blacks to political power—threatened the social, political, and financial dominance of Whites, particularly in the South.[106]

The U.S. Supreme Court would become an important player in the protection and preservation of the White way of life through its holding in the *Slaughter-House Cases*, which effectively empowered the states to deny their own citizens' civil rights through the enforcement of anti-miscegenation laws.[107] For example, a Black man and a White woman who had lived together for a considerable time with their three sons in Virginia were eventually married in Washington, D.C. in 1874.[108] Virginia's supreme court of appeals held that, although the marriage was valid in the District of Columbia, the contract was void as against the public policy of upholding moral purity in Virginia.[109]

In *Green v. State*, the Alabama Supreme Court employed the reasoning of the *Slaughter-House Cases* in surmising that marriage, interracial or otherwise, is a state civil right.[110] The court deemed the Fourteenth Amendment, which deals exclusively with federal civil rights, not applicable to Alabama's anti-miscegenation law, which the court upheld.[111] Thus, implicitly or explicitly, the handprint of the *Slaughter-House Cases* was visible upon the jurisprudence of state anti-miscegenation cases.

4. *Plessy v. Ferguson*

Plessy v. Ferguson spawned the virulent doctrine of "separate but equal."[112] It was a principle that would hold sway in American jurisprudence and life for fifty-eight years until overturned in 1954 by *Brown v. Board of Education.*[113]

The *Plessy* Court held that Blacks and Whites may be legally segregated on public transportation.[114] Though *Plessy* claimed to be only one-eighth Black, he was lawfully charged with violation of the segregation statute.[115] But *Plessy* did not add anything to the determination of who is

106. Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1980-1934*, 20 LAW & HIST. REV. 225, 228–29 (2002).

107. *See* Slaughter-House Cases, 83 U.S. 36, 67 (1872) (granting the states the power to define the civil rights of state citizens).

108. Kinney v. Virginia, 1878 WL 5945, at *1–2 (Va. Oct. 3, 1878).

109. *Id.* at *7.

110. Green v. State, 58 Ala. 190, 195 (1877).

111. *Id.*

112. *See* 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (using the phrase "separate but equal" to describe the impact of the majority's decision), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

113. 347 U.S. 483, 495–96 (1954) (rejecting the doctrine of "separate but equal" in the field of public education).

114. *Plessy*, 163 U.S. at 538.

115. *Id.* at 528.

Black and, in fact, left the question of Plessy's race for another day and another court.[116] What *Plessy* did do was separate political and social equality, determining that the law afforded Blacks only political equality.[117] The court explained:

> Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane.[118]

If *Plessy* was simply about public accommodations, it would not have had such an impact.[119] But the ratification of the "separate but equal" doctrine was critical in myriad contexts. For example, after *Plessy*, separate school systems and public facilities were sanctioned so long as they could be made "separate but equal."[120] Further, we find that the "but equal" part of the mandate quickly became nonexistent. In 1899, a little over three years after *Plessy*, the same U.S. Supreme Court held that it was not unequal treatment of Blacks for White high school students in a separate school to receive a free high school education while, at same

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116. *Id.* at 551–52.

117. *Id.*

118. *Id.* at 551–52.

119. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of [C]olored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the [C]onstitution, by one of which the [B]lacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of [W]hites are in no danger from the presence here of eight millions of [B]lacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that [C]olored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by [W]hite citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

Id.

120. Gong Lum v. Rice, 375 U.S. 78, 87 (1927) (holding that it was not a violation of the Equal Protection Clause of the Fourteenth Amendment for Mississippi to mandate the separation of schools for White and "Colored" children).

time, Black high school students had to pay tuition.[121] For Blacks, the reality of separate and *unequal* belied what the Court regarded as its wisdom in establishing "separate but equal."

5. A New Dawning

In the fifty-eight-year period from 1896 to 1954, there were monumental changes in the socio-political climate in the United States.[122] There was the birth of the NAACP, in which Whites united with Blacks in recognition of the plight of Blacks as second-class citizens and began a combined effort to rectify this situation.[123] Social activists W. E. B. DuBois, the first African-American to receive a Ph.D. from Harvard, and Marcus Garvey, a publisher and journalist, instigated Blacks to take a fresh look at their being and value.[124] There was the Harlem Renaissance, in which young Black artists expressed themselves in their Blackness.[125] Two world wars in which Blacks made major military contributions were fought.[126] And on the sports scene, Jackie Robinson broke the color barrier in major league baseball.[127]

And then, along came *Brown v. Board of Education* in 1954, overturning *Plessy*.[128] The discrimination fomented in the educational arena is perhaps the most insidious legacy *Plessy* left, as Chief Justice Earl Warren's Court recognized in *Brown*.[129] The Court realized the devastating

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121. Cumming v. Bd. of Educ., 175 U.S. 528, 545 (1899).

122. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004) (detailing the history of Black Americans' fight for civil rights from *Plessy v. Ferguson* through *Brown v. Board of Education*).

123. *Id.* at 78 (2004) (describing the early years of the NAACP).

124. *Id.* (describing these and other activists' efforts to combat civil rights injustices).

125. A Brief Guide to the Harlem Renaissance, http://www.poets.org/viewmedia.php/prmMID/5657 (last visited Oct. 5, 2009) (explaining that during this era, "[African-Americans] were encouraged to celebrate their heritage and to become 'The New Negro,' a term coined in 1925 by sociologist and critic Alain LeRoy Locke in his influential book of the same name").

126. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 224–27 (2004). Despite African-Americans' voluntary and heroic service, the military continued to mandate unit segregation. *Id.* at 225.

127. Biography of Jackie Robinson, http://www.jackierobinson.com/about/bio.html (last visited Oct. 5, 2009) ("When Jackie first donned a Brooklyn Dodger uniform, he pioneered the integration of professional athletics in America. By breaking the color barrier in baseball, the nation's preeminent sport, he courageously challenged the deeply rooted custom of racial segregation in both the North and the South.").

128. 347 U.S. 483, 494–95 (1954) (rejecting the doctrine of "separate but equal" as applied to public schools and overturning *Plessy*'s contrary holding regarding segregation in public transportation).

129. *Id.* at 494. Quoting the lower court, the Supreme Court stated:

consequences for African-Americans of the "separate but equal" doctrine espoused in *Plessy* and declared that "[s]eparate educational facilities are inherently unequal."[130]

The Reconstruction and Jim Crow eras had a momentous impact upon the notion of race in the United States. The end of slavery put great pressure on the Black/White relationship to change. During this time, Blacks experienced political power as never before, and Whites suffered defeat and degradation as never before because they no longer had slavery to funnel Blacks into the vortex of White power.[131]

> Segregation of [W]hite and [C]olored children in public schools has a detrimental effect upon the [C]olored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. (fifth and sixth alterations in original) (internal quotation marks omitted).

130. *Id.* at 495. The Warren Court stated that "[s]eparate educational facilities are inherently unequal," but the Justices were themselves victimized by instilled racial biases that colored their thinking. At first glance, the pronouncement that "separate but equal" was "inherently unequal" seems a welcome salve. But what does this characterization truly reflect about the Warren Court's perception of Black competency? These words infer that an organization must have White participation in order to be competent. We believe the Court had good intentions and *Brown* has produced positive results; but did Blacks of that era believe that they needed White participation to validate their institutions?

An 1899 Georgia case decided shortly after *Plessy—Cumming v. Board of Education*—sheds light on the issue of whether Blacks in the days of *Plessy* felt a need for validation through White participation in their schools. 175 U.S. 528 (1899). In *Cumming*, Blacks in Richmond County simply wanted their children to be allowed to attend, free of charge, the Black high school, just as the White students were allowed to attend, free of charge, the White high school. *Id.* at 529–30. The plaintiffs in *Cumming* did not attack "separate," but they did attack "equal." *Id.* at 530–31. It is, thus, evident that the Black plaintiffs did not believe that separate was inherently unequal, instead believing in their own competency given the proper tools. *See id.*

But in *Brown*, the Supreme Court attempted to alleviate racial discrimination in public schools and unwittingly revealed its own discriminatory psyche by presuming that Black people cannot succeed without the physical presence of people of the White race. The Court presents the fundamental issue in *Brown* as follows: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). Specifically, *Brown* was not about equality of resources, but rather the psychological and social damage done to Black children when they did not receive an education with White children. *See id.* The Court could have more accurately stated that segregation deprived all children, Black and White, of a comprehensive and worthwhile education, but it did not. Thus, racism, the progenitor and *sine qua non* of race, has its veiled features.

131. W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 How. L.J. 1, 37–42 (2004).

In unity with White Republicans and armed with the Thirteenth, Fourteenth, and Fifteenth Amendments, Blacks made significant strides, as evidenced by cases recognizing the right to intermarry.[132] But in the *Slaughter-House Cases* and *Cruikshank*, the Supreme Court upended the Civil War amendments by giving the states the right to define civil rights, forcing the federal government to become a secondary player in race relations.[133]

State anti-miscegenation laws were used to keep Blacks from integrating with White society in any meaningful way.[134] But after conscious efforts to avoid the hotbed issue of anti-miscegenation laws, the Supreme Court finally laid to rest the insidious notion that it was illegal for love to cross racial boundaries in *Loving v. Virginia* in 1967.[135] Evidence strongly indicates that the Court made a calculated decision not to address this issue prior to its decision in *Loving* in order to give the country an opportunity to cool down and weather the climate change caused by *Brown*, which was decided in 1954.[136] Apparently, the Court felt compelled to defer the issue of anti-miscegenation during a time when the White population was still attempting to comprehend and react to the broad impact of the Court's decision in *Brown*.[137]

C. *The "New Identity Politics" of Race*

The "new identity politics" of the late twentieth century emphasized an understanding of race as both an historical and a political construction.[138] The Black Power movement of the 1970s fused race and politics in such a

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132. John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15, 16 n.7 (2007).

133. United States v. Cruikshank, 92 U.S. 542, 550 (1875); Slaughter-House Cases, 83 U.S. 36, 77 (1872).

134. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (declaring that Virginia's anti-miscegenation law prohibiting only intermarriage involving Whites was clearly aimed at preserving and promoting White supremacy).

135. *Id.* at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

136. Christopher W. Schmidt, Essay, Brown *and the Colorblind Constitution,* 94 Cornell L. Rev. 203, 222 (2008) (explaining the Court's rationale for avoiding the racial intermarriage issue). At the time *Brown* was announced, many White Americans were opposed to interracial marriage. *Id.* at 222–23. In fact, "[s]egregationists regularly sought to rally opposition to school desegregation by characterizing it as the first step toward 'open[ing] the bedroom doors of our [W]hite women to the Negro men.'" *Id.* at 223. After *Brown* was decided, the Court continuously denied certiorari to cases involving interracial marriage issues in an effort to avoid explosive social upheaval. *Id.*

137. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 Chi.-Kent L. Rev. 371, 415–16 (1994).

138. Robert W. Cherny, American Politics in the Gilded Age, 1868-1900, at 25–26 (1997).

way that "Blackness" came to signify a political and cultural orientation.[139] Therefore, to affirm "Blackness" in this era of new identity politics was to also affirm a desire for social change.[140] Blacks began to cultivate "oppositional identities" that were expressions operating within, but against, the racial and social status quo.[141]

The clenched, black-gloved fist became a ubiquitous symbol of both Black pride and Black power; it at once signified Black achievement and Black defiance, as demonstrated by the salutes of U.S. sprinters Tommie Smith and John Carlos as they received their medals in the 1968 Summer Olympics in Mexico City.[142] Such demonstrations were born out of the idea that Black achievement (Smith and Carlos won gold and bronze medals, respectively) could become a vehicle for social protest.[143] Moreover, it reflected an understanding of race (and Blackness) as essentially performative—that is, derived from certain ideological and cultural practices. Smith and Carlos *literally* wore their "Blackness," performing their racial identities vis-à-vis the ubiquitous symbol of the black glove, which

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139. WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS 138–39 (1980). The Black Power movement supplied the energy needed to mobilize the Black community to combat unemployment, improve education, and stop the cycle of poverty. *Id.*

140. *Id.*

141. SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 4 (1991) ("[T]hose who provoke this sort of [racial division] are operating out of a [B]lack identity that obliges them to badger [W]hite people about race almost on principle. . . . [T]hese provocations . . . are *power* moves, little shows of power that try to freeze the 'enemy' in self-consciousness." (emphasis in original)).

142. DOUGLASS HARTMANN, RACE, CULTURE, AND THE REVOLT OF THE BLACK ATHLETE: THE 1968 OLYMPIC PROTESTS AND THEIR AFTERMATH 4–6 (2003) (describing how Smith and Carlos raised black-gloved fists in triumph after their victories in the 1968 Mexico City Summer Olympics); *see also* On This Day: October 17, 1968, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/17/newsid_3535000/3535348.stm (last visited Oct. 5, 2009) (describing Smith's and Carlos's "silent protest"). For raising their fists into the air with heads bowed as the American National Anthem played, Smith and Carlos were booed off the podium by the Mexico City crowd. On This Day: October 17, 1968, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/17/newsid_3535000/3535348.stm (last visited Oct. 5, 2009). At a subsequent press conference, Tommie Smith explained: "If I win I am an American, not a [B]lack American. But if I did something bad then they would say 'a Negro.' We are [B]lack and we are proud of being [B]lack. Black America will understand what we did tonight." *Id.* Peter Norman, the White silver medalist in the sprint, was ostracized in his native Australia and publicly reprimanded by the Australian Olympic Committee for wearing a human rights badge on the podium to show solidarity with Smith and Carlos. Mike Wise, *Clenched Fists, Helping Hand*, WASH. POST, Oct. 5, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100401753.html.

143. DOUGLASS HARTMANN, RACE, CULTURE, AND THE REVOLT OF THE BLACK ATHLETE: THE 1968 OLYMPIC PROTESTS AND THEIR AFTERMATH 5–6 (2003).

itself symbolized a message of social protest and Black defiance in the context of Black achievement.[144]

This idea that race could be performed through distinctive political and cultural acts relied on an understanding of racial identity as socially constructed. Therefore, "Blackness," once defined by the racialist discourse of the nineteenth century as an irrefutable biological construct, now emerged as a social and political construct that derived much of its meaning through the interaction of cultural and political practices. This was the culmination of a kind of racial peregrination in which "Negro" (literally, a black thing) had given way to "Afro-American" (a Black person in America), finally to become "African-American" (a person of African descent in America). The journey from "Negro" to "African-American," with every derivation in between (i.e., "Colored," "Mulatto," etc.), was more than merely a shift in racial nomenclature; it was indicative of a radical movement from racial essentialism to a kind of racial hyper-fluidity, wherein "Blackness" was negotiated in the hyphenated interstices between "African" and "American." In short, to be "Black" after the 1960s was to assert a kind of racial self-determination in which the terms underwriting Blackness could be (re)defined.

The crucial importance of (re)defining "Blackness" in this era of new identity politics is nowhere more apparent than in Toni Morrison's first novel, *The Bluest Eye*.[145] Published in 1970, the novel approaches the problem of internalized racism through the central perspective of its narrator, Claudia MacTeer, who recounts the tragic story of her childhood friend, Pecola Breedlove, whose unrealizable desire for "beauty" in the form of blue eyes ultimately leads to her disillusionment and insanity.[146] Suspicious of popular racial slogans valorizing "Black beauty,"[147] Morri-

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144. *Id.* at 6.

> My raised right hand stood for the power in [B]lack America. Carlos's raised left hand stood for the unity of [B]lack America. Together they formed an arch of unity and power. The black scarf around my neck stood for [B]lack pride. The black socks with no shoes stood for [B]lack poverty in racist America. The totality of our effort was the regaining of [B]lack dignity.

Id. (quoting Tommie Smith's explanation of the protest).

145. *See generally* TONI MORRISON, THE BLUEST EYE (Plume/Penguin Books 1994) (1970) (exploring the complexity of beauty as children understand it). The novel analyzes the way Black girls are taught to accept only Whiteness and White features as beautiful, while Blackness and Black features are considered less attractive.

146. *See generally id.*

147. *See* TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 5 (1994) (exploring "[B]lack presence" in the novels of the most notable authors in the American literary canon). Because these authors are mostly White and male, Morrison contends that their works construct Blackness as the "other," a foil against which the ideals of Whiteness and beauty are imbued with meaning and racialized ideals of

son sets out in the novel to interrogate perceptions of beauty based on an acknowledgement of race.[148] As Morrison understood, even ideals of "Black beauty," which functioned as a response to racist assumptions about the undesirability of Black skin, relied on a similar set of racial values that posited inherent value in "Blackness" as beautiful.[149] When Black classmates ridicule Morrison's tragic protagonist for being "too Black," the author acknowledges the tacit assumption that Black is ugly only by degrees.[150] Inversely, classmates hold up Maureen Peale, a Black girl of mixed racial background, as a model of Black beauty because of her fair skin.[151] What this comparison reveals is that racialized definitions of beauty (e.g., "Black beauty") re-inscribe racial differences even as they seek to minimize the negative effects of those differences.

Morrison's novel also points to the construction of "Whiteness" vis-à-vis the negative meanings ascribed to "Blackness."[152] In one passage, Morrison's narrator recalls her obsession with White dolls and uncovering the "secret" of their "[W]hiteness."[153] The passage is worth quoting at length:

> I had only one desire: to dismember [the doll]. To see of what it was made, to discover the dearness, to find the beauty, the desirability that had escaped me, but apparently only me. Adults, older girls, shops, magazines, newspapers, window signs—all the world had agreed that a blue-eyed, yellow-haired, pink-skinned doll was what every girl child treasured . . . I could not love it. But I could examine it to see what it was that all the world said was lovable. Break off the tiny fingers, bend the flat feet, loosen the hair, twist the head around, and the thing made one sound—a sound they said was the sweet and plaintive cry "Mama," but which sounded to me like the bleat of a dying lamb, or, more precisely, our icebox door opening on rust hinges in July.[154]

Although the novel interrogates "Blackness" as a construction—particularly the ideological baggage it carries in the form of "internalized racism"—it also deconstructs the concept of "Whiteness" as a positive

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beauty and aesthetic value that rely on the privileging of one racial category over another. *Id.*

148. *See generally* TONI MORRISON, THE BLUEST EYE (Plume/Penguin Books 1994) (1970).

149. *See generally id.*

150. *See generally id.*

151. *See id.* at 62 (describing Maureen Peal as a "high-yellow dream child").

152. *See generally id.*

153. TONI MORRISON, THE BLUEST EYE 62 (Plume/Penguin Books 1994) (1970).

154. *Id.*

ideal.[155] In this binary pairing of terms, "Whiteness" accrues value in direct correlation with the negative value assigned to "Blackness." Claudia's de(con)structive act of disassembling the White dolls represents her attempt to *dissemble* "Whiteness." By revealing the constructed nature of the dolls—and, by extension, the constructed*ness* of race in general—she effectively (re)inscribes "Blackness" with positive value. The novel thereby conveys an understanding of race in general, and "Blackness" in particular, as malleable concepts within the political and cultural context of American society.

More recently, however, there has been some resistance to the idea that race is a malleable construct.[156] The "new identity politics" that became a major component of Black Studies in the 1970s and provided much of the conceptual basis for the multicultural and revisionist movements of the 1980s and 1990s has recently given way to a retrenchment of essentialist racial attitudes that reject the view of race as constructed.[157] Instead, many African-Americans have come to view "Blackness" as a natural category of distinction.[158] As Black Studies scholar, Paul Gilroy, points out, this movement toward racial essentialism is largely the result of an expressed desire to reinvest the concept of "Blackness" with positive value over and against the negative meanings that historically have been assigned to it.[159] In response to this reactionary mode of thinking, Gilroy warns of the following:

> When ideas of racial particularity are inverted in this defensive manner so that they provide sources of pride rather than shame and humiliation, they become difficult to relinquish. For many racialized populations, "race" and the hard-won, oppositional identities it supports are not to be lightly or prematurely given up.[160]

Indeed, what such individuals would have to "give up" is the essentialist notion that race is biologically inherited. Instead, they would have to understand race as a political and social construct—in short, as an assigned, rather than biological, feature of one's identity.[161]

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155. *See id.* (describing the narrator's fascination with White baby dolls, which are given to her as symbols of beauty).

156. Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1093–94 (2004).

157. *Id.*

158. PAUL GILROY, AGAINST RACE: IMAGING POLITICAL CULTURE BEYOND THE COLOR LINE 12 (2000).

159. *Id.*

160. *Id.*

161. *Id.* at 12–13.

III. Codification of Race as an Identity in Federal, State, and Local Laws

There is a wide range of laws on the federal, state, and local levels that make reference to "race" and/or the categorization of "African-American/Black" as either a protected class or simply as a subject of classification for a multiplicity of purposes.[162] Since the abolition of slavery and the passage of civil rights laws in subsequent years, most such references generally have changed in character from being punitive to protective or ameliorative in nature.[163] In fact, many of these laws provide special benefits and opportunities to persons who are classified as African-American/Black, but are not intended for or as available to Whites.[164]

It is most likely a safe assumption that hordes of White Americans have not attempted to be legally classified as African-American in order to take advantage of whatever benefits might inure by virtue of being so classified, but it has occurred. An example of the jurisprudential difficulties encountered in defining race is the case of the "Mixed-Up Malones."[165] The Malones were twin brothers applying for jobs as

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162. Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 Ariz. St. L.J. 1093, 1104 (2004).

> [N]umerous statutes establish[ing] additional anti-discrimination mandates . . . apply to the following: housing, interethnic adoptions, programs and entities receiving federal funding, personnel decisions made by governmental entities and unions, insurance providers offering policies to government employees, state food stamp programs, the granting of visas, naturalization, refugee assistance and services, membership in veterans' associations and other organizations linked with the armed forces, the Olympic Committee, banking, mortgages, credit, jury service, criminal justice, education, foreign policy, highway projects, tax law, local government programs, public health policies, voting rights, disaster assistance, aviation, and other areas.

Id. at 1104–06 (footnotes omitted).

163. *Id.* at 1104–05.

164. *Id.*

165. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 Cal. L. Rev. 1231, 1232–34 (1994) (analyzing the impact of the Malones' case, which led to investigations of eleven other firefighters for similar deception); Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 Vand. L. Rev. 513, 515–17 (1995) (examining the Malones' case and considering the difficulties in differentiating among individuals by race). Wright also discusses the case of Stockton, California City Councilman, Mark Stebbins, who was accused of lying about his race in order to win votes. Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 Vand. L. Rev. 513, 515–17 (1995). Stebbins claimed to be Black, despite the fact that he had a light complexion, brown hair, and blue eyes. *Id.* In addition, though Stebbins's birth certificate listed his grandparents and parents as White, he was nevertheless accepted as Black by many Black community leaders. *Id.* at 517. There have been increasing abuses of affirmative action programs where applicants for university admission may have fabricated minority racial

firefighters who changed their racial classification from White to Black in order to be eligible for a racial hiring preference.[166] Their pretense was discovered when they sought promotion.[167] A hearing officer determined that the Malones were not Black and had falsified their applications, and they were, thus, promptly fired.[168]

Interestingly, the Malones appealed on the basis that they had ascertained their race through "self-identification."[169] The court, however, did not accept that justification.[170] The court applied a three-part test to determine whether the Malones were Black: "(1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community."[171] We can see from this case the potential for fraud and the need for an objective standard.

Most laws that pertain to African-Americans pertain to other classifications of minorities as well.[172] Thus, in this examination there will not normally be a need to distinguish between an African-American and any other non-White person; that assessment simply is beyond the scope of this Article. There are few laws that are directed solely at African-Americans to the exclusion of other minorities.[173] It should also be noted that courts generally interpret various civil rights laws to allow Whites to be

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status. Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society,* 11 MICH. J. RACE & L. 367, 369 (2006). "There have even been reports of systematic efforts to find such connections via genetic analysis." *Id.*

166. Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society,* 11 MICH. J. RACE & L. 367, 368 (2006).

167. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1233 (1994). Because the Boston Fire Department was court-ordered to implement an affirmative action program, the twins' test scores from the 1977 application were considered high enough for both twins to be hired if they were Black, even though their scores would not have been high enough for a White candidate to be considered for employment. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1233–34.

171. *Id.* at 1233. Ultimately, the Malone twins were determined not to be Black under the three-part test. *Id.* The court determined that they were both fair-skinned, with light hair coloring and Caucasian facial features. *Id.* Also, the twins' birth certificates proved that the families had held themselves out as White for the past three generations. *Id.* Last, there was sufficient evidence to prove that the twins had reported that they were Black only for the "purpose of claiming jobs and promotion in the Fire Department." *Id.*

172. Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1104–06 (2004).

173. *Id.*

considered a "protected class" as well.[174] Yet, as this Article discusses, the "class" must nonetheless be defined.

It is also not the purpose of this Article to debate or contribute to the expansive literary discourse on the validity of any such programs or protections, nor concomitantly to engage in the debate of whether vestiges of discrimination remain in our society for which such protections are necessary. Rather, in this part, our stated purpose is simply this: to examine a few of the key laws that currently exist and critically analyze how these laws define "African-American/Black" as a racial category, if at all. What we present here is a vexing need for clarification—to point out a definitional deficiency that exposes a flaw in the system.

A. *The Civil Rights Act of 1866*

The Civil Rights Act of 1866, passed during the Reconstruction Era, was one of the earliest laws that referred to race as a class for which its protections were designed.[175] This law was adopted as an effort to counter the laws known as "Black Codes," which Southern states passed after the abolition of slavery in an effort to keep former slaves in practical bondage by denying them certain basic rights.[176] The act is now codified at 42 U.S.C. § 1981, which states, in part:

> All persons within the jurisdiction of the United States shall have the same right in every [s]tate and [t]erritory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *[W]hite* citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[177]

Section 1981 does not specifically refer to or define African-Americans as a race, but by referring to "[W]hite" citizens, it implicitly distinguishes between those who are White and those who are non-White.[178] Never-

174. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295–96 (1976) (holding that anti-discrimination laws apply to discrimination against White people); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975) (upholding the right for a White person to sue for a civil rights violation).

175. Civil Rights Act of 1866 § 1, 42 U.S.C. § 1982 (2006).

176. John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 363.

177. 42 U.S.C. § 1981(a) (2006) (emphasis added).

178. *Id.* "Non-White" can refer to any "ethnic" grouping of people. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/nonwhite (last visited Oct. 5, 2009) (defining a "non-[W]hite" person as "a person whose features and especially whose skin color are distinctively different from those of peoples of northwestern Europe; *especially*: one who has [B]lack African ancestors" (emphasis in original)).

theless, it must be said that courts have held that White plaintiffs, as well as Black plaintiffs, may bring racial discrimination claims, as each racial group is considered a member of a protected class.[179] Some suggest there should be a shift away from racial status to racist acts in determining who is entitled to bring a discrimination claim.[180] These same authors make the argument that race cannot be defined, stating: "The courts have attempted to define race in terms of the predominant dichotomies of [W]hite, [B]lack, and other color-defined groupings. But this effort is misguided because race is an inherently irrational and subjective concept."[181]

In response, we say this: as long as there are racist acts there is a need to address issues of race. One cannot address issues of race without recognizing that there are distinct "races" of people as that term has come to be known in this country. Although racism is irrational, race is not. Rather than illusory, which denotes a subjective concept, race is objective, or "without bias or prejudice."[182]

To bring an action alleging a violation of § 1981 and to establish a prima facie case of intentional racial discrimination, a plaintiff must establish membership in a protected class.[183] Even though a White person may be an aggrieved plaintiff in a § 1981 claim and would, therefore, fall within a protected class, there must nevertheless be some identification of that person's "race" in order to bring a claim of racial discrimination.[184] One cannot claim to have been discriminated against on the basis of race without specifying one's own racial identity. And so we have reached the need for definition.

B. *The Civil Rights Act of 1964*

The Civil Rights Act of 1964 (CRA) outlaws discrimination in a broad range of areas including voter registration (Title I), public accommodations (Title II), public facilities (Title III), government agencies receiving

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179. *E.g.*, *McDonald*, 427 U.S. at 295–96.

180. *See, e.g.*, Linda A. Lacewell & Paula Shelowitz, Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823, 824 (1987) (discussing the ambiguous and contradictory views taken by courts in defining race).

181. *Id.* (footnote omitted).

182. *See* BLACK'S LAW DICTIONARY 1103 (8th ed. 2004) (defining "objective" as "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions").

183. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

184. *Id.*

federal funding (Title VI), and employment (Title VII).[185] The CRA prohibits discrimination with respect to five "protected classes": race, color, religion, sex, and national origin.[186]

The CRA attempts to legislatively define what the terms "religion" and "sex" encompass,[187] but provides no definition of "race."[188] As with § 1981 claims, one does not have to be a minority to qualify for protection under the CRA.[189] As one author notes:

> Of course, it has long been established that one need not be a racial minority in order to qualify for [CRA] protection—members of the "majority" race may also allege racial discrimination. But while the circuits are split as to the showing required of a person of the majority category, whether under a purely symmetrical scheme or under a requirement where the "majority" plaintiff must meet a stricter "background circumstances" test, . . . the plaintiff [is still required] to allege his race in order to establish his case.[190]

Thus, whether one is considered White or a member of a minority group, a person's race remains a factor that must be proven in an action for violation of a civil rights law.[191]

The Equal Employment Opportunity Commission (EEOC) is the primary enforcement agency for carrying out the mandates of the CRA.[192] Pursuant to Title VII of the CRA, the EEOC requires employers to file an annual report known as the EEO-1, which must contain, inter alia, information regarding the races of the company's employees.[193]

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185. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a-1–2000h-6 (2006)).

186. *Id.* § 201(a).

187. *Id.* § 701(j), (k).

188. Ken Nakasu Davison, Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 166–67 (2005) (discussing the confusion created by Congress's failure to define "race" in the CRA). The omission of a definition for race has led to uncertainty over what constitutes racial discrimination. *Id.* at 167. Although there is no actual definition of race in the CRA, the legislative history shows that Congress intended for the definition of race to be broad. *Id.*

189. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 293 (1976).

190. Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1189 (citing *McDonald*, 427 U.S. at 290–96).

191. *Id.*

192. Civil Rights Act of 1964 § 706(a), 42 U.S.C. § 2000e-5(a) (2006) ("The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.").

193. 29 C.F.R. § 1602.7 (2009) (requiring all employers with one hundred or more employees to file an "Employer Information Report EEO-1").

> On or before September 30 of each year, every employer that is subject to title VII of the Civil Rights Act of 1964, as amended, and that has [one hundred] or more employ-

The EEOC has published an instruction booklet to provide guidance in completing the EEO-1.[194] In the appendix to this booklet, the "Race and Ethnic Identification" section states that "[r]ace and ethnic designations as used by the [EEOC] do not denote scientific definitions of anthropological origins" and defines various "racial" categories.[195] Under this section, a non-Latino "Black or African-American" person is defined as "[a] person having origins in any of the [B]lack racial groups of Africa."[196]

There are deficiencies in this definition. How does one prove his or her "origins"? As we discuss in Part IV of this Article, there are credible genealogical organizations that provide origin-tracing services.[197] Utilizing an organization such as these can be helpful, but these services are expensive and often futile, since so many of the ancestral records of those people who were brought to this country as slaves are untraceable.[198] Even though this process can prove useful, it should not be the only means by which one can establish oneself as Black or African-American.

Secondly, are there really "Black racial groups" in Africa? In his proposal for the creation of a biracial category, Luther Wright, Jr. notes that the EEOC was forced to use the term "origins in the [B]lack racial groups of Africa"[199] because the EEOC definition of non-Latino "White" in-

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ees shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1") in conformity with the directions set forth in the form and accompanying instructions.

Id.

194. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY STANDARD FORM 100, REV. JAN. 2006, EMPLOYER INFORMATION REPORT EEO-1 INSTRUCTION BOOKLET 4 (2006), *available at* http://www.eeoc.gov/eeo1/instruction_rev_2006.pdf.

195. *Id.*

196. *Id.* This definition for Black or African-American people references only origins and geographic prescriptions. *Id.* In contrast, the definition for a White person is "a person having origins in any of the original peoples of Europe, the Middle East, or North Africa." *Id.* The distinctive use of the words "original peoples" and the geographic prescriptions raise questions that may form the basis for a companion Article that would perhaps be sardonically titled: "Is Obama White?"

197. These organizations include the International Commission for the Accreditation of Professional Genealogists, located in Utah and formerly associated with the Church of Jesus Christ of Latter-day Saints, and the internationally recognized Board for Certification of Genealogists, located in Washington, D.C.

198. "For many [African-Americans], tracking down ancestors can present a unique set of challenges—few cultural groups face as many obstacles when it comes to family history research. Often, a lack of credible documentation can make the journey both difficult and time-consuming." African American Research Center, *Learn All About African American Records*, http://www.ancestry.com/learn/contentcenters/contentCenter.aspx?page=AfricanAm (last visited Oct. 5, 2009).

199. Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513,

cludes people "having origins in any of the original peoples of Europe, the Middle East, or *North Africa*."[200] The EEOC definition appears to raise more questions than it presumes to answer. In the definition of "Black" proposed in Part IV of this Article, we do not presume to develop a perfect solution to a conundrum that defies defining with exactitude; rather, we attempt to seek a rational solution with minimal flaws and with recognition of the historical and socio-political contextual basis.

A plaintiff has the burden of proving that he or she is a member of a protected class.[201] As Wright explains, "The issue of racial classification, therefore, could become a major barrier to the claims of many future plaintiffs, particularly if employers are able to produce compelling evidence of a perception different than that of the employee."[202] Because the EEO-1 report is used for data collection purposes, the definitions contained therein are not necessarily conclusive as to who is an African-American for purposes of determining whether one is a member of a "protected class" within the meaning of the civil rights statutes.[203] Nevertheless, the definition exists, and the need for uniformity goes begging.[204]

It should be noted that, generally, people will self-identify for purposes of the EEO-1 report.[205] The guidelines state: "Self-identification is the preferred method of identifying the race and ethnic information necessary for the EEO-1 report. Employers are required to attempt to allow employees to use self-identification to complete the EEO-1 report. If an employee declines to self-identify, employment records or observer identification may be used."[206] But self-identification raises concerns that we will not discuss in depth here.[207] Suffice it to say that self-identification

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538 (1995). Wright argues that defining the Black race by using the term "Black" frustrates attempts to establish a working definition of race. *Id.*

200. *Id.* at 569 n.150 (emphasis added).

201. *Id.* at 554.

202. *Id.*

203. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY STANDARD FORM 100, REV. JANUARY 2006, EMPLOYER INFORMATION REPORT EEO-1 INSTRUCTION BOOKLET 4 (2006), *available at* http://www.eeoc.gov/eeo1/instruction_rev_2006.pdf.

204. *Id.*

205. *Id.*

206. OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, OMB NO. 3046-0007, EMPLOYER INFORMATION REPORT EEO-1 INSTRUCTION BOOKLET (2006).

207. *See* Keneisha M. Green, Comment, *Who's Who: Exploring the Discrepancy Between the Methods of Defining African Americans and Native Americans*, 31 AM. INDIAN L. REV. 93, 107 (2006) ("As much as an individual may wish to identify himself with a particular race, this desire takes a backseat to the will of society.").

does not provide an objective basis for achieving bona fide uniformity. Yet self-identification is the primary means used for the U.S. Census.[208]

As cited above, the EEO-1 report guidelines also provide: "If an employee declines to self-identify, employment records or observer identification may be used."[209] The first question that arises is what employment records are going to be used and what is the basis for ascertaining race from those forms? Then, if the racial identity cannot be derived from employment records, the person completing the form must resort to "observer identification."[210] Needless to say, such a subjective method of identification is fraught with the possibility of error in many cases.

The Office of Management and Budget (OMB) is the federal agency responsible for developing guidelines for the collection of data and recordkeeping concerning race in federal programs.[211] In 1997, the OMB issued a new directive entitled "Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity."[212] The new directive was the result of various groups putting pressure on the OMB to recognize different racial groups.[213] The OMB also states a preference for self-identification, stating: "[I]t is useful to remember that these decisions . . . underscore that self-identification is the preferred means of obtaining information about an individual's race and ethnicity, except in instances where observer identification is more practical (e.g., completing a death certificate) . . . ."[214]

In its background statement, the OMB clarifies: "The [racial] categories represent a social-political construct designed for collecting data on the race and ethnicity of broad population groups in this country, and are not anthropologically or scientifically based."[215] The definition of Afri-

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208. Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 Nw. U. L. Rev. 1701, 1718–19 (2003) ("[The Census] is a regularly administered, *probing questionnaire*, to which the state requires a response, inquiring into myriad details of life which are at once mundane and intimate." (emphasis added)).

209. Equal Employment Opportunity Commission, Equal Employment Opportunity Standard Form 100, Rev. January 2006, Employer Information Report EEO-1 Instruction Booklet 4 (2006), *available at* http://www.eeoc.gov/eeo1/instruction_rev_2006.pdf.

210. *Id.*

211. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782, 57787-88 (Oct. 30, 1997).

212. *Id.*

213. Hiroshi Fukurai, *A Collaborative Work with* La Raza Law Journal*: Social De-Construction of Race and Affirmative Action in Jury Selection*, 4 Afr.-Am. L. & Pol'y Rep. 17, 31 (1999).

214. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782, 58785 (Oct. 30, 1997).

215. *Id.* at 58782 (relating the purpose of the OMB's standards for classifying race and ethnicity data). The standards provide a "common language to promote uniformity and

can-American, according to OMB guidelines,[216] appears to be the basis for the definition adopted in the EEO-1 report form.[217] The OMB guidelines state: "Terms such as 'Haitian' or 'Negro' can be used in addition to 'Black or [African-American].'"[218] In this statement, the OMB recognizes "race" as a socio-political construct, rather than a scientifically based construct for which many, including the American Anthropological Association, have argued.[219] It is also interesting to note that the definition treats "Haitian" as synonymous with "Black," "African-American," and "Negro."[220] This inclusion certainly leaves one querying as to what other geographical groupings might obtain their own politically correct moniker.

C. *Voting Rights Act of 1965*

The Voting Rights Act of 1965 (VRA) states, in part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any [s]tate or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .[221]

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comparability" for information on race. *Id.* The passage of civil rights laws spurred the federal government to establish standards in order to ensure that the laws were enforced. *Id.* Federal agencies participated in the development of the standards, which are now used to oversee equal access in housing, among other areas, for groups that have traditionally experienced racial discrimination. *Id.*; *see also* 85 Md. Op. Att'y Gen. 26, 2000 WL 151225 (answering inquiry about use of racial and ethnic identification forms in Maryland).

216. *Id.* at 58789.

217. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY STANDARD FORM 100, REV. JANUARY 2006, EMPLOYER INFORMATION REPORT EEO-1 INSTRUCTION BOOKLET 4 (2006), *available at* http://www.eeoc.gov/eeo1/instruction_rev_2006.pdf.

218. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58788, 57789 (Oct. 30, 1997).

219. Am. Anthropological Ass'n Statement on "Race," http://www.understandinggrace.org/about/statement.html (last visited Sept. 13, 2009).

220. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58788, 57788 (Oct. 30, 1997). The introduction of the classification "Haitian" to this racial group adds a different feature to the discussion which these authors will resist further commenting upon in this Article.

221. Voting Rights Act of 1965 § 2(a), 42 U.S.C. § 1973(a) (2006) (prohibiting any voter qualification or prerequisites from denying a lawful voter from voting in any state or political subdivision within the United States); *cf.* Sean Flynn, Comment, *One Person, One Vote, One Application: District Court Decision in* Ray v. Texas *Upholds Texas Absentee Voting Law That Disenfranchises Elderly and Disabled Voters*, 11 SCHOLAR 469, 498–99 (2009) (discussing the disenfranchising impact of absentee ballot rules upon elderly and minority voters in Texas).

Thus, the issue of race remains a prominent one in modern jurisprudence. For instance, Black voters brought a 2009 federal case pursuant to section 2 of the VRA, alleging that they were denied the opportunity to elect a sufficient number of Black school board members.[222] The court had to first consider the *Thornburg v. Gingles*[223] factors necessary to establish a violation of the VRA, i.e.: "(1) the minority group is sufficiently large and geographically compact to constitute a majority in one or more single member districts; (2) the minority is politically cohesive, i.e., tends to vote as a bloc; and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate."[224] After analyzing the *Thornburg* factors, the court then determined, under the totality of the circumstances, that the Black voters were denied an equal opportunity to elect Black school board members.[225]

This case is, thus, illustrative of the reality of how race is considered in deciding cases of this nature. The court examined hard data reflecting a disparity in the treatment of Black and White voters in the school board elections.[226] In this case and others, voters are categorized by race in a manner that affects the political lives and futures of elected officials and their constituents.

The provision of the VRA that has had the most marked impact is section 5.[227] Section 5 of the VRA generally requires state and local governments to obtain pre-clearance from the federal government before implementing any change with respect to local or statewide voting procedures.[228] The pre-clearance requirements of section 5 apply to those jurisdictions that historically were the most rampant violators of the voting rights of African-American citizens.[229] A jurisdiction must obtain pre-clearance for certification that any proposed change to any one of a broad range of voting procedures is not discriminatory in effect or purpose.[230] Thus, the burden of proof is upon the jurisdiction.[231]

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222. Etheridge v. Lexington County, S.C. Sch. Dist. Three, No. 3:03-3093-MBS, 2009 U.S. Dist. LEXIS 13385 (D. S.C. Feb. 19, 2009).

223. 478 U.S. 30, 50–51 (1986); see Appendix to this Article.

224. *Etheridge*, 2009 U.S. Dist. LEXIS at *15 (citing *Thornburg*, 478 U.S. at 50–51).

225. *Id.* at *48, *58.

226. *Id.* at *15.

227. Mark E. Haddad, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 139 (1984).

228. *Id.* at 140–41.

229. Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 812–19 (2006).

230. Voting Rights Act of 1965 § 5(a), 42 U.S.C. § 1973c(a) (2006). Section 5 of the Voting Rights Act provides unique procedural protection to specified minorities. Mark E. Haddad, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 140

The kinds of proposed changes that would require pre-clearance affect virtually every aspect of voting procedures in a jurisdiction. As one scholar explains:

> Changes affecting voting include: changes in methods of election, districting plans, annexations, rules for candidate qualifying, procedures for casting write-in votes, and locations of polling places. Thus, the federal government must scrutinize and approve everything from a city's annexation of vacant land to a state's adoption of new congressional districts.[232]

Inevitably, what is at stake in these kinds of cases is whether changes to voting procedures are affecting the voting power, voting influence, or voting ability of African-Americans (or other minorities), which may result in a jurisdiction's efforts to prove numerical and/or proportional impact to disprove discriminatory effect or purpose.[233] Hence, a determination may be required at some point, either implicitly or explicitly, as to who is and who is not an African-American (or other minority) within a particular locale. The VRA does not define race.[234] Thus, how does one go about proving, for example, that a particular district is or is not comprised of a majority of African-Americans (or other minority group) absent a definitive basis for arriving at such a conclusion?

D. *Fair Housing Act Section 3604(a)*

> The Fair Housing Act (FHA) states, in part:
> [I]t shall be unlawful –
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of ser-

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(1984). Never before in the history of the United States has Congress required state and local governments to submit new laws to the federal government for approval. *Id.* at 141.

231. Georgia v. United States, 411 U.S. 526, 538 (1973).

232. Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 234–35 (2003) (footnotes omitted).

233. Pursuant to the Supreme Court's 1976 decision in *Beer v. United States*, the effect standard has a specialized meaning and is violated only when a voting change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 68 (2006) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

234. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (2006).

> vices or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.[235]

As with other federal statutes we have analyzed in this Article, courts have determined that a plaintiff must establish membership in a protected class in order to make a prima facie case of discrimination under the FHA.[236] Thus, to make a prima facie showing of racial discrimination, a plaintiff must establish (a) his or her racial identity, and (b) that his or her race was the basis for the discriminatory treatment.[237] Courts may likely determine, just as they have under other civil rights statutes, that a person may be both White and part of a "protected class."[238] But it would be rare, indeed, that a White person would be suing for not being allowed to reside in a predominantly Black housing development, and we have not been able to find any cases of this sort. But race is still a critical factor that must be proven in these types of cases if one alleges the denial of a dwelling place on a racially discriminatory basis.[239]

E. *Set-Asides and Government Contracts*

In a post-*Croson/Adarand* environment, the courts strictly scrutinize any law that uses race as a basis for awarding contractual preferences.[240] Both of these cases involved minority set-aside programs for government contracts on a state and federal level, respectively.[241] The U.S. Supreme Court essentially held that any program for which race was utilized as a preference would be subject to strict scrutiny.[242]

As a result of these decisions, most federal and state set-aside programs have been modified away from a "racial" focus to a focus upon

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235. Fair Housing Act § 804(a)-(b), 42 U.S.C. § 3604(a)-(b) (2006).

236. Robinson v. 12 Lofts Realty, Inc., 610 F. 2d 1032, 1038 (2d Cir. 1979).

237. *Id.*

238. There have been cases where Whites were plaintiffs in actions brought under the Fair Housing Act, but these cases involved a question of standing where the White person sued as an "aggrieved person" based on the White person's association with a Black person. *See, e.g.*, Gladstone Realtors v. Bellwood, 441 U.S. 91, 115 (1979) (holding that area residents and a village had standing to bring suit against real estate brokers who were "steering" home buyers to different residential areas based on race); Woods-Drake v. Lundy, 667 F. 2d 1198, 1200–01 (5th Cir. 1982) (holding that "so long as race of plaintiffs' guests was a significant factor in defendant's decision to evict plaintiffs, the eviction was in violation of Section 1982 and of the Fair Housing Act").

239. *E.g.*, Ragin v. New York Times Co., 923 F.2d 995, 1000 (2d Cir. 1991); *Robinson*, 610 F.2d at 1038; Portis v. River House Assocs., No. 06-cv-2123, 2008 U.S. Dist. LEXIS 76817, *10–14 (M.D. P.A. Sept. 30, 2008).

240. Adarand Constructors Inc. v. Pena, 515 U.S. 200, 227–38 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 472 (1989).

241. *Adarand Constructors Inc.*, 515 U.S. at 207; *J.A. Croson Co.*, 488 U.S. at 471.

242. *Adarand Constructors Inc.*, 515 U.S. at 227; *J.A. Croson Co.*, 488 U.S. at 493.

businesses that may be deemed socially disadvantaged.[243] For example, the Small Business Administration lowered the burden of proving disadvantage for non-minority businesses from clear and convincing evidence to a preponderance of the evidence so that they could participate in the Small Disadvantaged Business (SDB) program.[244] In addition, the presumption that "race" constitutes a disadvantage, thus enabling a minority business to qualify as an SDB, became a rebuttable presumption.[245]

Government agencies are, thus, adopting race-neutral policies in awarding government contracts to businesses.[246] Nevertheless, in seeking to be awarded these highly competitive, lucrative government contracts, businesses will strive to garner every competitive edge possible. Although "race" may no longer be an irrefutable presumption of disadvantage, it probably does not hurt a company's chances of winning contracts if the company employs qualified minorities, particularly if the contract is awarded in a field where minorities have been underrepresented.[247]

The Department of Justice suggests that race may still be one of the factors to be considered in awarding these contracts.[248] With so much at stake in these lucrative contracts, businesses have and will continue to attempt to fraudulently represent their eligibility for these special set-asides.[249] Thus, it remains imperative that government regulations provide precise racial definitions.

IV. An Apologetic for Re-Identification and a Proposal for Change

A. *The Complexities of Defining—Comparison to Native Americans*

The federal and state governments have a long history of making efforts to definitively resolve the question of who is and who is not an "Indian" or "Native American."[250] Indeed, within the Native American community itself there is a divergence of opinion as to who is entitled to

243. Patricia C. Bradley, *Affirmative Action or Passive Participation in Perpetuating Discrimination? The Future of Race-Based Preferences in Government Contracting*, 2008-Feb. Army Law 24, 36.

244. *Id.* at 34.

245. *Id.*

246. *Id.* at 31–32.

247. *Id.* at 38.

248. Patricia C. Bradley, *Affirmative Action or Passive Participation in Perpetuating Discrimination? The Future of Race-Based Preferences in Government Contracting*, 2008-Feb. Army Law 24, 31–32.

249. *See* Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Ref. 275, 279 (2001) (discussing non-Indians' false claims to tribal land grants).

250. *Id.* at 278.

tribal membership and the benefits pertaining to that membership.[251] Different Native American tribes have varying methods of determining who should be considered a member of that tribe.[252]

A five-factor test was developed by the Bureau of Indian Affairs to certify Native Americans for benefits available through the Indian Reorganization Act of 1934.[253] These five factors are: "1) tribal rolls; 2) testimony of the applicant; 3) affidavits from people familiar with the applicant; 4) findings of an anthropologist; and 5) testimony of the applicant that he has retained a 'considerable measure of Native American culture and habits of living.'"[254] This five-factor test, however, has met resistance. On a political level, the test has faced challenges because of the perception that it gives insufficient deference to tribal sovereignty and self-determination.[255] On a legal level, the test has been challenged as an unconstitutional law that is based, at least in part, upon racial characteristics.[256]

No uniform basis for determining whether a person can be legally classified as "Indian" or "Native American" has emerged. Congress has deemed it prudent, both because of constitutional concerns and the concerns of tribal sovereignty and self-determination, to shift the statutory language from requirements that would focus upon racial and descent issues to a designation that defers to membership within a tribal organization.[257] But variances remain in the laws on both the federal and state

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> There is no one definition of "Indian" that serves all federal purposes. According to one congressional survey, federal legislation contains over thirty-three different definitions of the term "Indian." Both the federal government and the courts have defined the term "Indian" for many purposes, including eligibility for social programs, jurisdiction in criminal matters, preference in government hiring, and administration and distribution of tribal property.

Id.

251. *Id.* at 308 ("Definitions vary among the tribes, but most require blood quantum or descent from a tribal member. Beyond that, tribes require varying degrees of blood quantum for membership eligibility, anywhere from one-half degree of tribal blood to no blood requirement at all.").

252. *Id.*

253. Keneisha M. Green, Comment, *Who's Who: Exploring the Discrepancy Between the Methods of Defining African Americans and Native Americans*, 31 AM. INDIAN L. REV. 93, 95 (2006).

254. *Id.* (footnote omitted). This test proved ineffective in successfully establishing Native American roots because it excluded people who, by blood, were considered Native American but could not establish Native American ancestry or did not exude Native American characteristics. *Id.*

255. Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 288 (2001).

256. Morton v. Mancari, 417 U.S. 535, 555 (1974).

257. Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 298–99 (2001).

levels for defining who is and who is not a Native American for purposes of legal benefits and protections.[258]

Utilizing the Native American paradigm for the concluding task before us—i.e., to create a means for uniformly and legally defining who is an "African-American"—is problematic at best and may, in fact, prove counterintuitive. There is no doubt that appropriate comparisons can be made between the two groups of people. Both groups have suffered both socially and politically within the culture of this country. Both groups have had most aspects of their cultural and natural identities stripped away from them. Both groups have been forced in varying degrees to assimilate into a culture foreign to their own, but without many of the normal incidences of inheritance allowed to those of the dominant culture.

A primary feature lacking within African-American society that does exist to some degree within the Native American community is the existence of tribal rolls and/or a method for certifying that a person fits within a certain tribal group. When African-Americans were transported to this country as slaves, they were as "travelers without luggage,"[259] bereft of everything but "their muscle power, their spirit and their soul"[260] and deprived of the ability to continue any physical connection with their tribal ancestry. Attempts to reconnect these lineages have in most cases proven futile and are available only to those few who can afford the expense involved.[261]

So where does this leave us? The only definitive basis for determining whether one is or is not "African-American" or "Black" would be phenotypically based, dependent upon racial characteristics, at least to a certain extent. Consideration would also have to be given to social and cultural habits—many of the same factors the Supreme Court appeared to find constitutionally deficient when analyzing the Bureau of Indian Affairs's five-factor test.[262] "The implication is that a race-based criterion such as

258. *Id.* at 276.

259. Mame-Kouna Tondut-Séne, *The Travel and Transport of Slaves*, *in* FROM CHAINS TO BONDS: THE SLAVE TRADE REVISITED 15, 19 (2001).

260. *Id.*

261. "Slave records are difficult to locate and found rarely at NARA." African American Records, http://www.archives.gov/geneology/heritage/african-american/ (last visited Sept. 9, 2009).

262. Morton v. Mancari, 417 U.S. 535, 555 (1974); Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 278 (2001).

blood quantum is acceptable only as long as it is linked to the requirement of membership in a federally recognized tribe."[263]

As stated above, there are no tribes in the case of African-Americans, at least not within this country, nor are there tribal groups that would likely be federally recognized if they could be traced back to the African continent. Of course, for President Obama, whose father was born in Kenya, it would be a simple matter to trace his African heritage. But Mr. Obama would be more the exception than the rule. Thus, the Native American paradigm fails in that respect and may prove to be a hurdle toward reaching a result.

B. *The Need to Define*

There is a need to define what it is to be "Black" or "African-American." There can be little doubt among most sentient people that vestiges of racial discrimination remain in this country, notwithstanding the election of President Obama and other "people of color"[264] who have attained positions of distinction and wealth.[265] As one scholar succinctly notes, "[r]ace still matters."[266]

As discussed, there are existing laws that provide benefits and protections specifically to African-Americans. Without a formal legal definition of precisely who is entitled to the benefits and protections of these laws, administration of such laws will remain poorly enforced. There can no more be a law that prohibits foreign nationals from making contributions to political elections without defining "foreign national"[267] than a law

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263. Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 295 (2001) (footnote omitted).

264. The generic term, "people of color" is used distinctively here, as it has yet to be ascertained whether President Obama is in fact "Black."

265. Some have argued (with renewed vehemence in light of the election of President Obama) that there is no longer a need for the various laws that provide benefits and/or protections to African-Americans. Joseph Williams & Matt Negrin, *Affirmative Action Foes Point to Obama: Say Candidate Is Proof Effort No Longer Needed*, BOSTON GLOBE, Mar. 18, 2008, at 1A, *available at* 2008 WLNR 5280772.

266. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1265 (1997).

267. 2 U.S.C. § 441e(b) (2006). A "foreign national" is:

> (1) a foreign principal . . . except that the term "foreign national" shall not include any individual who is a citizen of the United States; or (2) an individual who is not a citizen of the United States or a national of the United States . . . and who is not lawfully admitted for permanent residence.

Id. A "foreign principal" is:

> (1) a government of a foreign country and a foreign political party; (2) a person outside of the United States, unless it is established that such person is an individual

that provides benefits and protections to "African-Americans" without a legally recognized and precise definition of "African-American."

C. *How to Define*

To say that there is a need to define in no way relieves the quandary that embarking on such an endeavor poses. As with the Native American experience—both on the tribal level, as well as on the state and federal levels—attempting to reach a consensus as to just who is an African-American entails pitfalls. And, certainly, it is far easier to adjudicate who is or is not a foreign national than to determine a "racial" category, since there are official mechanisms that must be satisfied for establishing one's citizenship but not one's race.

Professor Christine Hickman correctly asserts that "[s]ince race still matters, we must be circumspect when presented with proposals to redefine it."[268] We must be careful to consider the dynamics of social, political, phenotypical, and genealogical factors, as they have worked in concert to circumscribe a people to a particular racial categorization. Any attempt at defining must also ensure no unnecessary inclusion or exclusion that might work to harm the silk-like fabric of our society's racial coexistence.

A purely mathematical, ancestrally based, biological formula to define who is African-American, such as that found in various state statutes,[269] simply will not work in today's world. Any definition that would require one to count his or her ancestors in order to determine "Blackness" is practically impossible. The one-drop rule, or hypodescent, would also be unworkable, as would the majoritarian system[270] some have proposed, since both systems would have to begin with a presupposition that a particular ancestor was "Black." Where does one begin? Who was the first African-American ancestor? To make an accurate determination, those

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> and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any [s]tate or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

22 U.S.C. § 611(b) (2006).

268. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1265 (1997).

269. *Id.* at 1178 (citing Virginia's and North Carolina's eighteenth century attempts to define what it meant to be "Black").

270. *Id.* at 1206–08 (disputing Luther Wright Jr.'s majoritarian classification system, which suggests that a multiracial person belongs to the race of which he or she has the most ancestry).

whose ancestors were slaves would have to trace their genealogy all the way back to the slave ships.

Is this what a true African-American is: a person descended from an African brought to this country as a slave? Or, to overlay that query with socio-political realities: is this the African-American the civil rights laws and Voting Rights Act were enacted to protect? Then we ask: is Obama an African-American? He certainly is not according to that definition. President Obama's father was not brought to this country as a slave. His father was an African national who married a White U.S. citizen.[271] Thus, Barack Obama certainly is an "African-American." Moreover, he looks Black. But what of White South Africans of Dutch ancestry who marry Americans of European descent? Are their American-born progeny African-Americans? They will likely look White. Certainly the definition should not be expanded to include this child of a Dutch South African and an American of European descent.

Or should the definition of an African-American be determined purely morphologically through phenotypical traits? The obvious drawbacks of such a system become readily apparent. Excluded from such a definition would be anyone who did not have features characteristic of a person descended from Africans. Consider this true scenario: one of the co-authors, who is African-American, knew a pastor in his hometown, who, along with his wife, looked distinguishably African-American, although they were of moderate and very light complexion, respectively. They had two sons: one looked distinguishably African-American and the other looked distinctively White. Both were considered to be Black by both the Black and White communities because of their familial identification. When the White son grew up, he left the town and moved to another city where no one knew him and he "passed" for White. He married a White woman and lived in that community for a number of years as part of a White family. Eventually, he and his White wife moved back to his hometown and were considered a Black family, though everyone knew his wife was White. By the morphological standard, the son who appeared distinctively White would be excluded from any of the benefits and protections of the subject laws.

Contrarily, consider the case of "White Boy Michael." White Boy Michael (whose true name was not Michael) also lived in the hometown of one of the co-authors. White Boy Michael was so-called because he was a White boy. But what was unique about White Boy Michael is that he was raised by a Black woman, though his natural mother and father were both White. When Michael was very young his mother died, and he

271. Ta-Nehisi Paul Coates, *Is Obama Black Enough?*, TIME, Feb. 1, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1584736,00.html.

was left with his White father. Soon after, his White father married a Black woman. While Michael was very young, the White father died and White Boy Michael's Black stepmother raised him as her own son.

What is even more significant about White Boy Michael is that if you did not or could not see him, you would be convinced he was Black. The timbre of his voice, the cadence, his mannerisms, everything about him overwhelmingly bespoke "Black," but he clearly appeared White. The co-author met Michael in a courtroom while legally representing Michael on a minor misdemeanor matter. When he met Michael, he felt no prejudicial or judgmental "vibe," and there was a psychological feeling of connectedness when he spoke with him that made him feel as though he was relating to a Black person. He asked him: "Michael, there is something about you and I can't figure out what it is – you seem so different." That is when Michael related his story.

How would White Boy Michael fare under this system? Should he be cast as the "putative" Black man? Many civil rights activists, at least on first glance, would probably adamantly maintain that White Boy Michael is not entitled to the legal benefits and protections afforded to African-Americans. Any definition that had a purely morphological basis would certainly leave him out. Nor would he fare well within a system based upon hypodescent or any mathematically based methodology, since White Boy Michael presumably cannot trace his ancestry to anyone of African descent. Yet one is left with the feeling that White Boy Michael may not be so different from that son of the Black pastor who appeared distinctively White but was not. One can envision White Boy Michael being so associated with the Black race as to be identified with it. Certainly, if the timbre of his voice was indistinguishably Black, he might face discrimination based upon race in certain situations where he could be heard but not seen, such as in a telephone conversation. Consider this: "I'm sorry, Michael, but we just rented out the last apartment yesterday." The prospective landlord may believe Michael to be Black and, thus, deny him housing on that discriminatory basis. The perniciousness of racism often does not allow for "the benefit of the doubt."

When President Lyndon B. Johnson delivered the commencement address at the historically Black institution of higher education, Howard University in Washington, D.C., on June 4, 1965, just two months prior to signing the Voting Rights Act into law, he spoke of the plight of the "American Negro."[272] Johnson described the American Negro as deprived of freedoms, stating: "No act of my entire administration will give

272. President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965) (transcript available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp).

me greater satisfaction than the day when my signature makes [the Voting Rights Act], too, the law of this land."[273] This "American Negro," the one who exists by virtue of the experiences he or she suffers, the one deprived of freedoms within this country because of racially discriminatory perceptions, is the one to whom the protections of the law should adhere.

We posit a definition:

> An African-American within the meaning of state and federal laws that address the benefits and protections designed for that class of persons as a race category is a U.S. citizen, other than Native Americans, Native Hawaiians, and Alaskan Indians,[274]
> (a) with phenotypical characteristics indicative of ancestry derived from the dark-skinned peoples of the sub-Saharan African nations; or
> (b) who by virtue of his or her experience in this country as an American is familially associated with persons possessing such characteristics such that the person is indistinguishably identified as being familially of that ancestry.

Thus, by this definition, there are two separate means by which a person might "prove" that he or she is an African-American: first, phenotypically, by virtue of physical appearance, and second, through familial association.

Applying this definition to the specific factual situations presented in this Article will show how the legislative intent of the various statutes we reference would best be met by our definition. It will also show how this definition is better suited than that proposed by others to satisfy the objectives of the legislation uniquely designed to provide protections to this class of persons.

We begin with President Obama. Is Obama Black? According to the subject definition, he would likely be able to easily satisfy both of the criteria advanced: a) phenotypically, since he does possess certain classic features that are typically identified with African-Americans, and b) familially, since his father was an actual native of a sub-Saharan African nation. His father was "a Kenyan of the Luo tribe, born on the shores of Lake Victoria in a place called Alego."[275]

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273. *Id.*

274. Native Americans, Native Hawaiians, and Alaskan Indians are explicitly exempted from this definition because of the uniqueness of these minority groupings and the fact that there are government regulations designed to specifically cover these groups of people. Certainly, this is not a perfect methodology, since there are peoples within these groups who, due to mixed parentage, may more fully identify as African-Americans.

275. BARACK OBAMA, DREAMS FROM MY FATHER 9 (2004).

D. *Comparison to Other Methods of Racial Classification*

Professor Neil Gotanda points to anthropologist Marvin Harris as the originator of the term for the "American system of social reproduction: 'hypodescent,'" or the "one drop rule."[276] According to Gotanda, this system of racial classification produces two formal rules in answer to the question—"Who is Black?":

> 1) Rule of recognition: Any person whose Black-African ancestry is visible is Black.
> 2) Rule of descent: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person's visual appearance; or, stated differently, (b) the offspring of a Black and a [W]hite is Black.[277]

In comparing hypodescent to our proposed definition, there are obvious similarities. Both definitions are designed to be inclusive. That is, both our proposed rule and the rule of hypodescent are designed to make it more likely than not that a person with any "Blackness" would meet the definitional requirements. Where the rule of hypodescent and our proposed rule would differ is in Part 2 of the hypodescent system and Part b of our proposed definition. Part 2 of the hypodescent system essentially would require a person to prove African ancestry—a biological requirement. Part b of our definition is, to a degree, "ecologically"[278] based in that proof that one is African-American can be ascertained through community perception of familial association based upon the physical, cultural, and social environments that affected that person.

In proposing alternatives to the hypodescent system, Professor Gotanda posits what he deems a more logical and symmetrical scheme for the purpose of categorizing persons of mixed descent.[279] This scheme is based upon historically documented methods of racial categorization, which he cites as having been used throughout the United States:

> 1. *Mulatto*: All mixed offspring are called [M]ulattoes, irrespective of the percentages or fractions of their Black or [W]hite ancestry.

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276. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 24 (1991) (footnote omitted).

277. *Id.*

278. Human ecology deals with the interrelationship between humans and their environments. Merriam-Webster Online Dictionary, Human Ecology, http://merriam-webster.com/dictionary/human+ecology (last visited Oct. 5, 2009). Specifically, human ecology focuses on the economic, social, and political environments in which humans engage every day. *Id.* Thus, the definition of "African-American" must consider how humans engage in their environments, in addition to biological factors.

279. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 25 (1991).

> 2. *Named Fractions*: Individuals are assigned labels according to the fractional composition of their racial ancestry. Thus, a [M]ulatto is one-half [W]hite and one-half Black. A quadroon is one-fourth Black and three-fourths [W]hite, a sambo one-fourth [W]hite and three-fourths Black, etc.
>
> 3. *Majoritarian*: The higher percentage of either [W]hite or Black ancestry determines the [W]hite or Black label.
>
> 4. *Social Continuum*: This is a variation on the Named Fractions scheme: Labels generally correspond to the proportion of [W]hite or Black ancestry, but social status is also an important factor in determining which label applies. The result is a much less rigid system of racial classification.[280]

What each of these methodologies requires is a categorization of persons of mixed descent that would cause such persons to be defined as something other than African-American.[281] But such delineation ignores the socio-historical realities of race. Thus, persons who would be considered multiracial by any of these named methods would therefore not be considered African-American, making such persons ineligible for the protections or benefits any federal and state laws may provide for persons who are considered legally African-American.[282]

According to Professor Hickman, Luther Wright derives his definition of African-American using elements of both the "Mulatto" and "majoritarian" systems.[283] The following is that portion of Wright's proposed racial classification system that includes a definition of African-American and a separate classification for biracial Americans:

> *African[-]Americans*—All natural born citizens having the majority of their origins in the original peoples of sub-Saharan Africa.
>
> . . .

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280. *Id.* (footnotes omitted).

281. *Id.*

282. This is not to argue against the present system in effect since 2000, which allows census respondents to self-identify as multi-racial.

283. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1206 (1997) (analyzing Luther Wright's majoritarian classification system). "Wright briefly proposes a scheme that would use elements of both the [M]ulatto and majoritarian systems in order to realign racial definitions in this country." *Id.* Under Wright's system, individuals would trace their ancestry to determine their race. *Id.* This classification system takes biology more into account than sociopolitical considerations. *Id.* at 1207.

> *Biracial Americans*—All natural born citizens who have origins in two or more racial groups or have the majority of their origins in the original peoples of Northern Africa and the Middle East.[284]

This definition of African-American is essentially a majoritarian system requiring a person to have a majority of ancestors from the sub-Saharan region in order to be included within this definition.[285] It would also require that a person prove his or her ancestry, which is certainly difficult given the paucity of genealogical records that would be needed to make such proof.[286] In addition, Wright's definition would categorize persons as "biracial" if their origins are in two or more racial groups; thus, such persons would not be considered African-American even though they may appear to be African-American and, therefore, in need of the protections of various federal and state antidiscrimination laws.[287]

To illustrate how the features of these various definitional systems compare with our proposed definition (the subject definition), the following chart shows how certain individuals referenced in this Article might be categorized:[288]

284. Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 563 (1995) (emphasis in original) (proposing a new system of racial classification).

285. *Id.*

286. *Id.*

287. *Id.* at 563.

288. This chart is not necessarily inclusive of every possible racial phenomenon. In addition, neither the "Named Fractions" nor the "Social Continuum" systems are depicted in this chart.

CHART A

System	Obama[278]	White Boy Michael[279]	Pastor's son #1[280]	Pastor's son #2[281]
Hypodescent	■		■	■
Mulatto				
Majoritarian	*		*	*
Wright's Scheme				
Subject Definition	■	+	■	+

Legend: Dark = Black Light = White Medium = Biracial

* Assuming the likelihood of Black ancestors on the Black parent's side.

+ Categorization depends on affidavits from people in the community as to whether the person is regarded as Black or White.

E. *Impact of Such a Proposal upon Existing Laws*

How can our proposed definition be practically enforced? Certainly, as with most laws, enforcement would be complex—particularly so concerning a subject matter as sensitive and volatile as race. Regulations with respect to each of the individual groups to which the definition might apply would be needed to facilitate proving that a person meets the defining qualifications. To prove the second part of our definition, a person may be required to provide affidavits from one or more persons within his or her community, particularly where he or she may have grown up, attended school, and/or worked. These affidavits may satisfy the proof of familial association. Tracing one's genealogy, though far more difficult and expensive, might be done by a certified or accredited genealogist. This approach would require the subject to trace his or her genealogical roots to sub-Saharan Africa.

Determining a person's physical characteristics, of course, is far more problematic. Who should be the judge of that? This determination would necessitate a system whereby someone who is considered an expert in, perhaps, anthropology would discern a person's physical characteristics to determine whether that person possessed sub-Saharan African features. Professor Hickman cites two cases that illustrate the difficulty

in using experts and visual inspections.[289] Much of the confusion in these cases appears to result from the fact that the persons who were allowed to testify as "experts" may not have been experts at all.[290] And then the so-called experts themselves could not agree on which evidence should be considered "scientific" evidence of the existence of "Black blood."[291] Yet if a person clearly possesses recognized African-American features, there ought to be a basis for proof (as contemnible as it may be to judge race based upon a person's features) that would not require production of affidavits or other external evidence. But if a person clearly appeared to be African-American, there would likely be no challenge to the person's race, and, thus, phenotyping would be rarely utilized. In this, there is some redemption for phenotyping's use.

During the slavery period and those periods in the history of this country when the "Black codes" and Jim Crow laws were enforced, plaintiffs in racial definition cases sought to establish that they were not Black in order to avoid the legal penalties for being a part of that race. But in a modern-day case, the plaintiff would normally be seeking to establish himself as fitting within the definition of an "African-American" (as opposed to being excluded from the definition) in order to gain a benefit conditioned upon such classification. Our definition of African-American serves to both facilitate and regulate this process.

V. CONCLUSION

As we are not in a perfect world, it would be impossible to craft a rule that would operate uniformly and without flaws. Indeed, any such definition based upon race may be exposed to a constitutional confrontation. Arguing that racial categories be eliminated entirely or that there be multi-racial distinctions, while attractive, ignores the harsh persistence of racial divisions and discriminatory treatment that prevail in our society today. Such proposals promote an idealism that clashes with reality.

The inclusiveness of our conceptual formulation recognizes that the concept of race was spawned out of a social/historical context pulling within its grasp a people who, for better or worse, are powerless to escape. These are the people whom the various civil rights laws were designed to protect. These are the people for whom the protections of such laws should lie.

So long as there are federal, state, and local laws that pertain to race, there must be a workable definition for distinguishing a racial categoriza-

289. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV 1161, 1228–29 (1997).

290. *Id.*

291. *Id.*

tion to which an individual would be assigned. Any such definition could be uniformly applied on a federal, state, and local level. Our proposed definition absorbs the historical socio-political context that spawned its existence; thus, rather than discard this historical parentage, it acknowledges and reflects this reality. Race is an issue in this country that, thus far, refuses to be defused.

APPENDIX

Appendix A to Opinion of Justice Brennan from the case of: Thornburg v. Gringles, 478 U.S. 30

CHART B

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

	Primary		General	
	White	**Black**	**White**	**Black**
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

House District 21

	Primary		General	
	White	**Black**	**White**	**Black**
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

House District 23

	Primary		General	
	White	**Black**	**White**	**Black**
1978 Senate				
Barns (Repub.)	n/a	n/a	17	5
1978 House				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89
1980 House				
Spaulding	n/a	n/a	49	90
1982 House				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

House District 36				
	Primary		General	
	White	Black	White	Black
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92

House District 39				
	Primary		General	
	White	Black	White	Black
1978 House				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25
1980 House				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate				
Small	12	61	n/a	n/a
1982 House				
Hauser	25	80	42	87
Kennedy, A.	36	87		

Appendix B to Opinion of Justice Brennan from the case of: Thornburg v. Gingles, 478 U.S. 30

CHART C

Black Candidates Elected From Seven Originally Contested Districts							
District (No. Seats)	Prior to 1972	1972	1974	1976	1978	1980	1982
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2 (2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0