

ARTICLES

CHANGING RACE: FLUIDITY, IMMUTABILITY, AND THE EVOLUTION OF EQUAL-PROTECTION JURISPRUDENCE

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ABSTRACT

One of the bedrock principles of American constitutional jurisprudence is its commitment to provide heightened scrutiny to laws that distinguish amongst us on the basis of certain immutable traits. But race—the very trait that has historically received the most searching form of scrutiny under modern equal-protection doctrine—is far more fluid than the law has traditionally recognized. This Article examines the mutability of race—both through its social and legal construction—and the resulting impact of that fluidity on the theoretical underpinnings of constitutional jurisprudence. Specifically, using examples such as the debates around Rachel Dolezal and Elizabeth Warren’s heritage, the Census Bureau’s recent proposal to create a new race (MENA) for certain individuals previously classified as white, legal controversies around eligibility requirements for affirmative action policies, and discrimination claims involving language use and personal appearance, this Article argues that modern understandings about the mutability of race can inform interpretations of the scope of Fourteenth Amendment protections and their application to broader notions of identity, whether fixed or chosen. In short, the Article calls for a more robust understanding of the Fourteenth Amendment that moves beyond the myopic and ill-conceived fetishization of immutability that has problematically guided equal-protection jurisprudence over the past half-century.

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INTRODUCTION

In 2020, I may change my race. For better or worse, however, I will not find myself alone in this enterprise. Several million of my fellow Americans may join me in this fantastical journey by going to bed one night as white people and waking up the next morning as something quite different. While one might suspect this remarkable transformation is the result of a magical new serum, a parlor trick, or some mystical hocus-pocus, it decidedly is not. Instead, it is the product of the bureaucratic machinery of the state. Just in time for its next decennial tally, the United States Census Bureau has undertaken serious consideration of a proposal to create, *ex nihilo*, an entirely new racial category that has never before existed: MENA.¹ If race is a biological and immutable fact, our government has a funny way of showing it.

For at least the last century, individuals of Middle Eastern and North African descent have found themselves formally, albeit tenuously, deemed white by law.² The reasons for this categorization are multifarious.³ Pseudo-scientific efforts to categorize the races of humanity created a broad Caucasian category, with which the term white was conflated.⁴

¹ See U.S. Census Bureau, U.S. Dep't of Commerce, Presentation for Nat'l Advisory Comm. on Racial, Ethnic, & Other Populations (Oct. 3, 2016), <https://www2.census.gov/cac/nac/meetings/2016-10/2016-nac-jones.pdf> (analyzing quality of census data when a dedicated MENA response category was included).

² See, e.g., JOHN TEHRANIAN, *WHITENED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* 36–37 (2009) (discussing the catch-22 of Middle-Eastern racial identity where individuals of Middle-Eastern descent are considered white by law but not on the street); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817, 839 (2000) (analyzing the whiteness naturalization trials of the late nineteenth and early twentieth centuries and noting that “racial-determination games often produce judicial opinions riddled with internal contradictions and dadaistic logic that find Arabs to qualify as white in some situations and nonwhite in others”).

³ See, e.g., John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 *IND. L.J.* 1, 12 (2007) (tracing the origins of the legal categorization of Middle Easterners as white).

⁴ See JOHANN FRIEDRICH BLUMENBACH, *ON THE NATURAL VARIETY OF MANKIND* 98–99 (Thomas Bendyshe ed., Bergman Publishers 1969) (1775); THOMAS H. HUXLEY, *On The Methods and Results of Ethnology*, in *MAN'S PLACE IN NATURE AND OTHER ANTHROPOLOGICAL ESSAYS*, 209, 244–45 (1896) (“Of all the odd myths that have arisen in the scientific world, the ‘Caucasian

Naturalization trials at the end of the nineteenth century and early twentieth century pressed for the inclusion of Arabs, Armenians, and others from the Levant into the white category.⁵ The largely Christian emigration from the region also played a strong role in the process, as perceptions of race and religion have historically gone hand in hand.⁶ As a result, our modern classification system has designated four broad racial divisions (American Indian/Alaska Native; Asian or Pacific Islander; Black; and White),⁷ with the white category defined to include “persons originating in Europe, the Middle East, and North Africa.”⁸ This scheme, formally adopted by the Census

mystery,’ invented quite innocently by Blumenbach, is the oddest. A Georgian woman’s skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as deviations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic ‘Adamic’ man.”); *see also* Dow v. United States, 226 F. 145, 146 (4th Cir. 1915) (noting how Blumenbach’s work, and his naming of the Caucasian race, “became known” and “generally accepted” in the United States upon its translation into English in 1807).

⁵ *See* Tehranian, *Compulsory Whiteness*, *supra* note 3, at 11–17.

⁶ Until the 1960s, the vast majority of individuals of Middle Eastern descent coming to the country were Christian. In 1924, there were approximately 200,000 Arabs living in the United States and approximately 90% of them were Christian. *See* Louise Cankar, *Immigration to the U.S.*, in ARAB AMERICAN ENCYCLOPEDIA (2000) (describing the immigration of Arabs to the United States during the Great Migration). Since 1965, 60% have been Muslim. *See* Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 74 (2004) (analyzing how the demographics of the Arab population in the United States have changed over time). This dramatic change in the religious composition of immigrants from the Middle East in recent years has, perhaps, not coincidentally led to renewed questioning as to whether individuals of MENA descent are white. For more on the general tendency to link Christianity with whiteness, *see generally* TEHRANIAN, WHITEWASHED, *supra* note 2, at 28–29, 69–70 (describing the historic conflation of race and religious affiliation); Tehranian, *Compulsory Whiteness*, *supra* note 3, at 12 (noting that “the Armenian’s historical affiliation with Christianity and their impressive capacity for assimilation and intermarriage, attested to by expert witnesses, enabled the court to confidently proclaim them white by law”) (footnote omitted).

⁷ *See* 28 C.F.R. § 42.402(e) (2019) (defining designations of persons by race, color, or national origin). The classification stems from the categories announced by the Office of Management and Budget in 1977 in its Directive No. 15. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977) (defining racial and ethnic categories for federal statistics and program administrative reporting). Hispanics are notably missing from the list as that identity is considered a cultural/ethnic category, rather than a racial one, as per Directive No. 15. *See id.*

⁸ *Id.*

Bureau in 1980,⁹ has quickly spread in use, both legally and socially, making it “felt well beyond the arena of demographics into the civic, political, and economic life of the country.”¹⁰

The Census Bureau’s MENA proposal makes a notable change to the modern classifications. Specifically, it seeks to limit the designation ‘white’ to only those who trace their ancestry to the historical peoples of Europe.¹¹ In turn, it spins out the remainder of the erstwhile ‘white’ category into the separate MENA grouping that would apply to any “person having origins in any of the original people of the Middle East and North Africa.”¹² The Bureau’s preliminary definition of MENA included nine illustrative examples that captured the three largest Middle-Eastern Arab nationalities (Lebanese, Syrian and Iraqi), the three largest North-African Arab nationalities (Egyptian, Moroccan and Algerian), two of the largest non-Arab Middle Eastern nationalities (Iranian and Israeli), and a transnational, non-Arab group (Kurdish).¹³

The MENA proposal is, unsurprisingly, not without controversy. Some have hailed the new category as an important recognition of the distinct identity of individuals who trace their heritage to the Middle East and North Africa.¹⁴ In addition, adoption and use of the designation may help better align our bureaucratic classifications with popular perceptions, monitor

⁹ See *History: 1980 (Population)*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1980_population.html (last visited Nov. 4, 2019).

¹⁰ Helen Hatab Samhan, *Not-Quite-White: Racial Classification and the Arab-American Experience in ARABS IN AMERICA: BUILDING A NEW FUTURE* 209, 215 (Michael W. Suleiman ed., 1999).

¹¹ See U.S. Census Bureau, *supra* note 1 (noting that when no MENA category is available, MENA respondents often use the “White” category).

¹² Proposals from the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 82 Fed. Reg. 12,242, 12,245 (Mar. 1, 2017).

¹³ See *id.* at 12,245 n.1.

¹⁴ See, e.g., *Support Adding a MENA Category to the U.S. Census*, ARAB AM. INST. (Oct. 18, 2016), https://www.aaiusa.org/support_adding_a_mena_category_to_the_u_s_census (arguing that “[c]reating a separate aggregate response category for Middle Eastern or North African origin will better equip the U.S. to understand a growing constituency, allocate federal aid that addresses community-based needs and enforce civil rights laws”).

discrimination (and remediation thereof), and produce valuable socioeconomic data. There are, however, reasons to be less sanguine about MENA.¹⁵ There are lingering questions to address about the exclusion of certain peoples (such as individuals of Turkish, Armenian, Afghani, and Azeri descent) from the classification.¹⁶ Perhaps most significantly, some observers have questioned the government's sudden, post-9/11 interest—after decades of categorizing such individuals as white—in getting a precise and disaggregated count of our Middle Eastern population.¹⁷ The timing is indeed suspicious, coming at a moment when the war on terrorism continues to dominate the public imagination and when our reigning presidential administration has implemented an immigration ban on individuals hailing from numerous Middle Eastern countries—a ban that was blessed (albeit by the thinnest of margins) as constitutional by the Supreme Court.¹⁸

All told, there are many serious questions surrounding MENA. But, putting aside inquiries about the motivations behind the policy and the issues it raises, the potential creation of the new MENA category highlights a salient point about the inherently volatile nature of the race-identification

¹⁵ For example, there is the issue of nomenclature. The leading proposal, which bills this new group 'MENA,' is far from ideal. Other racial groups get full words (Hispanic, Pacific Islander, Asian), not an acronym that sounds bureaucratic and mildly sinister with its "MEAN-A" pronunciation and resemblance to the most prominent English word that begins with the letters m-e-n-a: menace. Eastern Mediterranean or Levantine might be preferable terms, as neither ossifies an Anglo-centric viewpoint about the region's relative location to the Western world (i.e., in the 'Middle East')—a viewpoint so encumbered with political and historical baggage.

¹⁶ Indeed, it is unknown precisely which populations the group encompasses. For example, Turkey was curiously left out of the initial proposal. Although almost any dictionary definition of the Middle East has long contained Turkey, Turkey is also a member of the EU and has long styled itself as a European country. One might reasonably speculate, therefore, whether the conspicuous absence of Turkish-Americans from the MENA category might constitute a move to support the efforts of the Turkish government to look westward and to eschew categorization into a group that some fear may just be a monitoring tool by the government to better surveil unpopular populations.

¹⁷ See Khaled A. Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOY. U. CHI. L.J. 693, 743–751 (2016) (analyzing "concerning ramifications that the proposed reform [the MENA designation] poses to Arab Americans," including the facilitation of "War on Terror policing").

¹⁸ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overturning lower courts' striking of the aforementioned ban as unconstitutional).

enterprise. In particular, MENA provides the latest instantiation of a trend that our courts have long ignored: racial fluidity.

On one hand, one of the bedrock principles of American constitutional law is its commitment to provide heightened scrutiny to laws that unfairly distinguish amongst us on the basis of immutable traits—traits that are mere “accidents of birth” and have no link to individual merit.¹⁹ The Supreme Court has deemed race to constitute just such a trait and, as a result, under its consistent precedent, racial classifications have received strict scrutiny.²⁰ On the other hand, the study of history, biology, sociology, and even the law suggests that racial identities are far from immutable;²¹ indeed, they are fluid, as the very creation of the MENA category illustrates. This resulting state of affairs leaves us with a critical tension that remains unappreciated and under-theorized: the intellectual superstructure of our equal-protection doctrine rests on the purported immutability of race while, in fact, it is clear that racial identity is malleable and can change—not only over time and place but also through forces both within and without. This central tension, with which the extant constitutional literature has failed to grapple, serves as the focus of this Article. In this analysis, we reexamine the notion of equal protection in light of the fact that racial identity is not as rigid as it was once thought to be.

Part I of this Article begins by establishing the tension between the theory and praxis in the Supreme Court’s equal-protection doctrine, particularly as it relates to the immutability factor. While our constitutional jurisprudence

¹⁹ See *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (plurality opinion) (referring to the importance of immutability as a basis for heightened scrutiny of sex-based classifications).

²⁰ Even *Korematsu v. United States*, which upheld an exclusion order and the internment of Japanese Americans on the West Coast of the United States during World War II, purported to apply strict scrutiny to race-based classifications. 323 U.S. 214, 216–19 (1944) (noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” but that “[p]ressing public necessity,” but never “racial antagonism,” can serve as a potential ground to justify a policy that discriminates on the basis of race).

²¹ See, e.g., Ken Nakasu Davison, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals under Title VII*, 12 *ASIAN L.J.* 161, 161 (2005) (“Social characteristics such as one’s language, manner of speech, style of hair, attire and choice of friends are all factors that are commonly viewed as indicators of a person’s racial ancestry, but remain unprotected under a mutability analysis.”).

has deemed the immutability of race a “fact,”²² social realities tell a different story. In examining both the temporal and spatial fluidity of race, we document the existence of two different types of racial mutability: the changing of racial schemata themselves and the ways in which an individual’s racial designation can vary within a given scheme. While the first form of mutability offers little opportunity for agency in the process of racialization, the second form does. We therefore assess the level of individual choice in the operation of racial hermeneutics, a fact that is documented by the growing body of empirical research in the social science literature that has identified the surprisingly high rates of racial transformation. Part I concludes by examining the mutability of race through that most ubiquitous of cultural barometers: Kim Kardashian.

Part II explores the consequences of this stark dichotomy between de jure immutability and de facto fluidity. We begin by tracing the oddly haphazard origins of the immutability factor in equal-protection jurisprudence. As we document, the notion of immutability as a central criterion in the determination of suspect classifications entitled to heightened scrutiny originally entered the legal lexicon with an influential commentary from the *Harvard Law Review*.²³ The Supreme Court then adopted the commentary’s emphasis on immutability in *Frontiero v. Richardson*²⁴ in a manner that made argumentative and rhetorical sense for the purposes of that case (the extension of equal protection to gender) but lacked rigor for the purposes of more widespread embrace. With the unusual history of the trope’s appearance into the equal-protection calculus in mind, we then consider how immutability’s centrality has shaped the development of anti-discrimination

²² See *Vieth v. Jubelirer*, 541 U.S. 267, 338 n.32 (2004) (Stevens, J., dissenting) (referring to the “fact that race is an immutable characteristic,” yet cautioning that said immutability does not suggest there is anything certain or immutable about “the political behavior of the members of any racial class.”).

²³ *Developments in the Law—Equal Protection (The Concept of Equality: The View from a Wide Perspective)*, 82 HARV. L. REV. 1159, 1167 (1969) (providing an overview of the evolution of equal-protection jurisprudence and analyzing standards for reviewing legislation distinguishing on the basis of certain traits, including “immutable characteristics such as race, color, or lineage”).

²⁴ See *Frontiero*, 411 U.S. at 686.

jurisprudence and juridical inquiries into fairness. Specifically, we examine how the fetishization of immutability has actively stunted the evolution of equal-protection doctrine by impeding the development of a more robust conception of equality: a constitutional jurisprudence of acceptance that brings the Fourteenth Amendment into better alignment with the First Amendment. To that end, we assess how a proper reconciliation of the realities of racial fluidity would reconceptualize equal-protection jurisprudence in two different contexts: race-adjunct (as illustrated by an analysis of jurisprudence involving language, personal appearance, and cultural censorship) and extra-racial (as illustrated by an exegesis of the Supreme Court's landmark decision in *Obergefell v. Hodges*²⁵). Thus, Part II establishes that modern understandings about the mutability of race can inform interpretations of the scope of Fourteenth Amendment protections and their application to broader notions of identity, whether fixed or chosen.

Finally, the Article concludes by reflecting on some of the challenges that the realities of racial fluidity poses to constitutional jurisprudence. Curiously, it appears that notions about the immutability of race are far more immutable than race itself. And, acknowledging the fluidity of race comes with certain complications which will form the focus of both future scholarship and jurisprudence. First, the Supreme Court will have to consider whether wholesale abandonment of the conception of immutability makes sense or if a more pliable notion of immutability, which some lower courts and state courts have adopted, would make better sense for application in constitutional jurisprudence. Second, courts will have to develop new standards to distinguish between those mutable traits that will receive heightened scrutiny and those traits which will not. Finally, recognition of racial transitions could impact the viability of remedial race-based policies such as affirmative action and magnify the problem of race 'fraud.' We assess these three challenges as part of the process of supporting a more robust understanding of the Fourteenth Amendment that moves beyond the myopic and ill-conceived fetishization of immutability that has problematically guided equal-protection jurisprudence over the past half-century.

²⁵ 135 S. Ct. 2584, 2597–98 (2015) (holding that same-sex marriage is guaranteed by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment).

I. THE MUTABILITY OF RACE

The ubiquitous assumption that race constitutes an immutable trait (if not *the* quintessential immutable trait) is fundamental to our modern constitutional jurisprudence.²⁶ The Supreme Court has gone so far as refer to “the *fact* that race is an immutable characteristic.”²⁷ But race’s purported immutability is no fact at all. Indeed, the laboratory of society has shown that race is very much a mutable thing. Our examination of the tension between the de jure assumption of immutability and the de facto reality of mutability therefore begins with an analysis of the ways in which racial identities can morph, both contextually and temporally. Specifically, race is fluid in at least two different senses. First, race is malleable in that racial schemata themselves change, varying depending on time and place. Fluidity in this circumstance stems from without. Society, whether through a formal legal regime or informal norms, determines racial classification. Under this version of mutability, although race is not formally an “accident of birth” since categories vary both temporally and spatially, it is almost entirely imposed upon the individual. Schemata may morph and an individual’s racial designation might shift as a result, but the individual is largely powerless to impact that classification.

At the same time, however, race is also fluid in a second sense: an individual’s place within any given racial scheme might change depending on context and over time. In this second iteration of mutability, race is not immutable, but there is greater personal agency in the process of racialization. Thus, racialization represents an intricate negotiation amongst at least three players: society, racialized groups, and individuals themselves. There is agency (and, of course, a strong degree of white privilege) when Rachel Dolezal goes from white to black²⁸ or Elizabeth Warren deems

²⁶ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (referring to “the immutable characteristic of race”); *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (referring to race as “a highly visible and immutable characteristic”).

²⁷ *Vieth*, 541 U.S. at 338 n.32 (2004) (Stevens, J., dissenting) (emphasis added).

²⁸ See Mark P. Orbe, *The Rhetoric of Race, Culture, and Identity: Rachel Dolezal as Co-Cultural Group Member*, 6 J. CONTEMP. RHETORIC 23, 23 (2016) (arguing that Dolezal’s “insistence that she was not African

herself, in whatever capacity, an “American Indian.”²⁹ But such agency is not limited to those who enjoy white privilege. While not everyone possesses ethnic or racial options,³⁰ to differing degrees, many individuals (including those racialized as ‘white’ or ‘of color’) exert at least some level of control over their racialization. And, based on the growing body of empirical data from recent sociological research, there is at least some reason to believe that rates of fluidity may be increasing.³¹

A. Mutability’s First Iteration: The Sociolegal Evolution of Racial Schemata

In the popular imagination, racial identity represents an immutable trait and biological fact. But such a view ignores what Michael Omi and Howard Winant have dubbed the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.”³² Racialization is an ideological process—a “process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings.”³³ Racial classification systems are therefore the products of intricate sociolegal constructs that morph over time.

American, but culturally Black triggered critical dialogue around the social construction of race in the United States, the one-drop rule, and agency issues surrounding assertions of authentic identity.”).

²⁹ See Annie Linskey & Amy Gardner, *Elizabeth Warren Apologizes for Calling Herself Native American*, WASH. POST (Feb. 5, 2019), https://www.washingtonpost.com/politics/elizabeth-warren-apologizes-for-calling-herself-native-american/2019/02/05/1627df76-2962-11e9-984d-9b8fba003e81_story.html (reporting on Elizabeth Warren’s apology for identifying as Native American for almost two decades).

³⁰ See WATERS, *infra* note 39.

³¹ See *infra* notes 81–82, 128–142 and accompanying text.

³² MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 55 (1994).

³³ *Id.* at 61.

1. A Brief History of the Ideological Construction of Whiteness

The very creation and evolution of the ‘white’ race illustrates this ideological process in action. Whiteness, of course, is just a concept—and one whose meaning has changed dramatically since the founding of the Republic. For those bent on originalism, one need look no further than the Framers for surprising proof of the malleable definition of whiteness. To Benjamin Franklin, white racial identity belonged chiefly to individuals of English descent. As he once wrote, the Angles and Saxons alone made “the principal Body of White People on the Face of the Earth.”³⁴ He therefore had no compunction about challenging the whiteness of even the Swedes, whom he viewed—along with the Germans, French, Italians, Spaniards, and Russians—as “generally of what we call a swarthy Complexion.”³⁵

Franklin’s musings about the swarthy Swedes are not as anomalous as they may first appear. American history is rife with examples of the shifting definition of whiteness. In the 1800s, the Irish faced a century-long battle against persistent discrimination before finally achieving ‘acceptance’ as white.³⁶ In the early part of the twentieth century, Italians,³⁷

³⁴ BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND (1751), reprinted in 4 THE PAPERS OF BENJAMIN FRANKLIN 234 (Leonard W. Labaree et al. eds., 1961).

³⁵ *Id.*

³⁶ See, e.g., NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 1, 3 (1995) (documenting the century-long struggle of Irish-Americans to obtain recognition of their ‘whiteness’ in the United States).

³⁷ See, e.g., *Rollins v. State*, 92 So. 35, 36 (Ala. Ct. App. 1922) (reversing the conviction of a black man for the crime of miscegenation on the grounds that the state had failed to produce competent evidence that the woman he had married, a Sicilian immigrant, was in fact white by law); LEONARD DINNERSTEIN & DAVID M. REIMERS, ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION 36 (1982) (“Italians . . . were one of the most despised groups. Old-stock Americans called them wops, dagos, and guineas and referred to them as the ‘Chinese of Europe’ and ‘just as bad as the Negroes.’”). In the South, some Italians were forced to attend all-black schools, see DINNERSTEIN & REIMERS, *supra* note 37, and they even endured lynchings. See Thomas A. Guglielmo, “No Color Barrier”: *Italians, Race, and Power in the United States*, in ARE ITALIANS WHITE? 29, 35 (Jennifer Guglielmo & Salvatore Salerno eds., 2003) (describing lynchings of Italians that occurred in the South, West, and Midwest during the late nineteenth and early twentieth centuries). In 1875, the *New York Times* thought it “perhaps hopeless to think of civilizing them, or keeping them in order, except by the arm of the law.” See DINNERSTEIN & REIMERS, *supra* note 37. In a 1907 debate on immigration reform, Congressman John Burnett of Alabama, a member of the

Greeks,³⁸ Slavs,³⁹ and other groups were viewed as non-white. Race riots at the turn of the century in Nebraska pitted whites against Greeks.⁴⁰ In parts of the segregated South, Italian children were often banned from white-only schools.⁴¹ And seemingly tolerant outposts such as Southern California were far from immune. For example, segregation of public facilities in San Bernardino extended as recently as the 1940s to individuals of Italian, Portuguese, and Spanish descent⁴²—a fact recounted in *Westminster School*

House of Representatives Committee on Immigration and Naturalization, epitomized the rampant hostility towards these new immigrants: “I regard the Syrian and peoples from other parts of Asia Minor as the most undesirable, and the South Italians, Poles and Russians next.” See Nancy Faires Conklin & Nora Faires, “Colored” and Catholic: *The Lebanese in Birmingham, Alabama*, in *CROSSING THE WATERS: ARABIC-SPEAKING IMMIGRANTS TO THE UNITED STATES BEFORE 1940*, at 69, 76 (Eric J. Hooglund ed., 1987). According to Burnett, these new immigrant groups were, unequivocally, not white. Faires & Faires, *supra* note 37.

³⁸ *Macomber v. State*, 291 N.W. 674, 678 (Neb. 1940) (involving a brutal robbery, beating and forcible sodomization of Greek man with the perpetrator goading the attack by declaring, “You * * * Greeks ain’t going to run this town, the white people are going to run this town.”); LAWRENCE H. LARSEN & BARBARA J. COTTRELL, *THE GATE CITY: A HISTORY OF OMAHA* 166 (1997) (describing a 1909 race riot in Omaha, Nebraska pitting ‘whites’ against Greeks, when an angry mob of more than one thousand men gathered in South Omaha and raided “Greek Town,” destroying businesses, burning buildings and assaulting individuals of Greek descent and noting that the authorities refused to intervene to stop the mob’s violent actions).

³⁹ See, e.g., MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* 2 (1990) (observing that, at the turn of the century, individuals of Slavic and Mediterranean descent were viewed as a lower species of humanity, and certainly not as members of the ‘white’ race). As one candidate for political office wrote in 1920: “They have disqualified the negro, an American citizen, from voting in the white primary. The Greek and Syrian should also be disqualified. I DON’T WANT THEIR VOTE. If I can’t be elected by white men, I don’t want the office.” PHILIP K. HITTI, *THE SYRIANS IN AMERICA* 89 (1924). His views were not alone. For example, United States Senator Furnifold McLendel Simmons of North Carolina deemed these immigrant groups “nothing more than the degenerate progeny of the Asiatic hoards [sic] which, long centuries ago, overran the shores of the Mediterranean . . . the spawn of the Phoenician curse.” JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 164–65 (1971).

⁴⁰ See LARSEN & COTTRELL, *supra* note 38.

⁴¹ See DINNERSTEIN & REIMERS, *supra* note 37.

⁴² *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 782 (9th Cir. 1947) (noting that, in the case of *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Cal. 1944), “San Bernardino established a public park and recreational ground with an area containing a swimming pool and bath house. The mayor, city councilmen, chief of police and park superintendent, all through their agents, barred from their entry into the area all persons of Latin descent. The exclusion was not merely of Mexicans but of

District v. Mendez,⁴³ the famous lawsuit that ended segregation in California just a few short years before *Brown v. Board of Education*⁴⁴ deemed it unconstitutional nationwide.

The law itself has played an instrumental role in the process of racialization (and its mutability). Until 1952, federal law dictated that only white or black individuals could qualify for naturalization.⁴⁵ As a result, a wave of immigrants with racially “ambiguous” backgrounds—from Japanese⁴⁶ and Indian⁴⁷ to Armenian⁴⁸ and Arab⁴⁹—needed to earn judicial

all Latins, that is of people from the score or more Latin American Republics and from Italy, Spain and Portugal”).

⁴³ *Id.*

⁴⁴ *Brown v. Bd. of Educ.*, 394 U.S. 294 (1955).

⁴⁵ Until 1952, one had to be either black or white—but nothing ‘in-between’—to be eligible for naturalization. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795) (limiting naturalization to “any alien, being a free white person”); Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (amending the naturalization statute to also include “aliens of African nativity and [] persons of American descent.”). This racial limitation on naturalization provoked a series of race trials, from the late eighteenth century until 1952, where individuals would litigate their whiteness in order to obtain citizenship (and its attendant benefits at the time, such as the right to vote, the right to own land, and the right to practice certain professions and take part in certain economic and social activities). *See* Tehranian, *Performing Whiteness*, *supra* note 2, at 818–20 (noting that there were fifty-two reported cases litigating the naturalization law’s racial prerequisite from 1878 to 1952 and that naturalization regulations prohibited non-naturalized immigrants from exercising important economic and social rights).

⁴⁶ *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (rejecting Takao Ozawa’s petition to be declared white by law and therefore eligible for naturalization, on the grounds that individuals of Japanese ancestry were not Caucasian).

⁴⁷ *United States v. Thind*, 261 U.S. 204, 206 (1923) (considering whether Bhagat Singh Thind, a “high caste Hindu of full Indian blood, born at Amritsar, Punjab, India,” was a white person for the purposes of qualifying for naturalization). Overturning a lower court holding, the Supreme Court held in the negative, arguing that, while Indians might be technically ‘Caucasian,’ and “[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, [] the average man knows perfectly well that there are unmistakable and profound differences between them today.” *Id.* at 209. Ironically, in this language, the Court appears to acknowledge the possibility of racial transformation—albeit at glacial (“dim reaches of antiquity”) rates. *Id.*

⁴⁸ *United States v. Cartozian*, 6 F.2d 919, 922 (D. Or. 1925) (deeming Tatos O. Cartozian, an Armenian, white by law and therefore eligible for naturalization).

⁴⁹ *Compare Ex parte Mohriez*, 54 F. Supp. 941, 941 (D. Mass. 1944) (deeming an Arab male, Mohamed Mohriez, eligible for naturalization since he was a white person) *with In re Hassan*, 48 F. Supp. 843,

recognition of their whiteness before they could obtain citizenship. Whiteness not only gave them the vote, it also entitled them to a series of economic rights, including the abilities to own land and practice law, that were restricted at the time to citizens.⁵⁰ In Minnesota, for example, even Finnish immigrants had to litigate their whiteness in court when the United States District Attorney denied them naturalization on the grounds that they were “Mongolian.”⁵¹ While the Japanese and Indians lost these absurd cases (before the Supreme Court, no less), Arabs and Armenians were narrowly (if not reluctantly) deemed white.⁵² After all, the latter were literally found on the lands adjacent to the Caucasus Mountains which—through some hocus-pocus by a German ethnologist who studied skull shapes many hundred years ago—gave birth to the term ‘Caucasian.’⁵³

2. *Racial Fluidity and the History of the Census*

The very definition of race, as expounded by perhaps the most celebrated metric thereof—the decennial United States Census—captures the evolving notion of whiteness and the morphing of racial epistemologies over time. While the Census’s role in ascertaining racial identities in its first century of existence was largely limited to the categories of white, black, and Native

846 (E.D. Mich. 1942) (deeming an Arab male, Ahmed Hassan, ineligible for naturalization since he did not qualify as a white person).

⁵⁰ See, e.g., *Porterfield v. Webb*, 263 U.S. 225, 233 (1923) (upholding constitutionality of California’s Alien Property Initiative Act (Alien Land Law) of 1920, 1 Cal. Gen. Laws, Act 261 (Deering 1938), which prohibited non-citizens from owning real property in California); *United States v. Pandit*, 15 F.2d 285, 285 (9th Cir. 1926) (noting law preventing non-citizens from practicing law in California); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 413 (1948) (scrutinizing California law denying commercial fishing licenses to non-citizens).

⁵¹ In 1908, United States District Attorney John C. Sweet rejected the naturalization applications of John Sven and fifteen other Finns. Their cases ultimately ended up in federal court and, on January 17, 1908, Sweet’s decision was reversed by Judge William Cant, who held that Finns, despite claims of their “Mongol origins,” were white persons eligible for naturalization. See Aleksu Huhta, *Debating Visibility: Race and Visibility in the Finnish-American Press in 1908*, 4 NORDIC J. MIGRATION RES. 168, 171 (2014).

⁵² See *supra* notes 46–49.

⁵³ See *supra* note 4.

American,⁵⁴ the changing racial composition of the country forced the Census Bureau to eventually confront the issue of racial classification with greater nuance starting in the late nineteenth century. Notably, during this era, the Census Bureau's treatment of various "racial" categories varied wildly in numerous respects.

For instance, as Susan Koshy⁵⁵ and Vinay Harpalani⁵⁶ have documented, individuals tracing their descent to the Indian sub-continent have seen their treatment under the Census subject to vertiginous vacillation. On almost every census conducted by the United States Government between 1910 and 2000, such individuals found themselves in a different racial category:

- "Other: Non-White Asiatic/Hindu" (1910)
- "Other: Hindu" (1920)
- "Hindu" (1930, 1940)
- "Other: Non-White/Asiatic Indian" (1950)
- "Non-White/Hindu" (1960)
- "White" (1970)
- "Asian Indian" (1980)
- "Asian or Pacific Islander" (1990)
- "Asian/Asian Indian" (2000).⁵⁷

So, while the Census gave individuals of Indian ancestry their own separate racial category in 1930, it deemed them white in 1970 and then Asian in 1990.⁵⁸

⁵⁴ From 1790–1840, the Census categorized individuals as free white persons, other/colored free persons, and slaves.

⁵⁵ See Susan Koshy, *Category Crisis: South Asian Americans and Questions of Race and Ethnicity*, 7 *DIASPORA: J. TRANSNAT'L STUD.* 285, 293–94 (1998) (noting the changing classifications of South Asians in the Census).

⁵⁶ See Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 *N.Y.U. ANN. SURV. AM. LAW* 77, 134–37 (2013) (referencing Koshy's observation regarding changing census classifications).

⁵⁷ *Id.*

⁵⁸ *Id.*

The Census has also meandered in its categorization of individuals of Latino descent. As sociologists Vilma Ortiz and Edward Telles point out, “The issue of how race is collected and analyzed for Mexicans (and Hispanics) is . . . complicated. The general trend over time has been a shift from no classification to Mexican as a [separate] race, to Mexicans as *White*, to Mexicans as *any race*.”⁵⁹ Through 1920, the Census made no mention at all of individuals of Mexican (or Latin) descent.⁶⁰ In 1930, ‘Mexican’ was suddenly given its own racial category on the Census.⁶¹ By 1940, however, the Census did an about-face and formally characterized Mexicans (and

⁵⁹ Vilma Ortiz & Edward Telles, *Racial Identity and Racial Treatment of Mexican Americans*, 4 RACE & SOCIETAL PROBS., April 2012, at 1, 4 (citations omitted).

⁶⁰ See *History: 1920*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1920_1.html (displaying 1920 census questionnaire) (last visited Nov. 4, 2019).

⁶¹ The instruction accompanying the “Mexican” racial category on the 1930 census curiously read: “Mexicans.-Practically all Mexican laborers are of a racial mixture difficult to classify, though usually well recognized in the localities where they are found. In order to obtain separate figures for this racial group, it has been decided that all person born in Mexico, or having parents born in Mexico, who are not definitely white, Negro, Indian, Chinese, or Japanese, should be returned as Mexican (“Mex”).” *1930 Census: Enumerator Instructions*, IPUMS USA, <https://usa.ipums.org/usa/voliii/inst1930.shtml> (last visited Nov. 4, 2019). Interestingly, although there were also instructions as to who should be categorized as “[American] Indian” and “Negro,” there were no corresponding instructions for the White designation, *see id.*, thereby supporting the notion that, historically, white has represented the absence of race, a norm that defined by exceptionalism from the entire conception of race in the first place. As Robin DiAngelo writes, “Because race is constructed as residing in people of color, whites don’t bear the social burden of race. We move easily through our society without a sense of ourselves as racialized subjects We see race as operating when people of color are present, but all-white spaces as ‘pure’ spaces—untainted by race *vis à vis* the absence of the carriers of race (and thereby racial polluters)—people of color.” Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 62 (2011) (citations omitted); *see also* Richard Dyer, *The Matter of Whiteness*, in WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM 9, 10 (Paul Rothenberg ed., 2005) (“[A]s long as race is something only applied to non-white peoples, as long as white people are not racially seen and named, they/we function as a human norm . . . [and] [t]here is no more powerful position than that of being ‘just’ human.”).

other Hispanics) as white.⁶² They remained so until 1980, when the category of Hispanic was deemed a type of culture/heritage, and not a race at all.⁶³

The changing treatment of Hispanics under the Census reflects the broader societal confusion regarding their place in the American racial schema. In Texas, for example, Latinos were occasionally considered white, serving in white National Guard units and possessing the right to marry white, but not black, partners.⁶⁴ But, more often than not, they suffered from the types of discrimination suffered by non-whites.⁶⁵ Latinos also found themselves occupying the liminal spaces of whiteness in California. At the time of the State's founding, Mexicans were deemed—after lengthy debate—white enough to receive citizenship, vote, and own land—rights that were not extended to such groups as the Chinese and Japanese.⁶⁶ Whites and

⁶² See *What Census Calls Us: A Historical Timeline*, PEW RESEARCH CENTER (June 10, 2015), <https://www.pewsocialtrends.org/interactives/multiracial-timeline/> (showing changing census classifications throughout American history).

⁶³ *Id.*

⁶⁴ Zev Chafets, *The Post-Hispanic Hispanic Politician*, N.Y. TIMES MAGAZINE (May 6, 2010), <https://www.nytimes.com/2010/05/09/magazine/09Mayor-t.html>. In 1943, in an apparent attempt at solidarity with Latin American allies fighting World War II and as a means to continue to secure cooperation with the Mexican government on labor issues, the Texas Legislature even passed a “Caucasian Race Resolution,” see Thomas A. Guglielmo, *Fighting for Caucasian Rights: Mexicans, Mexican Americans, and the Transnational Struggle for Civil Rights in World War II Texas*, 92 J. AM. HIST. 1212, 1219–23 (2006) (discussing Texas’ Concurrent Resolution 105, which affirmed equal treatment of all members of the Caucasian race); see generally Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 126 (2016) (discussing the adoption of agreements between the executive branches of both the United States and Mexico in order to prevent discrimination against Mexican-Americans). Notably, however, the resolution “was non-binding as statutory law.” CARLOS KEVIN BLANTON, GEORGE I. SANCHEZ: THE LONG FIGHT FOR MEXICAN AMERICAN INTEGRATION 93 (2014)).

⁶⁵ See LAURA GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); Ariela Gross, *Texas Mexicans and the Politics of Whiteness*, 21 L. & HIST. REV. 195, 195–205 (2003) (suggesting that Mexicans, while legally considered white, were socially non-white because they still suffered from rampant discriminatory practices); Ian Haney-Lopez, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003) (contending that leaders of Latino communities who advance Latino whiteness end up promoting social inequality and mistreatment); see also *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948) (challenging racially restrictive covenant prohibiting sale or lease of property to “persons of Mexican descent”).

⁶⁶ This was largely due to the Treaty of Guadalupe Hidalgo in 1848, which secured “all the rights of citizens of the United States” for those Mexicans who remained on the land that was ceded to the

individuals of Latin descent could also marry at a time when individuals from other ethnic groups could not ‘miscegenate.’⁶⁷ All the while, however, Mexican-Americans endured widespread animus, and were subject to segregation⁶⁸ and the use of racially restrictive covenants.⁶⁹

The tectonics of race continue to shift, and racial schemata are still in the process of flux, as the Census Bureau’s consideration of a proposal to adopt a new “MENA” category makes clear. Put in the context of these prior transformations in the Census’s racial classifications, the creation of the new MENA category appears routine, if not downright mundane. MENA just represents a new phase in the ever-changing state of race, in general, and whiteness, in particular.

All the while, the history leading up to the genesis of MENA highlights the forces at play in fomenting legal changes in racial definitions. A complex

United States per the Treaty. *See* TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 9, 54 (1994) (noting that “[t]his international agreement virtually tied the hands of white convention delegates when the issue of suffrage for Mexicans was raised” and that the California State Constitutional Convention of 1849, after fierce[] debate,” decided to “formally grant[] Mexicans the same citizenship rights as ‘free white persons’ in California . . . while the California Indians, like Indians elsewhere, were deemed ‘nonwhite’ and ineligible for citizenship.”).

⁶⁷ *Id.* at 58.

⁶⁸ *See, e.g.*, *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 545, 551 (S.D. Cal. 1946) (striking, as unconstitutional, the practice by the Westminster, Garden Grove, Santa Ana and El Modeno School Districts of excluding Mexican children from so-called white schools); *Lopez v. Seccombe*, 71 F. Supp. 769, 771–72 (S.D. Cal. 1944) (challenging constitutionality of San Bernardino’s practice of excluding Mexicans and other individuals of Latino descent from city park and playground).

⁶⁹ *See, e.g.*, Complaint at 1, 3, *Doss v. Bernal*, No. 41466 (Cal. Super. Ct. 1943), *cited in* ROBERT CHAO ROMERO & LUIS FERNANDO FERNANDEZ, UNIV. CAL. L.A. CHICANO STUDIES RESEARCH CTR., CSRC RESEARCH REPORT NO. 14, *DOSS V. BERNAL* ENDING MEXICAN APARTHEID IN ORANGE COUNTY 3 (2012), <https://www.chicano.ucla.edu/files/RR14.pdf> (striking, as unconstitutional, a racially restrictive covenant on a property in Fullerton, California that prohibited the property from being “used, leased, owned or occupied by any Mexicans or persons other than of the Caucasian race”); Amy Taxin, *California Bill Aims to Strike Racist Housing Language*, S.D. UNION-TRIBUNE (Mar. 14, 2009), <https://www.sandiegouniontribune.com/sdut-racist-covenants-031409-2009mar14-story.html> (detailing covenant on a South Gate, California property preventing transfer to buyers “whose blood is not entirely that of the Caucasian Race, and for the purposes of this paragraph, no Japanese, Chinese, Mexican, Hindu or any person of the Ethiopian, Indian or Mongolian Races shall be deemed to be Caucasian.”).

series of sociopolitical circumstances preceded the bureaucratic change and triggered the reconceptualization of individuals hailing from the Middle East within the rubric of whiteness. Put in personal terms, while I might legally lose my whiteness in 2020, the truth is that I lost my de facto whiteness (if I ever had it to begin with) long ago—a fact made clear by the waves of random heightened scrutiny I have inevitably enjoyed through the years at airports across the land. Sometime between childhood and adolescence, as my physiognomy grew more unmistakably Semitic, sometime between the painfully drawn out tragedy of the Iranian Hostage Crisis and the painfully sudden tragedy of the 9/11 attacks, and sometime between the rise of the Ayatollah and the fall of the Twin Towers, magic carpets and belly dancers gave way to terrorism and fundamentalists as the dominant image of the Middle East. And with that transformation, perceptions of race changed as the trope of the Middle Eastern as Other became imprinted in the American mind. Racial identity can be imposed from within and, in evolutionary terms, the process can take place in the blink of an eye. MENA represents the culmination of this process.

3. *Spatial Variations in Racial Schemata*

All the while, racial schemata vary spatially as well. For example, while the principle of hypodescent has dominated American notions of blackness,⁷⁰ it has not played as prominent a role in racial conceptions in other countries such as Brazil. Thus, while the United States has generally adopted a racial classification system, popularly known as the ‘one-drop rule,’ that has “grouped all mixed-race offspring of Black and white unions into the Black category,”⁷¹ Brazil’s system reflects more “‘fluid’ multi-racial categories” and the “comparatively greater vertical and horizontal mobility of African

⁷⁰ See, e.g., VA. CODE § 67 (1930) (“Every person in whom there is ascertainable any negro blood shall be deemed and taken to be a colored person . . .”).

⁷¹ D. Wendy Greene, *Determining the (In)Determinable: Race in Brazil and the United States*, 14 MICH. J. RACE & L. 143, 155 (2009).

descendants.”⁷² In one broad national survey, for example, Brazilians used a whopping 135 different categories to classify themselves racially.⁷³

Even putting aside bureaucratic categories, geographic context inevitably impacts the informal process of racialization on the street as racial epistemologies vary based on location. Nigerian-American author Chris Abani, the son of an Igbo-Nigerian father and an English mother, poignantly captures this dynamic in *The Face*, his meditation on identity in the twenty-first century. As he recounts:

When I lived in East Los Angeles, a predominantly Chicano/Latino neighborhood, I was assumed to be Dominican or Panamanian. In Miami, where I go regularly for religious reasons, I am confused for a Cuban. In New Zealand, I was assumed to be Maori. In Australia, Aborigine. In Egypt, Nubian. In Qatar, Pakistani. In South Africa, Zulu or some other group, depending on who was talking. Other times, because of my accent, which is a mix of Nigerian, British, and now American inflections, I am assumed to be from ‘one of the islands.’ No one accepts Nigerianness, not without argument. In fact, the two things I have been rarely taken for—Nigerian and white—are the very things that form my DNA.⁷⁴

As Abani can attest, while one’s DNA may be largely immutable, perceptions of racial belonging are highly mutable and context-dependent. Racial determination is an act of reading, with all of the subjective and interpretive elements of any other process wherein humans seek to give meaning to a series of signs and symbols. Explains Abani: “Most of the confusion about who I am is a product of how my face is read. Thus it is perceived to be where it is thought to belong. And how it is supposed to look.”⁷⁵ Abani’s racial ascription therefore morphs in ways beyond his control as he navigates his way through the geographies of the modern world.

⁷² *Id.* at 161.

⁷³ In its 1976 *Pesquisa Nacional por Amostragem de Domicílios* (the National Household Survey, or PNAD), the Brazilian Institute of Geography and Statistics found individuals using 135 different categories to self-identify their race. See Sales Augusto dos Santos, *Who Is Black in Brazil? A Timely or a False Question in Brazilian Race Relations in the Era of Affirmative Action?* 33 *LATIN AM. PERSP.* 30, 34 (Obianuju C. Anya trans., 2006) (choosing, among others, white, light, tawny, moreno, pardo, and black).

⁷⁴ CHRIS ABANI, *THE FACE: CARTOGRAPHY OF THE VOID* 20 (2016).

⁷⁵ *Id.* at 20–21.

B. Race Mutability's Second Iteration: The Negotiation of Individual Identity Within a Given Racial Scheme

But the ascription of race is not just achieved through automatic application of the extant racial scheme. Racialization also occurs in the processing of individuals within a given classification system. In this second iteration of mutability, race is mutable based on how society may locate a person's race within its racial epistemology and also how an individual performs race. On this latter point, Kurt Vonnegut once wrote that "we are what we pretend to be"⁷⁶ and individuals change society's perception of their race based on the aspects of their identity that they (both consciously and unconsciously) emphasize and those which they choose to downplay. In the process, many individuals can successfully manipulate how they are racialized. This individual control over the racialization process, even if limited, stems from an important corollary to the social construction of race: the inherent amorphousness of race.

As Patrick Egan points out:

the ability to claim or deny various racial and ethnic identities rests upon a bundle of attributes that can include fixed and sticky attributes like accent, skin tone, facial features, and body morphology, as well as changeable or concealable attributes like clothing, cultural practices, and the racial and ethnic identities of one's parents, spouse or friends. Various mixes of these attributes can provide individuals with a lot, some, or very little discretion in identifying with a racial or ethnic group, which can in turn give rise to identity variation in different contexts, including surveys.⁷⁷

Tseming Yang adds that opportunities for identity arbitrage have increased in recent year years due to two key developments.⁷⁸ First, scientific and medical advances have given individuals greater ability to manipulate

⁷⁶ KURT VONNEGUT, JR., *MOTHER NIGHT*, at v (Dell Publishing 1999) (1961).

⁷⁷ Patrick J. Egan, *Identity as Dependent Variable: How Americans Shift Their Identities to Better Align with Their Politics*, AM. J. POL. SCI., at 4 (forthcoming), available at <https://wp.nyu.edu/egan/research/> (citing Maya Sen & Omar Wasow, *Race as a Bundle of Sticks: Designs That Estimate Effects of Seemingly Immutable Characteristics*, 19 ANN. REV. POL. SCI. 499 (2016)).

⁷⁸ 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, 377 (2006).

their physical features.⁷⁹ Second, the growing availability of paper/virtual identities has provided opportunities for individuals to adopt alternative racial identities divorced from consideration of phenotype.⁸⁰

With these developments in mind, it should not be surprising that, “[i]n the last several decades, . . . [a]s growing numbers of Americans identify as multiracial, multiethnic, postracial, transgender, gender nonconforming, and bi (or multi) religious—[] ‘fluid identities’—it is increasingly difficult to profess with confidence ‘what’ a person is absent his or her input.”⁸¹ Thus, as Leora Eisenstadt concludes in her contemplation of identity fluidity, “the number of individuals who refuse to identify in a single category is increasing exponentially.”⁸² But importantly, it is not just multi-ethnic individuals or those who recoil at the idea of having racial ascription imposed upon them who enjoy racial fluidity. As we shall see, a recent series of studies in the social sciences indicate that actual rates of racial fluidity are surprisingly high and that individuals can often play a role in their racialization, including by adopting such practices as passing⁸³ and covering.⁸⁴ With the opportunity for racial fluidity in place, individuals can exert control over their racialization for personal and strategic social, political and economic purposes.⁸⁵

⁷⁹ *Id.* at 377–78.

⁸⁰ *Id.* at 378–80.

⁸¹ Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 790 (2015).

⁸² *Id.*

⁸³ See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 283 (2003) (defining the practice of passing as “a deception that enables a person to adopt specific roles or identities from which he or she would otherwise be barred by prevailing social standards”).

⁸⁴ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (defining covering as the toning down of a disfavored identity to fit into the mainstream).

⁸⁵ See, e.g., WATERS, *supra* note 39 (documenting the assimilation and gradual acceptance of European immigrants who were once considered not to be members of the “white” race).

1. *Identity Arbitrage*

a. *Strategic Conversion in an East Kenya Farming Community*

Located just off the northern coast of Kenya, the Giriama farming community faced an uneasy transition. Old ways were giving way to new ones, particularly economically, as market forces began to challenge the group's erstwhile egalitarianism. Driven by a generation of young upstarts, the emergence of this new proto-capitalistic system faced key challenges, however, as entrenched institutional practices enforcing egalitarian norms strongly inhibited surplus accumulation. In order to push for a "new ethics of production" amongst the Giriama, these parvenus had to unshackle themselves from the inefficient transaction costs associated with traditional customs and to "disentangle themselves from the demands of kin."⁸⁶ The way they accomplished such a transition is detailed in David J. Parkin's fascinating quarter-century study, entitled *Palms, Wine, and Witnesses*.⁸⁷

The proto-capitalists amongst the Giriama sought to stockpile land and palm trees to take advantage of the booming market for copra. But such transactions typically required participation in (costly) ritualized clientage in the form of exchange ceremonies with elders that featured both wine and meat. As Parkin documents, strategic conversion to Islam became a key tool utilized by the entrepreneurs to achieve their needed freedom to operate. By becoming (what Parkin dubs) "therapeutic Muslims,"⁸⁸ these upstarts in the younger generation avoided the heavy taxation of clientage activities because, under their new religion, they could neither drink wine nor partake in eating non-halal meat. In the process, they achieved what Paul Clough calls "ritual distinctiveness"⁸⁹ and managed to rationalize their exemption

⁸⁶ Kate Meagher, *Trading on Faith: Religious Movements and Informal Economic Governance in Nigeria*, 47 J. MOD. AFR. STUD. 397, 403 (2009).

⁸⁷ DAVID J. PARKIN, *PALMS, WINE, AND WITNESSES: PUBLIC SPIRIT AND PRIVATE GAIN IN AN AFRICAN FARMING COMMUNITY* (1972).

⁸⁸ See PARKIN, *supra* note 87, at 40–41.

⁸⁹ PAUL CLOUGH, *MORALITY AND ECONOMIC GROWTH IN RURAL WEST AFRICA: INDIGENOUS ACCUMULATION IN HAUSALAND* 373 (2014).

from custom without subverting tradition wholesale. In short, they smoothly opted into a different informal legal regime by altering their outward religious identities, thereby facilitating the transition to a capitalistic economy.

Although this story about the Giriama and the strategic conversion to Islam within their community relates to religious transformation in a bygone era on a different continent, it captures a process that repeats itself universally. The deployment of classification arbitrage is, after all, a time-honored practice. When legal regimes create different rules for different people and individuals enjoy some level of control over which rules apply to them, there is strong incentive to engage in reclassification—whether it is individuals seeking to repurpose earnings as capital gains rather than ordinary income to lower their effective tax rate or baseball players obtaining therapeutic exemptions for the use of substances otherwise banned as performance enhancing.⁹⁰ As such, it is not surprising to see individuals engage in identity arbitrage with respect to race, manipulating how they are categorized by the world, for strategic purposes. Both passing and covering can constitute forms of identity arbitrage⁹¹ and, as we shall see, occur regularly with respect to race, for purposes noble and unscrupulous, in

⁹⁰ See, e.g., Russell A. Carleton, *Baseball Therapy: Someone's Not Paying Attention*, BASEBALL PROSPECTUS (Apr. 5, 2016), <https://www.baseballprospectus.com/news/article/28824/baseball-therapy-someones-not-paying-attention/> (noting the statistically aberrational number of major league players, vis-à-vis the general population, receiving therapeutic exemptions for drugs that would otherwise be deemed performance enhancing). It is believed that Alex Rodriguez, who was later banned for 162 games for use of performance enhancing substances, took advantage of the therapeutic use exemption in both 2007 and 2008. See TIM ELFRINK & GUS GARCIA-ROBERTS, *BLOOD SPORT: ALEX RODRIGUEZ, BIOGENESIS, AND THE QUEST TO END BASEBALL'S STEROID ERA 3* (2014) (detailing the Biogenesis baseball scandal that involved Alex Rodriguez and other top baseball stars).

⁹¹ This is not to suggest that all (or even most) forms of passing or covering are the product, whether conscious or unconscious, of strategic manipulation to achieve social, economic, or political ends. Often times, passing and covering represent coping strategies to withstand the trauma of discrimination and ostracization.

manners extraordinary and mundane. Regardless of the purpose or manner, however, these instantiations reflect the individual agency possible in the racialization process.

b. Name Games: Racial Fluidity and Ambiguity in Electoral Politics

Strategic racial manipulation can often come in comically simple forms. Modulation in common racial or ethnic signifiers often does the trick. Thus, for example, a mere change in one's surname can create possibilities. For example, divorced from my last name, I enjoy a wide range of racial and ethnic options. With my last name in tow, I possess only two (depending on whether one focuses on the first part, or the last part, of my surname). Beyond the personal, when one examines this issue from a broader perspective, there is a long history of Anglicization of surnames to facilitate what we will euphemistically call the assimilation process. Most famously, generations of Hollywood stars have taken part in this charade.⁹²

Of course, changes can go the other way as well, particularly when regional demographic considerations are at play in electoral matters.⁹³ As far-fetched as it might sound, a shrewd Irish-American politician might nickname his son 'Beto' to arm him with an implied tie to the large Mexican-American population in one's community—a move that may assist his son a generation later when running for U.S. Senate and President as 'Beto O'Rourke' rather than under the birthname of 'Robert Francis O'Rourke.'⁹⁴

⁹² Some examples include: Amos Muzyad Yaqoob Kairouz (p/k/a Danny Thomas); Jo Racquel Tejada (p/k/a Rachel Welch); Ilyena Lydia Vasilevna Mironov (p/k/a Helen Mirren); Óscar Isaac Hernández Estrada (p/k/a Oscar Isaac); Jennifer Ellen Chan (p/k/a Jennifer Tilly); Ramon Antonio Gerardo Estevez (p/k/a Martin Sheen); Margarita Cansino (p/k/a Rita Hayworth).

⁹³ The tradition, of course, is not limited to performing whiteness. Famously, for example, during the height of World War I, King George V's edict changed the British royal family's surname from Saxe-Coburg-Gotha to Windsor to appear less German and more English.

⁹⁴ See Ruben Navarrette, Jr., *For Latinos, 'Beto' O'Rourke Is Just Another Privileged White Guy Trying to Manipulate Them*, USA TODAY (Mar. 15, 2019), <https://www.usatoday.com/story/opinion/2019/03/15/beto-orourke-democratic-presidential-race-latino-hispanics-column/3174425002/> (decrying "Beto's manipulative moniker" and stating that "Patrick O'Rourke — Robert Francis' father — once explained that he was the one who gave his son the nickname in the first place and

Or take the example of judges in the state of Florida. Like many other states, Florida elects its judges. As a result, judicial candidates attempt to remain responsive to the electorate and, like other political actors whose job security depends on popularity, they take certain steps to make themselves more appealing to the voter base. Since electoral politics are rife with racial considerations, some judicial candidates in Florida have strategically employed alterations to their names to either accentuate or draw attention away from aspects of their racial identity. Consider the case of Marina Garcia-Wood, a Cuban-born woman of Latino descent, who was running for a seat on Florida's Seventeenth Judicial Circuit in 2006. As of that time, voters in Broward County had never elected a Cuban-born judge to the bench—an unusual state of affairs considering the enormous Cuban population in that part of Florida. Garcia-Wood suspected that, in part, that fact may have reflected the unease a certain portion of the electorate may have had with any Latin judicial candidate.⁹⁵ So, she changed her name—at least for the purposes of her 2006 campaign. At the urging of her campaign advisor, Tony Gargiulo, she dropped her maiden name of Garcia on the actual ballot, so that her name merely reflected her Anglo surname Wood, which she adopted from her ex-husband, Dennis Wood. Garcia-

the reason had a lot to do with politics, as well as geography. . . . [T]he patriarch reasoned that if his son ever ran for office in El Paso, the odds of being elected in that largely Mexican-American city were far greater with a name like Beto.”)

⁹⁵ There appears to be good reason for Garcia-Wood's concern. In 2008, when three Latino judges appointed by Governor Charlie Crist faced re-election for the first time, all three lost (despite the heavy incumbency advantage that judges usually enjoy). All three—Catalina Avalos, Pedro Dijols and Julio Gonzalez—had overtly Latino names. The loss, the Broward Beat reported, “was widely attributed to them having Hispanic names.” Buddy Nevins, *Here We Go Again: Two Hispanic Judges File for Re-Election*, BROWARDBEAT.COM (July 31, 2009), <https://www.browardbeat.com/here-we-go-again-two-hispanic-judges-file-for-re-election/>. In addition, although 53% of Broward County's population is non-white or Hispanic, only ten out of ninety judges come from minority groups. See Tonya Alanez, *Judges Question Election Challenges; All 5 Minority Jurists in This Year's Race Face Opponents*, S. FLA. SUN-SENTINEL, at 1B (July 18, 2010).

Wood was surprisingly transparent about the ploy. As the Florida Sun Sentinel reported:

Garcia-Wood said other Hispanics already knew who she was from her public appearances and campaign literature, where her full name appeared. It was to avoid alienating other Broward residents who might be reluctant to vote for a Hispanic judge, she said, that she heeded the recommendation to delete the ‘Garcia’ part of her name from the ballot.⁹⁶

Under the name Marina G. Wood, Garcia-Wood became presumptively white (or, at the very least, not Hispanic) to those who did not know her. She won her seat and, soon thereafter, returned to her prior moniker. Following suit, in 2012, Olga Maria Gonzalez-Levine ran for a Broward County judgeship and won—under the name “Olga M. Levine.”⁹⁷

In other parts of Florida, candidates have taken a different tact, changing their surnames to more overtly suggest that they share Hispanic heritage as a means to appeal to the large Latino population in the state. In nearby Miami-Dade County, for example, “political observers say targeting candidates with non-Hispanic surnames is a time-honored tactic.”⁹⁸ In a 2006 study on “low-information” elections in Miami-Dade County, political scientists Marsha Matson and Terri Susan Fine suggested that “when candidates’ ethnicity can be inferred from their names on the ballot, Hispanic candidates might be advantaged,” particularly given Miami-Dade’s status as “a county with one of the largest concentrations of Hispanics in the United States.”⁹⁹ Some candidates have taken reports of this perceived ethnic advantage a tad too far. After her 2014 victory over Cuban-American challenger Frank Bocanegra, Judge Jacqueline Schwartz fatuously

⁹⁶ Tal Abbady, *Judge-elect Hopes She Paves the Way for Other Hispanics*, S. FLA. SUN-SENTINEL (Dec. 29, 2006), <https://www.sun-sentinel.com/news/fl-xpm-2006-12-29-0612281172-story.html>.

⁹⁷ Fred Grimm, *South Florida’s Name-Game Politics Has a Familiar Ring*, MIAMI HERALD (Nov. 24, 2014), <https://www.miamiherald.com/news/local/news-columns-blogs/fred-grimm/article4126467.html>.

⁹⁸ David Ovalle, *Ethnic Politics, Ethics Issues Spill Over into Some Judicial Races in Miami-Dade*, MIAMI HERALD (Aug. 1, 2014), <https://www.miamiherald.com/news/local/community/miami-dade/article1978044.html>.

⁹⁹ Marsha Matson & Terri Susan Fine, *Gender, Ethnicity, and Ballot Information: Ballot Cues in Low-Information Elections*, 6 ST. POL. & POL’Y Q. 49, 52–53 (2006).

proclaimed, “I think my re-election is a very significant victory for the people of Miami Dade County,” gloating that “[w]e have gone past the days when any nondescript Hispanic name could go on the ballot and defeat any Anglo sitting judge.”¹⁰⁰

Lest one dismiss such racial theatrics to a case of Floridian exceptionalism,¹⁰¹ political candidates in other regions with large Latino populations have also thought there is value in tangibly marking their latter-day embrace of their (purported) Hispanic roots. Perhaps most cynically of all, after twice running unsuccessfully as a Republican candidate for Congress in Arizona’s heavily Hispanic Seventh Congressional District, Scott Fistler opted to run as a Democrat in 2014 and to change his name.¹⁰² His new name was Cesar Chavez.¹⁰³ His candidacy, not surprisingly, went nowhere.

¹⁰⁰ Kyle Munzenrieder, *Judge Jacqueline Schwartz Boasts about Defeating “Nondescript Hispanic,”* MIAMI NEW TIMES (Nov. 6, 2014), <https://www.miaminewtimes.com/news/judge-jacqueline-schwartz-boasts-about-defeating-nondescript-hispanic-6527336>. As Kyle Munzenrieder quipped, “Finally, a ray of light for the long-disenfranchised Anglo population in American politics . . . Wait, what?” *Id.* As Munzenrieder goes on to observe: “Granted, some have complained that judicial candidates with Hispanic last names tend to do better. Likely because, well, no one really pays that much attention to judicial races and the county has a Hispanic majority. This is not something unique to Miami-Dade. Some say the same could be said of judges with Jewish last names in Broward County.” *Id.*

¹⁰¹ See e.g., Kent Russell, *What Makes Florida So Weird? A Native Tries to Explain*, N.Y. TIMES (July 19, 2016), <https://www.nytimes.com/2016/07/24/books/review/oh-florida-craig-pittman.html> (reviewing a book that grew out of a series chronicling Florida’s “endemic absurdity”).

¹⁰² Evan Wyloge, *Two-Time GOP Loser Changes Party to Democrat, Name to Cesar Chavez for New Congressional Bid*, ARIZ. CAPITOL TIMES (June 2, 2014), <https://azcapitoltimes.com/news/2014/06/02/az-republican-scott-fistler-changes-name-to-cesar-chavez-party-to-democrat-for-new-congressional-bid/>. In the petition accompanying his legal request for a name change, the erstwhile Scott Fistler explained that he had “experienced many hardships because of [his] name.” *Id.*

¹⁰³ The Young Turks, *Republican Pretends He’s a Democrat and That’s Not the Worst Part*, YOUTUBE (June 3, 2014), <https://www.youtube.com/watch?v=CUcYR2g6b5w>.

c. Passing in the Interest of Justice: Racial Fluidity and the Civil Rights Movement

Of course, not all attempts at identity arbitrage are so cynical. In fact, some constitute veritable acts of courage and sacrifice. On the streets of New Orleans, Homer Plessy, the plaintiff in *Plessy v. Ferguson*, readily passed as a white person since “the mixture of African blood [was] not discernable in him.”¹⁰⁴ In the opening brief of his Supreme Court case, his attorney, Albion Tourgée, noted as much, claiming that Plessy’s ability to pass as white constituted a protected property interest in the “reputation of being white.”¹⁰⁵ But when recruited for the purpose of bringing a lawsuit to challenge the segregation, Plessy willingly embraced his blackness. Of course, he did not do so for gain or to manipulate any system. But there was a level of agency in his defiant act that brought the force of the state’s discriminatory segregation regime upon him to confer him with legal standing to challenge the constitutionality of the practice. Many African-Americans living in the Jim Crow South had no choice, but Plessy did. Plessy strategically racialized himself for the purposes of litigation in an attempt to undo a vast injustice. Similarly, Walter White, an African-American member of the NAACP, used his lighter features to pass as white and conduct invaluable investigations into hate crimes in the Deep South during the early part of the twentieth century.¹⁰⁶

d. Racial Fluidity and the Alignment of Personal and Professional Interests: Sliding Along the Racial Spectrum

The purpose and morality of racial arbitrage decisions typically lies somewhere between the tactical ploys of elected officials looking for an advantage at the voting booth and the noble work of Homer Plessy and

¹⁰⁴ CHARLES A. LOFGREN, THE PLESSY CASE 41 (1987) (citing the formal plea in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

¹⁰⁵ Brief for Plaintiff in Error, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660, at *9 (arguing that “[p]robably most white persons if given a choice, would prefer death to life in the United States as colored persons. Under these conditions, is it possible to conclude that the reputation of being white is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?”) (emphasis omitted).

¹⁰⁶ WALTER WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE (1948).

Walter White in exploiting their racial fluidity to fight for civil rights. More often than not, in practice, exploitation of racial fluidity is just about individuals attempting to align their interests and goals, both personal and professional, with their sense of identity. Two examples from mid-twentieth-century America illustrate this point while featuring opposite moves along the racial spectrum.

The son of Welsh/Irish-American Samuel Stuart Williams and Mexican-American May Venzor, Theodore Samuel Williams was born in 1918 in the North Park neighborhood of San Diego, less than twenty miles north of the border. Williams concealed his non-white heritage and lived his public life as a white man. More commonly known as Ted, he grew up to be one the greatest baseball players of all-time.

Williams came to the majors during the time of the infamous Gentleman's Agreement, an implied compact amongst Major League Baseball owners which rigidly patrolled color lines and altogether prevented African-Americans from playing in the Big Leagues. Latinos did not fare much better during the pre-integration era.¹⁰⁷ So Williams said nary a word about his Latino heritage until his playing days were long over.¹⁰⁸ Instead, with his Anglo name, he strategically passed as white. Williams's choice certainly assisted his professional goals¹⁰⁹ and served his unflagging obsession

¹⁰⁷ As Adrian Burgos notes, "during the Jim Crow era (late 1880s to 1947) nearly all Latinos played in the Negro leagues, not in the major leagues." ADRIAN BURGOS, JR., *PLAYING AMERICA'S GAME: BASEBALL, LATINOS, AND THE COLOR LINE* xiii (2007). By Burgos' count, however, a total of fifty-four Latino players broke into the Majors before baseball's integration era started in 1947. *Id.* at 4.

¹⁰⁸ Williams did not make his mother's racial identity public until his 1970 autobiography, which came out long after his playing days were over. *See id.* at 149. In it, Williams wrote: "if I had had my mother's name, there is no doubt I would have run into problems in those days, the prejudices people had in Southern California." TED WILLIAMS, *MY TURN AT BAT* 28 (1970).

¹⁰⁹ While one might criticize Williams's choice, it's also worth noting that he was instrumental in baseball's latter-day recognition of the remarkable players from the Negro Leagues who never had a chance to play Major League Baseball. In his 1966 Hall of Fame induction speech, Williams took time to call for the celebration of the many great African-American baseball players who toiled outside of the Big Show as a result of the era's bigotry.

to become (and, more pointedly, *be known as*) “the greatest hitter that ever lived.”¹¹⁰

During the exact same era, another famous American chose to slide along the racial spectrum in the opposite direction. Born in 1921, musician Johnny Otis—one of the greatest band leaders and composers of the swing era—was a Greek-American who grew up in an era of contested racialization for individuals of Mediterranean descent.¹¹¹ Raised in a largely African-American community, he wrote in his autobiography that, “[a]s a kid I decided that if our society dictated that one had to be black or white, I would be black.”¹¹² Otis thereafter thought of himself as “black by persuasion.”¹¹³ He used the term “we” when talking about African-Americans and he would stay in “colored-only” hotels in the South while on tour with black bandmates.¹¹⁴ He married a woman of African and Filipino descent and collaborated with predominantly African-American musicians in playing his influential brand of rhythm and blues. Other musicians of the era made similar choices—sometimes more surreptitiously. Little Julian Herrera was a notable singer in the 1950s and popularly regarded as the “first Chicano R&B heartthrob.”¹¹⁵ But, it turned out, he was not Chicano at all. A brush with the law revealed that he was actually one Robert Wayne Gregory, a Caucasian of Hungarian Jewish extraction.¹¹⁶ Though the racial choices made by Herrera and Otis came, no doubt, with heavy costs, they may well

¹¹⁰ See TED WILLIAMS & JOHN UNDERWOOD, *THE SCIENCE OF HITTING* vi (Simon & Schuster, Inc. 1986) (1970).

¹¹¹ Greek-Americans suffered from extensive discrimination during this time, though this is not to suggest that the burdens of Jim Crow fell on them as harshly as it did on other groups, such as African-Americans. See Tehranian, *Compulsory Whiteness*, *supra* note 3, at 9.

¹¹² JOHNNY OTIS, *LISTEN TO THE LAMBS* xl (1968).

¹¹³ *Id.* at xi.

¹¹⁴ See John Blake, *The Blurring of Racial Lines Won't Save America. Why 'Racial Fluidity' is a Con*, CNN (June 11, 2018, 1:23 PM), <https://www.cnn.com/2018/03/02/us/racial-fluidity/index.html> (describing Otis's tendencies to stay with black bandmates while on tour).

¹¹⁵ Bob Carlson, *Little Julian's Secret*, KCRW: UNFICTIONAL (May 23, 2014), <https://www.kcrw.com/culture/shows/unfictional/little-julians-secret>.

¹¹⁶ See 9 BEYOND ALLIANCES: THE JEWISH ROLE IN RESHAPING THE RACIAL LANDSCAPE OF SOUTHERN CALIFORNIA (Bruce Zuckerman et al. eds., 2012) (noting that Julian Herrera was actually born Ron Gregory).

have served certain professional interests, particularly when one can surmise that, in the worlds of Chicano music and rhythm and blues, they may have enjoyed some advantages for adopting the racial identity of the dominant players in the genres.¹¹⁷

2. *Racial Fluidity and Its Limits*

Individuals therefore exercise some level of choice over their racial identification and do so based on a variety of conscious and unconscious motivations. This freedom to choose is tacitly acknowledged, if not encouraged, by a number of bureaucratic policies.¹¹⁸ Despite the widespread availability of DNA testing, for example, there are no blood quotient requirements to determine race at law (at least not anymore).¹¹⁹ Since 1960, the Census has left it up to individuals themselves to declare their own race;¹²⁰ the Census merely gives some guidance and then allows people to check the box of their own choosing. On other government forms that individuals fill out themselves, individuals are usually free to self-designate without strict

¹¹⁷ One may also fairly question whether both Otis's and Herrera's gambits also involved the exertion of white privilege—the ability to become a racial minority when convenience serves while retaining the option of being white at any time. Although racial fluidity—if possessed by all, on equal terms—may not inherently possess a valence, there is evidence to suggest that moving from white to non-white may be far easier than the other way around. See *infra* Part I.B.2 (discussing the limits of racial fluidity).

¹¹⁸ For all of the judicial solicitude to the concept of race as immutable, the government's bureaucratic deference to self-selection of race appears to acknowledge at least some level of agency in the identification process.

¹¹⁹ A remaining exception to this general proposition is blood quotient requirements for recognition in certain Native American tribes—a requirement that, at first blush, appears at tension with the notion that Native American status is legally deemed to be a political designation, not a racial one. See *Morton v. Mancari*, 417 U.S. 535 (1974) (holding that Native American is a political, rather than racial, classification and therefore not subject to heightened equal protection scrutiny).

¹²⁰ See, Helen Hatab Samhan, *Not Quite White: Race Classification and the Arab-American Experience*, in *ARABS IN AMERICA: BUILDING A NEW FUTURE* 209, 215 (Michael W. Suleiman ed., 1999) (linking the concept of self-enumeration as a census policy to the shift, in the 1960s, to a mailed census); MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 201 (1988) (noting that the 1960 census differed from its predecessors by asking respondents to self-identify their race). Prior to 1960, official Census Interviewers would mark race based on their perception of the individuals they were surveying.

rules.¹²¹ Thus, when Nikki Haley—who would later go on to be the first Indian-American woman elected to the governorship of any state—showed up to register to vote in South Carolina in 2001, she designated herself as ‘white.’¹²² When she speaks in public, however, she often identifies herself as a member of a racial minority.¹²³ Of course, it is impossible to know the reasons for her ‘white’ self-designation in her voting paperwork, but one cannot help but wonder if it reflected an unconscious cognizance of the centuries-long efforts to suppress, if not outright deny, the non-white vote.

To be sure, the freedom to choose one’s race only goes so far. Society may push back and, with its interventions, strongly curb the ability of an individual to actually practice a particular self-identification. After all, society has shown little interest in accepting Rachel Dolezal’s self-designation as black¹²⁴ or Elizabeth Warren’s self-designation as Native American.¹²⁵ And when a Nazi skinhead is beating up an individual of Middle Eastern descent, discussions about their shared Aryan roots (in the “dim reaches of antiquity”¹²⁶), Blumenbach’s skull collection,¹²⁷ and the Mesopotamian

¹²¹ Directive 15 of the Office of Management and Budget, revised in 1997, strongly encouraged race-data collection efforts to focus on enabling individuals to select their own racial status and formally asserted that self-identification was “the preferred means of obtaining information about an individual’s race and ethnicity.” See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,785 (Oct. 30, 1997).

¹²² Siddhartha Mahanta, *Indian Nikki Haley Says She Is White*, MOTHER JONES (July 29, 2011), <https://www.motherjones.com/politics/2011/07/indian-nikki-haley-says-she-is-white/>.

¹²³ See, e.g., Jelani Cobb, *The Complicated History of Nikki Haley*, NEW YORKER (Jan. 13, 2016) (noting that Haley has publicly referenced “the prejudices she encountered as part of the only Sikh family in Bamberg, South Carolina, which was ‘not white enough to be white, not black enough to be black.’”).

¹²⁴ Orbe, *supra* note 28, at 35 (noting that Dolezal’s identification as African-American was “largely rejected” by popular opinion).

¹²⁵ Linsky & Gardner, *supra* note 29 (noting that Warren apologized for her identification after “she took [a DNA test] to demonstrate her purported heritage, a move that prompted a ferocious backlash even from many allies.”).

¹²⁶ *United States v. Thind*, 261 U.S. 204, 209 (1923).

¹²⁷ Johann Friedrich Blumenbach, the father of the pseudoscience of phrenology, famously classified humanity into four races. He deemed his favorite (the white, or Caucasian, race) after the most prize skull in his collection—that of a woman from the caucuses—that he deemed most harmoniously proportioned. See *supra* note 4.

origins of western civilization are not going to move the needle. Racial belonging can be imposed, sometimes with lethal force. At the same time, however, a growing body of evidence has revealed a surprisingly high level of agency in the process of racialization. This empirical work also suggests that factors other than mere passing or covering are at play in the process.

3. *Capturing Racial Fluidity Rates: The Growing Body of Empirical Research*

The enterprise of determining variance rates in racialization is, admittedly, fraught with uncertainty. However, an emerging empirical literature in the social sciences has begun to indicate that such rates may be more robust than previously thought. The unwitting results produced from a decades-long U.S. Bureau of Labor Statistics longitudinal study that began in 1979 provide surprising support for this view. In the study, the Bureau traced the economic histories of 12,686 (initially) young men and women through the years.¹²⁸ Later, as two sociologists, Aliya Saperstein and Andrew M. Penner, evaluated the study's data, they found something quite unexpected: *peoples' races were changing over time*.¹²⁹ In other words, the very same individuals were being coded as different races over different reporting periods (either annual or biennial) by the survey interviewers. As Saperstein and Penner noted, despite all the rhetoric about race as a social construction, sociological studies almost universally take race as a given input¹³⁰ and situations involving the malleability of race are generally assumed to be outliers, limited to individuals falling into one of three circumstances:

- (1) a small minority of present-day Americans with widely recognized mixed ancestries, such as Latinos, American Indians, and the children of the post-1960s "biracial baby boom";
- (2) macro level changes in social hierarchies that marked historical epochs in the United States, such as the early 20th

¹²⁸ *National Longitudinal Surveys: NLSY79*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/nls/nlsy79.htm> (last updated June 25, 2003).

¹²⁹ Aliya Saperstein & Andrew M. Penner, *Racial Fluidity and Inequality in the United States*, 118 AM. J. SOC. 678 (2012).

¹³⁰ *Id.* at 680 ("Qualitative researchers also often, if inadvertently, treat membership in any given racial population as an underlying fixed characteristic.") (citation omitted).

century ‘whitening’ of southern and eastern Europeans; or (3) places with a high degree of racial mixing, such as Brazil.¹³¹

Yet the survey studied by Saperstein and Penner suggested that we have significantly underestimated the breadth of race malleability. Specifically, in a whopping 20% of instances, the reported race of a given surveyed individual changed at least once between 1979 and 1998.¹³²

All the while, there were some disturbing tendencies associated with the pattern of change. As subjects suffered lower social status (through incarceration, unemployment, divorce, or poverty), they became blacker in the interviewers’ eyes. As they gained social status, interviewers viewed them as whiter. For example:

- Individual 9372 had been categorized as “other” three times while employed (*i.e.*, “black” 0% of the time).¹³³ After unemployment, this individual was categorized as “black” 13 out of 14 times (*i.e.*, “black: 93% of the time).¹³⁴
- Individual 9969 was classified as “white” 11 of 11 times while employed (*i.e.*, “white” 100% of the time).¹³⁵ After unemployment, this individual was categorized as “other” 4 out of 6 times (*i.e.*, “white” just 33% of the time).¹³⁶
- Individual 9266 was classified as “white” 3 out of 4 times during employment (*i.e.*, “white” 75% of the time)¹³⁷ After unemployment, this individual was categorized as “black” or other 10 out of 11 times (*i.e.*, “white” just 9% of the time).¹³⁸

The participants clearly “enjoyed” racial fluidity. But this was no cause for celebration. The changes were intricately tied to social status, something about which individuals have only a limited level of control. More troublingly, the linking of social status to race only further accentuates damaging racial stereotypes, building them like an avalanche since those who defy them effectively get moved out of the very racial category that allegedly

¹³¹ *Id.* at 677.

¹³² Sometimes these changes would persist; other times, people would eventually return to their originally designated race. *Id.* at 688.

¹³³ *Id.* at 706.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

embodies such traits. As such, while racial identities may be more fluid at the individual level, racial categories and associated prejudices at the macro level may only be hardening in our societal structure.

The Saperstein and Penner study showed shifting external identifications of race based on changing socioeconomic indicia for the racialized individuals. However, changes in race also occur in terms of self-identification. A comprehensive review of Census data found that nearly ten million Americans responded differently when asked about their race or Hispanic origin in the 2000 Census versus the 2010 Census, even though the categories for both surveys remained largely the same.¹³⁹

Meanwhile, in another recent study, political scientist Patrick Egan found that ostensibly stable identities such as race and sexual orientation changed over time in response to political opinions.¹⁴⁰ Using three waves of General Social Survey data and controlling for other changes, he found that individuals actually morph key group identities to better conform with prototypical demographics associated with their political ideology. For example, his data showed that individuals who are liberal Democrats tend to become “more” Hispanic over time—meaning that they shift their racial identification to better match the perceived demographics of their political identity—and conservative Republicans tend to become “less” Hispanic over time.¹⁴¹ As Egan concludes:

[T]he highly salient nature of political identities in contemporary U.S. politics can lead them to supersede other identities we typically think of as fixed, and thus counter-intuitively causing these identities to change to better align with partisan and ideological prototypes . . . Conservative Republicans are more likely than liberal Democrats to shift into identification as born-

¹³⁹ Carolyn A. Libeler et al., *American's Churning Races: Race and Ethnic Response Changes Between Census 2000 and the 2010 Census* 3–4 (Ctr. for Admin. Records Research and Applications, Working Paper No. 2014-09, 2014), <https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-09.pdf>.

¹⁴⁰ Egan, *supra* note 77, at 2 (hypothesizing that “the highly salient nature of political identities in contemporary U.S. politics can lead them to supersede other identities we typically think of as fixed, and thus counter-intuitively causing these identities to change to better align with partisan and ideological prototypes”).

¹⁴¹ *Id.* at 17–18.

again Christian, Protestant, and national origins associated with being non-Hispanic white. Liberal Democrats are more likely than conservative Republicans to shift into identification as lesbian, gay or bisexual, having no religion, and being of Latino origin.¹⁴²

C. Racial Fluidity in Practice: A Case Study of Kim Kardashian

None other than the most ubiquitous celebrity of our generation, Kim Kardashian, illustrates the process of racial mutability in action and highlights the role that both society and individuals play in racial hermeneutics. Journalist Erin Keane once quipped that, “Like a round, shiny mirror, [Kim] Kardashian’s butt reflects back to us our myriad cultural panics and anxieties, inviting us to oil them up and present them to the world.”¹⁴³ It should therefore come as no surprise that, even on the issue of race, Kim Kardashian and her backside have relevance.

Kardashian’s racial identity has long been the subject of attention, interest, and speculation. The way in which it is shaped implicates both the first and second iterations of mutability. Part of Kardashian’s racial identity remains wholly out of her control, but is subject to change and is therefore mutable nonetheless. As we have already detailed, by historical standards that prized Anglo-Saxon stock, as an individual of Armenian descent,¹⁴⁴ Kardashian was decidedly not white. But then again, consider this: neither are most of you.

From a modern legal point of view, and in contrast to the historical view, Kim is undoubtedly white. Her descendants literally trace their origins to the Caucasus Mountains, the site of ethnologist Johann Friedrich Blumenbach’s favorite skull. And, according to the Federal Government, anyone of European, Middle Eastern, or North African descent is defined as white by law. Of course, under this precedent, Winston Churchill, Adolf

¹⁴² *Id.*

¹⁴³ Erin Keane, *All the Things We Project onto Kim Kardashian’s Butt: How One Woman’s Rear-End Came to Mean Everything*, SALON.COM (Nov. 12, 2014), https://www.salon.com/test/2014/11/12/all_the_things_we_project_onto_kim_kardashians_butt_how_one_womans_rear_end_came_to_mean_everything.

¹⁴⁴ For the purposes of this analysis, we are considering just Kardashian’s Armenian heritage.

Hitler, Paris Hilton, Saddam Hussein, Muammar Gaddafi, and Kim Kardashian are all deemed white by law.

At the same time, in some ways, Armenian-Americans have been growing decidedly less white in the past two decades. Specifically, the law's (purported) precision belies the inherent instability of social constructions of race. To put it bluntly, in the post-9/11 world, when individuals of Middle Eastern descent are at the airport, they are not white. When individuals of Middle Eastern descent are accused of a crime, they are not white. And while Steve Jobs (a Syrian-American¹⁴⁵) might be just another white male CEO, Ralph Nader (Lebanese-American¹⁴⁶) another white politician, and Andre Agassi (Iranian-American¹⁴⁷) another white tennis player, no one calls Osama bin Laden, Saddam Hussein, Nidal Hassan or Syed Farook white. Moreover, with the creation of the MENA category, individuals of Armenian descent may be finding themselves officially changing race.¹⁴⁸ With these realities in mind, Kim Kardashian may be legally white for now, but perhaps not for much longer. Racial definitions continue to be fluid, even to this day—and not just by law (i.e., what the Federal Government ultimately decides to do with the proposed MENA category) but also in social perception.

¹⁴⁵ See *Steve Jobs: Adopted Child Who Never Met His Biological Father*, TELEGRAPH (Oct. 6, 2011, 4:00 PM BST), <https://www.telegraph.co.uk/technology/steve-jobs/8811345/Steve-Jobs-adopted-child-who-never-met-his-biological-father.html> (noting that Steve's biological father, Abdulfattah Jandali, was a Syrian immigrant).

¹⁴⁶ See CRONIN MARCELLO, *RALPH NADER: A BIOGRAPHY* (2004) (noting that Nader was the son of Lebanese immigrants and even spent a portion of his childhood living in Lebanon).

¹⁴⁷ DOMINIC COBELLO, MIKE AGASSI & KATE SHOUP WELSH, *THE AGASSI STORY* (2008) (noting that Agassi's father, Mike, "was born in Persia – later called Iran – in 1930 to Armenian parents" and later emigrated to the United States).

¹⁴⁸ Whether Armenians count in the MENA category is still up in the air. But the country of Armenia abuts the geographic area often referred to as the Middle East and many Armenians have historically populated the region. The Armenian diaspora is particularly large in such countries as Iran, Lebanon, and Syria, especially in the wake of the genocide it suffered last century. However, Armenians were not listed in the initial draft of the classification.

But, perhaps most importantly, Kardashian also plays a role in how she is racialized. Whether consciously or not, she wields a level of control in the process herself. In some contexts—when she talks about her experience raising a “bi-racial” child and witnessing, for the first time, racism and discrimination¹⁴⁹—she very much plays white. She grew up wealthy and privileged and her mother, Kris, is popularly perceived of as white. In other contexts—for example, when she ‘breaks the Internet’¹⁵⁰ and monetizes her assets by presenting herself a bold and ‘exotic’ vision of beauty that stands in stark contrast to the waifish Anglo-Saxon blonde traditionally embraced by the fashion industry¹⁵¹—she plays ‘ethnic.’ To some, she even enjoys ‘honorary black’ status in the African-American community. With the (half) Armenian heritage that shapes her phenotype, her looks (the purported hallmark of common understandings of race) and aspects of how she presents herself (an underappreciated factor that impacts people’s perceptions of race), she might be viewed as non-white. In short, the single best word to capture the reality of Kardashian’s racial identity is *fluid*; over time and in different contexts, she has occupied numerous spots along the American racial spectrum.

¹⁴⁹ See, e.g., Kim Kardashian, *On My Mind*, CELEBUZZ (May 7, 2014), <http://kimkardashian.celebuzz.com/2014/05/07/on-my-mind/> [https://perma.cc/9RVQ-R39D] (“To be honest, before I had North [her son with Kanye West], I never really gave racism or discrimination a lot of thought. It is obviously a topic that Kanye is passionate about, but I guess it was easier for me to believe that it was someone else’s battle. But recently, I’ve read and personally experienced some incidents that have sickened me and made me take notice. I realize that racism and discrimination are still alive, and just as hateful and deadly as they ever have been.”).

¹⁵⁰ See, e.g., David Herskovits, *How Kim Kardashian Broke the Internet with Her Butt*, GUARDIAN (Dec. 17, 2014), <https://www.theguardian.com/lifeandstyle/2014/dec/17/kim-kardashian-butt-break-the-internet-paper-magazine> (positing that “Paper magazine’s winter issue, with the cover shot of Kim Kardashian by Jean-Paul Goude, set out to #BreakTheInternet”).

¹⁵¹ See, e.g., Savannah Munoz, *Kim Kardashian and the Politics (and Privilege) of Being Racially Ambiguous*, SUBSTANCE.MEDIA (Feb. 22, 2018), <https://substance.media/kim-kardashian-and-the-politics-and-privilege-of-being-racially-ambiguous-bfa9cf1a2636> (arguing that Kardashian’s “body’s racial ambiguity allows her to move between her own whiteness and shallowly associate herself with people of color when she needs to be cool, relevant and ‘ethnic.’ Rather than genuinely engage with communities of color, Kim K morphs her body into any race and/or ethnicity she pleases. She’s Black when she needs publicity and relevance, Armenian when she needs to be ‘ethnic,’ and white when shit starts getting real.”).

II. IMMUTABILITY AND ITS DISCONTENTS

As Part I has demonstrated, race is far from immutable. Yet, paradoxically, its purported immutability lies at the very heart of our equal-protection jurisprudence. Part II explores the consequences of the dichotomy between the legal fiction of racial immutability and the practical reality of racial fluidity. To begin, we examine the curious, accidental history of how immutability made its way into equal-protection doctrine in the first place. We then build on this history by assessing the impact of the immutability factor on the development of juridical respect for the dignitary interests of minority groups that come under the scope of its protection. Using the Supreme Court's evolving jurisprudence on sexual orientation as an example, we argue that, although the rooting of protection on the purported immutability of a trait may make sense in achieving early judicial tolerance for the targeted group, the fetishization of immutability ultimately impedes the fight against subordination and the achievement of a meaningful social equality that is grounded in acceptance.

A. *The Accidental Elevation of Immutability in Equal-Protection Jurisprudence*

One of the strangest aspects of immutability's doctrinal history is the fact that it had no formal role in the Supreme Court's constitutional jurisprudence until 1973, when it made its way into the argot of equal-protection law with *Frontiero v. Richardson*,¹⁵² the first case in which the Supreme Court recognized heightened scrutiny of gender-based classifications. Prior to that time, immutability was not a consideration in the juridical calculus for identifying suspect classes. It is not surprising that the issue of immutability did not come up with respect to cases involving African-Americans. After all, although the Court often issued troubling interpretations of the Equal Protection Clause, there was little question that the Fourteenth Amendment applied to laws targeting blacks. But, it is worth noting that, once the Supreme Court finally expanded equal protection to

¹⁵² *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

laws pertaining to any race, it continued to say nothing about immutability as a factor in its rationale.¹⁵³ If anything, the Court justified its decision to expand heightened scrutiny to all racial classifications (not just those pertaining to African-Americans) by an appeal not to the immutability of race, but to the *mutability of racism*:

Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and, from time to time, other differences from the community norm may define other groups which need the same protection.¹⁵⁴

When the Supreme Court subsequently widened its interpretation of the Equal Protection Clause beyond merely race-based distinctions, immutability played no role in that decision either, at least initially. For example, the Court made no mention of immutability when it extended heightened scrutiny to alienage classifications for the purposes of equal-protection analysis with its decision in *Graham v. Richardson*.¹⁵⁵ Instead, *Graham* simply considered whether aliens should enjoy “heightened judicial solicitude”¹⁵⁶ when courts review laws that singled them out, because they, like members of non-white races, constituted “discrete and insular” minorities per footnote four of *Carolene Products*.¹⁵⁷ Similarly, when the Supreme Court suggested that illegitimacy might constitute a suspect category, it also eschewed any consideration of immutability. Instead, quoting *King Lear*, the Court noted that, just like classifications based on race, those relating to legitimacy reflected a long history of discrimination grounded in nothing more than naked animus.¹⁵⁸ As the Court further posited, legitimacy classifications violated fundamental norms of fairness because “imposing disabilities on the illegitimate child is contrary to the basic

¹⁵³ See *Hernandez v. Texas*, 347 U.S. 475 (1954).

¹⁵⁴ *Id.* at 478.

¹⁵⁵ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁵⁶ *Id.* at 372.

¹⁵⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

¹⁵⁸ *Levy v. Louisiana*, 391 U.S. 68, 71, 72 (1968) (positing that the Court has “not hesitated to strike down an invidious classification even though it had history and tradition on its side” and citing to *Brown v. Board of Education*).

concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.”¹⁵⁹ Thus, it was not so much the immutable nature of one’s birth status that triggered heightened scrutiny but, rather, the absence of a link between use of the classification and any meaningful merit.

But when the Supreme Court finally expanded its reading of the Equal Protection Clause to include classifications based on gender in 1973, immutability suddenly appeared as a valuable heuristic. To understand this unexpected move, it is helpful to take a step back and appreciate the challenges facing the application of equal protection to gender classifications. First, from a textualist point of view, the Fourteenth Amendment says nothing expressly about gender.¹⁶⁰ Second, from an originalist point of view, its immediate purpose, in the eyes of those who enacted it during Reconstruction, related to the (newly emancipated) African-American population. As such, at the early stages of its invocation, the Supreme Court deemed the Equal Protection Clause to apply to classifications involving African-Americans alone.¹⁶¹ It was not until 1954, with *Hernandez v. Texas*, that the Court expressly held that any racial classification by the government was subject to equal-protection scrutiny.¹⁶² Third, and perhaps most

¹⁵⁹ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 177 (1972).

¹⁶⁰ At the same time, unlike the Fifteenth Amendment, which expressly limits its application to race, the Equal Protection Clause does not expressly do so, thereby leaving it open as to what equal protection means and to what classifications it might particularly pertain. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

¹⁶¹ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (“the clause which forbids a State to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the States where he had been a slave, and, for this purpose, the clause confers ample power in Congress to secure his rights and his equality before the law.”)

¹⁶² See *Hernandez v. Texas*, 347 U.S. 475, 477–78 (1954) (“The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. . . . But . . . [w]hen the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The

problematically, the Court had to overcome the fact that, unlike discrimination on the basis of other recognized suspect categories such as race, national origin, legitimacy or alienage, the typical victims of gender discrimination—women—were not, at least numerically and post-suffrage, a “discrete and insular minority”¹⁶³ without any ability to turn to majoritarian political processes for redresses of grievances.

Within this context, the *Frontiero* Court needed grounds beyond the failure of the political process¹⁶⁴ to warrant extension of heightened scrutiny to gender issues. So the Court analogized gender to race in other ways. The long and shared history of irrational and unjustifiable discrimination on the basis of both race and gender helped advance the argument for suspect-class status. More importantly, for our purposes, the Court latched on to the concept of immutability, which both classifications seemed to share. In the process, the Court made immutability one of the key factors considered by courts in determining whether a trait is subject to heightened scrutiny under

Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.”). The march towards *Hernandez*’s overt adoption of this broader reading of the Equal Protection Clause began with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that discriminatory enforcement of San Francisco’s permitting requirement for certain types of laundry services constituted a violation of the equal protection rights of individuals of Chinese descent).

¹⁶³ Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1452 (1999) (quoting *Frontiero* oral arguments and their referencing of footnote four from *Carolene Products*).

¹⁶⁴ It is worth noting, however, that the political process had failed women, and numerous discriminatory laws and policies grounded in gender bias and outmoded notions of proper gender roles have been enacted even though women represent the majority of the electorate. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685–86 (1973) (noting that, even though “the position of women in America has improved markedly in recently decades . . . women still face pervasive, although at times more subtle, discrimination”). Furthermore, although the numbers are getting better, women continue to constitute only a disproportionately small minority of elected officials. See, e.g., Danielle Kurtzleben, *Almost 1 in 5 Congress Members Are Women*, NPR (June 11, 2016, 6:00 AM), <https://www.npr.org/2016/06/11/481424890/even-with-a-female-presumptive-nominee-women-are-underrepresented-in-politics> (noting that, as of 2016, women constituted only 24.5% of state legislators, 19.4% of Members of Congress, and 12% of governors).

the Equal Protection Clause.¹⁶⁵ And it did so by drawing on prior legal commentary rather than legal precedent.

Specifically, as Donald Braman has traced,¹⁶⁶ it was not a court opinion but the 1969 series on *Developments in the Law* published by the *Harvard Law Review* (“*HLR*”) that first linked immutability and equal protection in the legal discourse.¹⁶⁷ In its influential commentary, the *HLR* Editorial Board sought to reconcile the extant equal-protection jurisprudence at the time. In an attempt to rationalize instances where the courts would subject legislative action to heightened scrutiny with those in which they declined to do so, the authors drew a distinction between definitions of status linked to merit and those that are not. According to the Editors, immutability served as a common thread unifying classifications in the latter category (such as race and national origin). *Frontiero* built on this logic, expressly citing to the *HLR*’s commentary in suggesting that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”¹⁶⁸ and, as such, differentiation based on gender is generally without merit. As a result, *Frontiero* held that distinctions based on gender would face heightened scrutiny¹⁶⁹ since the “most stringent level of [judicial review]” applied to governmental distinctions drawn on the basis of immutable traits.¹⁷⁰

¹⁶⁵ Courts also consider a history of discrimination against the group, the lack of any link between the group’s trait and ability to perform or contribute to society, and political powerlessness of the group. See, e.g., *Whitewood v. Wolf*, 992 F. Supp. 2d. 410 (M.D. Pa. 2014) (summarizing the extant jurisprudence establishing the four factors to determine heightened scrutiny).

¹⁶⁶ Braman, *supra* note 163, at 1447–48.

¹⁶⁷ *Developments in the Law—Equal Protection (The Concept of Equality: The View from a Wide Perspective)*, 82 HARV. L. REV. 1065 (1969).

¹⁶⁸ *Frontiero*, 411 U.S. at 686.

¹⁶⁹ Ultimately, of course, the Court arrived at application of intermediate, rather than strict, scrutiny to gender-based classifications. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). But see *United States v. Virginia*, 518 U.S. 515, 524 (1996) (requiring that the government provide an “exceedingly persuasive justifications” for any discrimination on the basis of gender).

¹⁷⁰ *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring).

In the years following *Frontiero*, the decision's immutability language caught on and, in future encapsulations of the Court's equal-protection jurisprudence, it would take center-stage. As the Court would opine only a few years later in *Fullilove v. Kluznick*, a remedial race benefits case decided in 1980, "Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision."¹⁷¹ Curiously, the Court's citation for this proposition, *Anderson v. Martin*,¹⁷² was a race-related case that made no mention of immutability at all.¹⁷³ Similarly, in *Parham v. Hughes*, an illegitimacy case decided in 1979, the Court concluded that "[T]he [ordinary] presumption of statutory validity may also be undermined [on equal protection grounds] when a State has enacted legislation creating classes based upon certain...immutable human attributes."¹⁷⁴ To support this proposition, the Court cited to both alienage and legitimacy cases decided prior to *Frontiero*—cases that also made no mention of immutability as a consideration.¹⁷⁵ Immutability, despite its previous absence from constitutional jurisprudence, had now become an entrenched part of the equal-protection calculus—even though the integration was accomplished accidentally, at best (or, more cynically, through judicial legerdemain).

B. From Tolerance to Acceptance: Immutability and the Realization of a More Robust Equal-Protection Doctrine

The uncritical introduction of immutability into the equal-protection calculus is not, by itself, reason enough to do away with the factor. After all, there may be good reason and utility behind the concept, even if it were introduced so haphazardly and adopted disingenuously, without careful consideration. But, as we shall see, there are significant reasons to question the continued use of the immutability heuristic.

¹⁷¹ *Id.*

¹⁷² 375 U.S. 399 (1964).

¹⁷³ *See id.* at 402–404.

¹⁷⁴ *Parham v. Hughes*, 441 U.S. 347, 351 (1979).

¹⁷⁵ *Id.* at 351 (citing *Gomez v. Perez*, 409 U.S. 535 (1973) and *Graham v. Richardson*, 403 U.S. 365 (1971)).

At the outset, the immutability assumption simply does not reflect reality. For example, gender is no longer viewed as immutable. A society-wide sea change has taken place in recent years, as we have increasingly recognized (albeit with pushback) gender fluidity. Gender is now viewed as a prime *malleable* component of identity. To give a single random example, Harvard University's Registrar's Office has a standardized form for students and alumni to fill out for changes in their official documentation. It allows modification along just three metrics: name, marital status, and gender.¹⁷⁶ Indeed, an entire bureaucratic infrastructure has begun to develop to show respect for, and give a voice and recognition to, gender fluidity, by, inter alia, facilitating changes of gender on passports and driver's licenses.¹⁷⁷ Of course, as the Trump administration's ban on transgender service members¹⁷⁸ indicates, there is still a great deal of work to do to achieve full protection for the rights of the transgendered. But, despite some retrenchment, both federal and state protections of gender identity have expanded notably over

¹⁷⁶ *Name and/or Gender Change Request Form*, HARV. UNIV. FAC. ARTS & SCI. REGISTRAR'S OFFICE, https://registrar.fas.harvard.edu/files/fas-registrar/files/name_and_gender_change_request_form.pdf (last updated June 2018).

¹⁷⁷ The Federal Government allows changes to passports, and most states now allow changes for driver's licenses and other records. *Change of Sex Marker*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT OF STATE, <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/change-of-sex-marker.html> (last visited Sept. 13, 2019); see, e.g., Laurel Wamsley, *Oregon Adds A New Gender Option To Its Driver's Licenses: X*, NPR (June 16, 2017, 12:36 PM), <https://www.npr.org/sections/thetwo-way/2017/06/16/533207483/oregon-adds-a-new-gender-option-to-its-driver-s-licenses-x?t=1568381169656>.

¹⁷⁸ Memorandum from President Donald J. Trump, to James Mattis, Sec'y of Def., U.S. Dep't of Def., and Elaine Duke, Acting Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 587 (Aug. 25, 2017) <https://www.gpo.gov/fdsys/pkg/DCPD-201700587/pdf/DCPD-201700587.pdf>; U.S. DEPT OF DEF., REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS (2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

the past decade.¹⁷⁹ And, as our analysis has shown,¹⁸⁰ race is also not immutable.¹⁸¹ Thus, the key traits deemed immutable by the courts are not immutable after all.

Yet there is good reason to continue to protect both race and gender with heightened scrutiny. So, if it is not their immutability that warrants such protection, we must reasonably ask what it is about characteristics such as race and gender that justifies the Courts' presumption that laws drawing distinctions based on them are invalid. When cast in this light, we see that equal protection is fundamentally about the preservation of fairness and the counter-majoritarian check that judicial review provides against laws borne of irrational prejudice.

Even without considering the mutability of race and gender, immutability's role in Fourteenth Amendment jurisprudence has not been without controversy. John Hart Ely, for one, strongly questioned reliance on the factor in noting that regulations pertaining to immutable characteristics, such as intelligence or physical disability, are not usually subject to heightened scrutiny: "The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?"¹⁸² Taking Ely's point a step further, Janet Halley has observed¹⁸³ that, although the Supreme Court has rejected heightened scrutiny for immutable characteristics such as

¹⁷⁹ See, e.g., *Transgender Rights*, ACLU, <https://www.aclu.org/issues/lgbt-rights/transgender-rights> (last visited Aug. 24, 2019) (documenting the judicial holdings and legislation that have widened the scope of protection given to transgender individuals from, inter alia, hate crimes, housing and employment discrimination, and harassment).

¹⁸⁰ See *supra* Part I.

¹⁸¹ However, it is worth noting that society appears to be far less accepting of racial fluidity than gender fluidity. We shall examine this phenomenon *infra*.

¹⁸² JOHN HART ELY, *DEMOCRACY AND DISTRUST* 150 (1980).

¹⁸³ Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 926 (1989).

disability,¹⁸⁴ it has applied heightened scrutiny to mutable characteristics such as alienage.¹⁸⁵ Halley has therefore posited that “immutability is neither a necessary nor a sufficient precondition for the recognition of a suspect classification, and where it has appeared as a factor in the Court’s analysis, it has always been shorthand for inquiry into the fairness of the political process burdening the group.”¹⁸⁶

Meanwhile, as Jessica Clarke has argued, the emphasis on immutability has distracted from the proper task of anti-discrimination laws, which should be targeting systemic and unreasonable forms of bias.¹⁸⁷ Indeed, use of immutability as an attempted proxy for fairness comes with significant problems. It may be true that, as a normative matter, we should not allow, or at least should strictly scrutinize, laws differentiating amongst people on the basis of traits which they cannot control. But our entire society is based on precisely that kind of differentiation. Whether rightfully or not, the post-Westphalian notion of the nation-state and the meaningful enforcement of borders and immigration laws seem to require disparate treatment of people on the basis of whether they happened, by the lottery of birth, to be born to a family with citizenship or on domestic soil. Meanwhile, the entire premise of capitalism is based upon solicitude to economic productivity and efficiency, thereby mandating discrimination on the basis of mental and

¹⁸⁴ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1981) (declining to extend suspect class status to individual suffering from mental disabilities, despite the immutability of such disabilities).

¹⁸⁵ *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (extending strict scrutiny to alienage classifications). While alienage is not formally an immutable status (after all, legal status can change), it is oftentimes an accident of birth (i.e., whether one is born in the United States (or to United States citizen parents) or not). In addition, while alienage has been theoretically deemed a suspect class, the Court has enunciated two critical exceptions to that rule (when the classification serves purposes of democratic self-governance, see *Foley v. Connelie*, 435 U.S. 291, 296–97 (1978), or when it serves federal plenary power in matters related to foreign policy and immigration, see *Matthews v. Diaz*, 426 U.S. 67, 79–80 (1976)). In practice, these exceptions have threatened to swallow up the general rule and significantly limited the application of heightened scrutiny to alienage.

¹⁸⁶ See Halley, *supra* note 183, at 926.

¹⁸⁷ Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 101 (2015).

physical abilities in many contexts, regardless of whether these characteristics are immutable (and, in at least some cases, they indisputably are).

At a minimum, therefore, the Court's fetishization of immutability lacks analytical rigor. In *Frontiero* (and other cases involving suspect classifications), the Court asserted that distinguishing between individuals on the basis of certain accidents of birth lacked inherent merit. In the process, the Court conflated the concept of immutability with accidents of birth.¹⁸⁸ But, of course, many accidents of birth (socioeconomic status, alienage, linguistic ability) are mutable. And while we believe some accidents of birth constitute unfair means by which to judge a person, we believe other accidents of birth (such as mental aptitude and physical abilities) form a perfectly sound basis to draw legal distinctions. As a result, it is not really immutable traits that equal protection seems to protect. Rather, it is distinctions that lack (or almost always lack) merit (of which certain accidents of birth are a subspecies). Thus, it is fairness that actually lies at the heart of equal protection, and heightened scrutiny therefore attaches when there is good reason to suspect that a particular classification arises not from sound public policy but, rather, from irrational prejudice, bias, or even animus.¹⁸⁹

¹⁸⁸ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .’”) (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

¹⁸⁹ Such a formulation of equal protection makes eminent sense when one considers that race is the original suspect classification and that immutability only entered the equal-protection lexicon as a result of the need to analogize other traits to race. Viewed in this light, immutability is only, at best, a heuristic tool (and an imprecise one at that) for determining what categories besides race deserve heightened scrutiny. And, with respect to race, it should be viewed as an irrelevant consideration, as it was never intended to be one in the first place. With that in mind, protection of traits intricately related to race should not be diminished on mutability grounds. Indeed, the focus on immutability turns race-related jurisprudence on its head. After all, even the most constrained reading of the Fourteenth Amendment would concede that the Equal Protection Clause applies to race. Thus, it is not logical to state that the Fourteenth Amendment protects against discrimination on the basis of immutable traits and, since race is immutable, race is protected. Rather, the Fourteenth Amendment protects against discrimination on the basis of race and, since immutability was (mistakenly) deemed to be a critical component of race, purportedly immutable traits outside of race received protection.

As such, decoupling immutability from the equal-protection calculus should cause us to view legislation targeting suspect classes in a different light. If equal protection is not about protecting us from discrimination on the basis of birth traits, it is about the protection of suspect-class-related identity traits (whether the product of birth or otherwise) that have no link to merit but have been the subject of historical targeting as a result of animus or bias. Since race has strong performative elements and race can change (sometimes with individual choice, sometimes without), the decisions associated with that change should properly come under the scope of equal protection. Yet our equal-protection jurisprudence has rarely been read so capaciously. Courts have consistently embraced the immutability factor as a mechanism to deny protection to such traits as hairstyle and language on the grounds that such characteristics are mutable; but, in fact, such characteristics are part and parcel of the performance of race. An exegesis of relevant case jurisprudence on matters such as language and hairstyle demonstrates the way in which the continued use of the immutability factor has actively impeded the development of a jurisprudence of acceptance and has prevented the Equal Protection Clause from achieving its full potential in putting an end to government action that unfairly targets racial groups on the basis of irrational bias.

1. Immutability, Equal Protection and the Performance of Race: Rethinking Race-Related Traits

Judicial approaches to laws discriminating on the basis of language and personal appearance illustrate the doctrinal shortcomings of equal-protection decisions excessively bound by the immutability factor. Consider *Olagues v. Russoniello*,¹⁹⁰ a key Ninth Circuit decision declining to extend heightened scrutiny to classifications based on language. In the early 1980's, Jose Olagues and several voting-rights organizations challenged an investigation into voting fraud conducted by the United States Attorney in Santa Clara County on the grounds that the investigation impermissibly

¹⁹⁰ 770 F.2d 791, 801 (9th Cir. 1985).

targeted, on its face, “recently registered, foreign-born voters who requested bilingual ballots.”¹⁹¹ In considering the matter, the Ninth Circuit characterized the plaintiffs’ challenge as a demand for heightened scrutiny based on language discrimination, and rejected the notion that language constituted a suspect class for equal-protection purposes.¹⁹² The court pointed to *Frontiero* and its admonition that heightened scrutiny attaches principally to “‘immutable characteristic[s] determined solely by the accident of birth,’”¹⁹³ and concluded that, “unlike race, place of birth, or sex,” language is a choice.¹⁹⁴ As the court reasoned, “Although our first choice of language may be initially determined to some extent ‘by the accident of birth,’ we remain free thereafter to choose another should we decide to undertake the initiative.”¹⁹⁵

The court’s approach to language and its rationale in rejecting heightened scrutiny for the classification reveal the shortcomings of an equal-protection jurisprudence that unnecessarily fetishizes immutability. Rather than asking whether language was a meritorious basis for drawing legal distinctions or, instead, was merely serving as a basis (or a proxy) to target individuals who have historically suffered from invidious discrimination and lack adequate representation to receive protection from the political branches of government, the court emphasized the purported mutability of language. The decision’s reasoning makes the poverty of its approach clear. Take, for instance, the words the court uses to describe the issue of language acquisition. Overreaching to rationalize its decision on mutability grounds, the court begins by referring to the language of one’s birth as an individual’s “first choice” of language.¹⁹⁶ Then, the court doubles down on the idea of volition in language acquisition by suggesting one’s first language is an accident of birth only to “some extent.”¹⁹⁷ One can only wonder just what

¹⁹¹ *Id.* at 793–94.

¹⁹² *Id.* at 801.

¹⁹³ *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (citations omitted).

¹⁹⁶ *Id.* at 801.

¹⁹⁷ *Id.*

part of an individual's initial language acquisition, which is determined by the country of someone's birth and the parents to whom one is born, is not an accident of birth. Moreover, the idea that initial language acquisition can be referred to as a "choice" is fatuous.

The quixotic preoccupation with mutability has similarly infected other cases involving race-related traits, such as hairstyle decisions and other aspects of personal appearance. Take a seemingly routine equal-protection case, *Betts v. McCaughtry*.¹⁹⁸ In this section 1983 suit, a federal district court granted summary judgment to defendants against claims brought by a group of African American inmates at Wisconsin's Waupun Correctional Institution challenging the constitutionality of certain prison regulations limiting the hairstyles and clothing inmates could choose and the music they could play. According to the plaintiffs, the regulated subject matter represented "expressions of 'black pride' and African-American cultural traditions."¹⁹⁹ Therefore, the policies violated the inmates' civil rights under the First and Fourteenth Amendments and constituted, among other things, race discrimination. In assessing whether the regulations ran afoul of the Equal Protection Clause, the court declined to apply heightened scrutiny since it found no evidence of discriminatory intent behind the facially race-neutral edicts.

In many ways, given that facially neutral laws are generally deemed constitutionally sound absent a finding of both discriminatory impact and intent,²⁰⁰ the *Betts* case appeared relatively simple at first blush. It was a mundane illustration of the difficulties plaintiffs face, as a result of the Supreme Court's impact/intent requirement, in raising equal-protection challenges to laws that ostensibly do not involve race on their face yet implicate traits with a relationship to racial identity. However, if one acknowledges the mutability of race, the decision's legal analysis becomes more challenging. Thus, while the final outcome might potentially be the same (*i.e.* the regulations, in the prison environment, might still pass

¹⁹⁸ 827 F. Supp. 1400, 1402 (W.D. Wisc. 1993).

¹⁹⁹ *Id.* at 1407.

²⁰⁰ *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that facially neutral laws receive rational basis review unless the plaintiff can show both disproportionate impact and discriminatory intent).

heightened scrutiny), there would be good reason to question the court's key assumption: that the law was facially neutral in the first place.

To dissect this argument, it is first necessary to consider the court's rationale for rejecting the plaintiffs' equal-protection claims. After deeming the regulations facially neutral (since they did not overtly involve race), the court rebuffed the argument that they were the product of discriminatory intent. With respect to the policies related to personal appearance, the court opined that, "[a]lthough plaintiffs characterize the grooming, hairstyle and fingernail practices as expressions of African-American heritage, they have not produced evidence to support a finding that they are exclusively so."²⁰¹ Similarly, with respect to the music-censorship policy, although the court admitted "[t]he fact that nearly all of the cassettes subject to censorship [under the prison's regulations] are African-American rap music,"²⁰² it nevertheless concluded that "it is questionable whether the censorship of African-American rap music can be equated with discrimination against African-American inmates."²⁰³ In granting summary judgment on the issue to the defendants, the court encapsulated the primary evidentiary shortcoming of the plaintiffs: their failure "to show that the audience for this music is exclusively black."²⁰⁴

But the court's analysis on both the personal-appearance and music-censorship regulations suffered from several shortcomings. To begin with, a trait need not be an exclusive expression of a particular heritage to be inextricably race-bound. Think of dark skin. It is not an exclusive expression of African-American heritage. Such reductionism would be both dramatically over-inclusive (neither individuals of Sri Lankan nor aboriginal descent are considered to be of African heritage) and under-inclusive (many individuals with light skin possess African lineage). Yet it would make no sense to treat a law that differentiates on the basis of skin color as facially neutral because it does not expressly mention race and because particular skin colors are not exclusive expressions of a particular racial identity. Yet,

²⁰¹ *Betts*, 827 F. Supp. at 1405.

²⁰² *Id.*

²⁰³ *Id.* The court reached this conclusion even though the policy did not outlaw other types of violent and graphic artistic content, such as movies and books. *Id.* at 1404, 1407.

²⁰⁴ *Id.* at 1405.

under the court's logic, a law that treats people differently on the basis of skin color could conceivably be deemed facially neutral, presumptively valid and subject to only rational basis review unless the plaintiff makes an affirmative showing of both discriminatory impact and intent. Such a posture would significantly hamper the ability to attack laws based on skin color, even though they are plainly racial in basis.

Meanwhile, the court's limited willingness to strictly scrutinize laws that, although formalistically neutral, target exclusive expressions of African-American heritage is particularly puzzling. Quite simply, the court appears to have articulated a standard that is impossible to meet. After all, it is fair to wonder whether exclusive expressions even exist with respect to any given racial heritage. The futility and absurdity of making such a showing is epitomized when the court comically takes the plaintiffs to task for failing to show that only African-Americans listen to rap. The fact that non-blacks might enjoy rap, might wear braids, might eat 'soul food' and might otherwise imitate or appreciate other aspects of African-American culture is no basis to hold that targeting of such characteristics is almost certainly not a violation of equal protection (as the application of rational-basis review all but guarantees). Yet, by the court's logic, a prison, school or other public institution could ban rap music, soul food, and braids and Afros by merely providing any rational basis (too graphic! too unhealthy! too unruly!). In the process, such policies could survive constitutional scrutiny, even in the midst of a conspicuous failure to ban other allegedly graphic artistic content, unhealthy foods and unruly hairstyles.

Such a result raises significant concerns when considered in light of equal protection's first principle: the elimination of legal distinctions arising not from sound public policy but, rather, irrational prejudice, particularly against long-victimized minority groups. Such a concerted attack on certain modalities of expressing African-American culture should properly raise significant constitutional issues. The fact that it does not, particularly under a traditional equal-protection analysis (as epitomized in the *Betts* case), stems from our continued fetishization of immutability.

Specifically, the *Betts* court's emphasis on exclusive expressions of African-American heritage makes clear that its requirement for relief under the Equal Protection Clause was implicitly, and problematically, driven by notions of immutability. As we have already detailed, courts view race as an

immutable trait. If that is the case, the exclusive expressions of a particular heritage must necessarily be immutable as well. To the court, therefore, blackness and its accompanying exclusive expressions (to the extent any actually exist) are immutable and laws that implicate them enjoy heightened scrutiny; but choices that may have a correlation with racial identity—choices such as how to wear one’s hair or what music to play—do not receive such judicial solicitude. Yet if race is not immutable, it has a strong performative component, which means that the performance of race is race itself and expression of a trait related to race is expression of race itself.²⁰⁵ As a result, providing equal protection to all, regardless of race, necessitates protecting racial identities, regardless of the volitional nature of the identity-related trait in question. The continued emphasis on immutability prevents such recognition, as characteristics such as one’s language or hairstyle will continue to remain outside of the scope of heightened judicial scrutiny, even when they constitute manifestations of race itself.²⁰⁶

Cast in this light, the wearing of an Afro is an act of racialization and an Afro is, in some ways, race itself. As psychologists Otto MacLin and Roy Malpass have documented, changes in hairstyle can dramatically alter racial perceptions of otherwise racially ambiguous faces.²⁰⁷ Or consider Rachel Dolezal. As one sensationalist headline (in the *New York Post*) put it, “The Blackest Thing About Rachael Dolezal Is Her Thousand-Dollar Hair.”²⁰⁸

²⁰⁵ If race is mutable, it is entirely reasonable to question why classifications on the basis of mutable traits should necessarily be excluded from heightened scrutiny. After all, race is not a suspect classification because it is an accident of birth and one cannot be “blamed” for their race. Rather, racial designations are given special constitutional scrutiny because, among other things, discrimination on the basis of race emanates from irrational prejudice—regardless of whether it is mutable or not.

²⁰⁶ Since race is a social construct, an alteration in the way that society perceives your racial identity is, in effect, a change in race.

²⁰⁷ Otto H. MacLin & Roy S. Malpass, *Racial Categorizations of Faces: The Ambiguous Race Face Effect*, 7 PSYCHOL. PUB. POL’Y & L. 98, 109 (2001).

²⁰⁸ Tashara Jones, *The Blackest Thing About Rachel Dolezal Is Her Thousand-Dollar Hair*, N.Y. POST (June 16, 2015, 10:02 PM), <https://nypost.com/2015/06/16/the-blackest-thing-about-rachel-dolezal-is-her-thousand-dollar-hair/> (“Ever since the emergence of the bizarre story of the former NAACP leader lying about her race, America has been enthralled by her spectacular, ethnic-looking hairdos.

Putting aside the hyperbole, there is no mistaking the fact that a large part of Dolezal's efforts to 'pass' as black related to her hairstyle. A law outlawing Afros is therefore not facially neutral and should not survive constitutional scrutiny absent a showing of discriminatory intent. Instead, since it is part and parcel of the social construction of race, it is a racial categorization itself that would (and should) be subject to heightened judicial scrutiny. Indeed, in 2019, two states—California and New York—passed legislation outlawing discrimination on the basis of natural hairstyles. Notably, both laws were grounded in the notion that such discrimination disproportionately impacts people of color,²⁰⁹ as the statutes made the link between race and hairstyle discrimination explicit by amending the definition of race to include “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.”²¹⁰ These laws recognize that, although hairstyles may be formally mutable, they are, in the words of Frank Wu, “not merely personal preferences to be dismissed as trivial. They are symbolic of membership within a community.”²¹¹ As such, there is growing recognition that purportedly ‘neutral’ laws pertaining to hair can directly and problematically implicate issues of racial identity.

2. *Equal Protection, the First Amendment and Constitutional Consonance in the Protection of Identity*

When race is divorced from immutability, other traits (such as hairstyle) inextricably bound in the construction of race can defeat facial neutrality. Such a move not only overcomes certain problematic aspects of the impact/intent requirement which have received significant criticism in the

Whether she's sporting kinky curls or immaculately kept dreadlocks, there's no doubt that Dolezal has nailed the color and texture of some classic African-American styles.”).

²⁰⁹ See Janelle Griffith, *New York is Second State to Ban Discrimination Based on Natural Hairstyles*, NBC NEWS (July 15, 2019, 6:57 PM), <https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931>.

²¹⁰ CAL. EDUC. CODE § 212.1(b) (2019); N.Y. EDUC. LAW § 11 (2019); N.Y. EXEC. LAW § 292 (2019).

²¹¹ Frank Wu, *Victory for Natural Black Hair Benefits All of Us*, DIVERSE: ISSUES IN HIGHER EDUC., July 12, 2019, <https://diverseeducation.com/article/149645/>.

academic literature;²¹² it also helps bring the First and Fourteenth Amendments into better alignment with one another. Specifically, equal protection's focus on immutability has unwittingly created a tension between Fourteenth Amendment and First Amendment rights. Under extant equal-protection jurisprudence, race and gender-based classifications are given heightened judicial scrutiny precisely because they are conceptualized as innate characteristics that are "accident[s] of birth,"²¹³ rather than as choices. Meanwhile, under the First Amendment, limitations on speech and expressive conduct are given heightened judicial scrutiny precisely because they are conceived of as choices (*i.e.*, they are volitional and have communicative intent).²¹⁴ As such, constitutional jurisprudence views First and Fourteenth Amendment protections as pertaining to wholly separate *res*:

²¹² Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You? Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1301 (2018) (arguing that "[t]he Supreme Court's decisions over the last forty years requiring proof of discriminatory purpose in order to demonstrate an equal protection violation, including in *McCleskey v. Kemp*, have dramatically lessened the ability of claimants to use the Constitution to create a more just society. These decisions are terribly misguided and the Court has compounded the problem by adopting a standard for proving intent that is very difficult to meet.") (citations omitted); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50 (1977) (criticizing the discriminatory purpose requirement by arguing that, "[w]hen the context is race . . . the problem of the stigma of caste cannot be confined to purposeful stigmatizing action. It is a global problem, this inheritance from slavery and the system of racial subordination that took slavery's place."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111 (1997) (positing that "the doctrine of discriminatory purpose currently sanctions facially neutral state action that perpetuates race and gender stratification, so long as such regulation is not justified in discredited forms of status-based reasoning. Once we recognize that the rules and reasons the legal system employs to enforce status relations evolve as they are contested, we ought to scrutinize justifications for facially neutral state action with skepticism, knowing that we may be rationalizing practices that perpetuate historic forms of stratification, much as *Plessy v. Ferguson* once did.").

²¹³ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

²¹⁴ Expressive conduct, the Supreme Court tells us, requires intentionality (*i.e.*, volitional decision-making) and a message apparent to the observers of the conduct. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'") (citing *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). Absent significant justification, the government cannot interfere with such expressive choices. *Johnson*, 491 U.S. at 407.

expressive choices may receive free-speech scrutiny, while immutable parts of one's being may receive equal-protections scrutiny.

By removing immutability from considerations as to whether a classification is suspect, we open up heightened scrutiny for characteristics that are inextricably related to race (and frequently constitute an indelible part of racialization, either as imposed by society or as exertions of individual performance of race) but constitute choices rather than “accidents of birth.” In so doing, we do not just vindicate the right to be free of discrimination from traits over which we have no control, but also extend protection to traits over which we do, particularly when they constitute an intricate aspect of race.

Under a reconstituted equal-protection doctrine that omits immutability, the Fourteenth Amendment and the First Amendment can work together in elevating tolerance for key identity-related features. In other words, by recognizing the mutability of race but nevertheless giving race strict scrutiny, other choices incident to race or akin to race (*i.e.*, key identity-related markers that are performative in nature) would also enjoy the benefits of equal protection. They would no longer depend on a claim of immutability for protection. Such a reformulation of equal protection in light of the mutability of race therefore has the ability to expand important constitutional protections beyond the limits of that which is ostensibly immutable and, as a result, has critical implications for judicial recognition of the inherent expressive and dignitary interests entwined with such traits as personal appearance, language, culture and even sexual orientation. And, as we shall discuss *infra*, such a tact allows equal protection to merge with expressive freedom to promote heightened acceptance of, and respect for, the rights of minority groups that have historically faced discrimination.

Under such a regime—where laws invoking traits that are reflective of individual identity enjoy meaningful judicial review, regardless of whether those traits are chosen or the product of the “accidents of birth”—equal protection aligns itself with free speech rights related to the expression of identity. This contrasts significantly to the state of our current jurisprudence, where equal protection and expressive freedom are concepts that, at best, are

at odds with another, if not mutually exclusive altogether. In short, recognition of the mutability of race and its inextricably performative elements allows for a reconceptualization of the meaning of facial neutrality and the advancement of a greater consonance between the First and Fourteenth Amendments.

3. *Immutability and the Development of a Jurisprudence of Acceptance*

Perhaps most significantly, the continuing fetishization of immutability in the equal-protection calculus has impeded the realization of a jurisprudence of acceptance (rather than one of just mere tolerance)—not only with respect to race and race-related traits, but more broadly to other classifications that also have little to no link to merit and have a long history of being targeted on the basis of animus and bias. The Supreme Court’s jurisprudence on sexual orientation illustrates the way in which immutability’s place in equal protection doctrine continues to constrain the courts from embracing a more robust form of equal protection that truly subverts subordination practices.

With its decision in *Obergefell v. Hodges*,²¹⁵ the Supreme Court famously recognized the constitutional right to same sex marriage, proclaiming that there is “dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices” and concluding that any refusal to legally sanctify same-sex marriage would constitute the “imposition of [a] disability on gays and lesbians [that] serves to disrespect and subordinate them.”²¹⁶ *Obergefell* thus took a critical steps towards celebrating the dignitary interests of gays and affirmatively renounce, and push back against, all discrimination against individuals on the basis of sexual orientation. But an exegesis of Justice Kennedy’s majority opinion suggests that the Court’s continued need to grapple with the issue of immutability (as compelled by the extant jurisprudence) ultimately diminished the force of *Obergefell*’s blow against subordination practices and its celebration of diverse sexualities.

²¹⁵ 135 S. Ct. 2584 (2015).

²¹⁶ *Id.* at 2604.

First, Kennedy’s decision actually asserted the immutability of sexual orientation, declaring, in a remarkable line, that, “in more recent years[,] psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”²¹⁷ In other words, the Court was signaling a change in its prior position, which viewed homosexuality as a “lifestyle”²¹⁸ and, implicitly, a choice. Such a move was unusual for several reasons. As a predicate matter, since the Court ultimately did not grant heightened scrutiny to sexual orientation,²¹⁹ the decision did not need to deal with the issue of immutability at all. Moreover, the source to which Kennedy cited in support of the immutability proposition—the American Psychological Association (“APA”)’s amicus brief—said nothing of the sort. Indeed, the APA carefully eschewed taking an absolute position on orientation fluidity and, in fact, expressly avoided use of the word ‘immutable.’ In tempered language, the APA Brief concluded that sexual orientation is “[i]s [g]enerally [n]ot chosen, and [i]s [h]ighly [r]esistant to [c]hange.”²²⁰ To support this statement, the APA Brief noted that 88% of gay men and 68% of lesbians reported that they had ‘no choice at all’ in their orientation²²¹—meaning that 12% of gay men and 32% of lesbians suggested they may have had some level of choice. To wit, the APA brief recounted that 5% of gay men and 16% of lesbians reported feeling that they had ‘a fair

²¹⁷ *Id.* at 2596 (internal citations omitted).

²¹⁸ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (referring to plaintiffs as “two adults who, with full and mutual consent . . . engaged in sexual practices common to a homosexual lifestyle.”).

²¹⁹ See Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 *YALE J. L. & FEMINISM* 331, 333 (2016) (“Post-*Windsor*, several lower federal courts declared the state law analogues to DOMA to be unconstitutional on class-based equal protection grounds—invoking *Windsor* as a basis for declaring classifications based on sexual orientation to be suspect or quasi-suspect and thus subject to some form of heightened scrutiny. However, Justice Kennedy’s majority opinion in *Obergefell* eschewed deciding the case on that basis. Instead, the Court concluded that such laws interfered with the fundamental right to marry protected primarily by the Fourteenth Amendment’s Due Process Clause but also buttressed by its Equal Protection Clause.”) (citations omitted).

²²⁰ Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556; 14-562; 14-571; 14-574), 2015 WL 1004713.

²²¹ *Id.* at 8–9.

amount' or 'a great deal' of choice regarding their sexual orientation.²²² In short, Kennedy's citation to the APA Brief to establish the purported immutability of sexual orientation was, at best, disingenuous. Of course, Kennedy's reference to immutability may have served to set the table for a future court to grant heightened scrutiny to sexual orientation—when public opinion ultimately catches up with elite opinion. But, such a tactic takes a backwards approach to the constitutional protection of civil rights because the need for heightened judicial scrutiny—and a check on majoritarianism—is at its greatest when there is widespread animus against a “discreet and insular minority,”²²³ not when public acceptance of that minority has finally been achieved.

Second, *Obergefell* stubbornly fixated on immutability in another sense. Specifically, it rested the decision on the need to protect dignitary interests of those for whom there is definitively no choice in the matter: the children of same-sex couples. In this sense, the *Obergefell* Court was no different than other Western courts, whom Debora Spar observes curiously did not start to recognize same-sex marriages until faced with the advent of reproductive technologies that eased the ability of same-sex couples to have children who are biologically related to at least one parent.²²⁴ It was only at that time that that courts could point to the important interests in protecting children with a stable and respected family structure.²²⁵ In this vein, the *Obergefell* Court emphasizes the harm that social opprobrium of same-sex relations inflicts on the children in those relations.²²⁶ Here, the Court's machinations almost seem to obscure the harm done to same-sex couples themselves. After all, no matter how badly societal stigmas might hurt the children of such couples, they will impact the couples themselves most immediately and for their entire lives. With this in mind, the *Obergefell* decision's ponderous fetishization of the dignitary interests of children of same-sex couples (perhaps above those

²²² *Id.* at 8.

²²³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

²²⁴ Jonathan Shaw, *Technology, Paternity, Patriarchy*, HARV. MAG., Mar.–Apr. 2019, <https://harvardmagazine.com/2019/03/marriage-technology-feminism> (reviewing DEBORA SPAR, *THE VIRGIN AND THE PLOW* (forthcoming 2020)).

²²⁵ *See id.* (citing Spar's position that the availability of *in vitro* fertilization and other reproductive technologies to same-sex couples helped accelerate judicial acceptance of same-sex marriage).

²²⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

of the same-sex couple itself) begins to feel like a search to reconcile the decision on the grounds of someone's immutability. Unable to definitively establish the immutability of the same-sex parents' sexual orientation, the Court points to the protection of their children, who possess the immutable status of being born to same-sex parents.

Kennedy's rhetorical move may have reflected an argumentative strategy, employed to persuade those who may believe that homosexuality is a chosen lifestyle (and an immoral one at that, not entitled to constitutional protection) but who might soften their position to protect children of homosexuals who cannot and should not be forced to answer for the perceived sins of their parents. In this light, this aspect of the decision echoes the rationale of *Plyler v Doe*,²²⁷ where the Supreme Court, claiming to apply rational-basis review, struck a Texas law that denied the children of undocumented aliens residing in the state access to public education. In *Plyler*, the Court conceded that undocumented status was a mutable characteristic (subject only to rational-basis review) but drew a sharp distinction between the equal-protection entitlements of undocumented adults and those of their children, thereby resting its decision on the protection of those targeted for a status that they have acquired "through no fault of their own."²²⁸ As the *Plyler* Court opined:

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.²²⁹

Since the law at issue was "directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control,"²³⁰ the Court found that it failed to survive equal-protection scrutiny. The undocumented children's "accident of birth"

²²⁷ 457 U.S. 202 (1982).

²²⁸ *Id.* at 226.

²²⁹ *Id.* at 219–20 (emphasis omitted).

²³⁰ *Id.* at 220.

therefore became the holding's fulcrum, justifying the application of a "more searching" form of rational-basis review that resulted in the striking of the statute.²³¹

Obergefell therefore leaves at least some room to continue to view same-sex couples as transgressive in some way (like undocumented aliens) but firmly rebukes putting a toll for those transgressions on their children. After all, even though the result of the case ultimately affirmed the rights of homosexuals, *Obergefell* still failed to embrace the application of heightened scrutiny to classifications based on sexual orientation,²³² despite the fact that gays constitute a minority group that has long suffered invidious discrimination and lacks sufficient numbers to seek appropriate political redress through majoritarian channels.²³³ Ultimately, such a result leaves protection of sexual orientation on uncertain grounds going forward as future courts which may be less inclined to protect sexual orientation may decline to apply a particularly searching form of rational basis when assessing laws implicating sexual orientation. In the end, therefore, *Obergefell* does not quite

²³¹ *Id.*

²³² See Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117 (2016) (referencing *Obergefell*'s lack of "discussion of tiers of review, suspect classes, strict scrutiny, or narrow tailoring").

²³³ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that Boy Scouts of America has a constitutional right to ban gay individuals based on the First Amendment's freedom of association); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a constitutional challenge to a Georgia anti-sodomy law and denying the existence of a constitutional right of homosexuals to engage in private sexual conduct); *One, Inc. v. Olesen*, 241 F.2d 772, 778 (9th Cir. 1957) (affirming a local U.S. postmaster's decision to decline to deliver copies of a gay magazine, in part, on constitutional grounds and asserting that its articles were "morally depraving and debasing" and that the magazine as a whole was therefore "obscene and filthy"), *rev'd*, 355 U.S. 371 (1958). *But see Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) (claiming that "[t]he problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.") (citations omitted).

represent as powerful a blow against subordination on the basis of sexual orientation as one might initially think.

Obergefell's fetishization of immutability also comes with other dangers. For many years, gay-rights activists have focused their strategy (largely based on the template for gender and the immutability language of *Frontiero* and its progeny) on suggesting that sexual orientation is an immutable trait and, therefore, subject to heightened scrutiny.²³⁴ The effort has enjoyed notable success. In several circuits, courts have expressly granted suspect-category status to sexual orientation.²³⁵ And although the Supreme Court has, to date, avoided issuing such a holding,²³⁶ it has clearly applied a particularly searching form of rational basis review to its scrutiny of laws distinguishing on the basis of sexual orientation.²³⁷

At the same time, however, many of those advocating for an immutability-driven position have themselves expressed discomfort with the

²³⁴ See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1196 n.12 (Wash. Ct. App. 1974) (considering (and rejecting) a same-sex couple's claim that discrimination on the basis of sexual orientation should be given heightened scrutiny on the grounds that "homosexuals constitute 'a politically voiceless and invisible minority,' that being homosexual, generally speaking, is an immutable characteristic, and that homosexuals are a group with a long history of discrimination subject to myths and stereotypes") (citations omitted).

²³⁵ See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480–81 (9th Cir. 2014) (interpreting *United States v. Windsor*, 133 S. Ct. 2675 (2013) as dictating the application of heightened scrutiny to classifications based on sexual orientation even though *Windsor* was silent on the issue of standard of review); *Windsor v. United States*, 699 F.3d 169, 181–82 (2d Cir. 2012) (weighing the extant Supreme Court factors on whether a classification is suspect to ultimately hold that laws distinguishing on the basis of sexual orientation are subject to heightened scrutiny), *aff'd on other grounds sub nom. United States v. Windsor*, 133 S. Ct. 2675 (2013).

²³⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Though the Court described sexual orientation as "immutable" in *Obergefell*, it did not hold that sexual orientation was a suspect classification entitled to heightened scrutiny. *Id.*

²³⁷ See, e.g., William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 523 (2005) (describing the purported application of rational basis review in recent sexual orientation cases as, in fact, "rational basis plus"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011) (describing the purported application of rational basis in recent sexual orientation cases as, in fact, "rational basis with bite").

strategy²³⁸—and with good reason. After all, resting the protection of sexual orientation on its purported immutability makes protection, per se, immutability-dependent. Such a strategy could backfire if, down the line, it is determined “scientifically” that sexual orientations are the product of both nature and nurture.²³⁹ A change from such a consensus could therefore subvert hard-won protections, a possibility made real by a widely-publicized 2019 genome-wide association study²⁴⁰ that triggered headlines confidently declaring that there is “no gay gene.”²⁴¹

More pointedly, the primacy of immutability seems to suggest that sexual preferences should not be protected if they are the product of choice. Such a view troublingly replicates certain institutional positions that have effectively treated gays as second-class citizens while paying lip service to tolerance. For almost two decades, of course, the American military carried out the inordinately tortured “Don’t Ask, Don’t Tell” policy²⁴² that enabled gay men and women to serve in the military but forced them to suppress entire parts of their identities that their heterosexual colleagues were able to enjoy openly.²⁴³ Similarly, numerous churches have taken the position of allowing gay parishioners into their community so long as those individuals

²³⁸ See Halley, *supra* note 183, at 921 (“Confronted with the supposed requirement for heightened scrutiny that the proposed classification be based on an *immutable* trait, advocates of gay, lesbian, and bisexual rights have almost uniformly—though often with visible qualms—embraced the argument that homosexuality is immutable.”).

²³⁹ See, e.g., *Sexual Orientation & Homosexuality*, AM. PSYCHOL. ASS’N, <https://www.apa.org/topics/lgbt/orientation> (opining that “[t]here is no consensus among scientists about the exact reasons that an individual develops . . . [their] orientation” and that “[m]any think that nature and nurture both play complex roles; most people experience little or no sense of choice about their sexual orientation”) (last visited Nov. 4, 2019).

²⁴⁰ Andrea Ganna et al., *Large-Scale GWAS Reveals Insights into the Genetic Architecture of Same-Sex Sexual Behavior*, SCIENCE, Aug. 30, 2019, <https://science.sciencemag.org/content/365/6456/eaat7693>.

²⁴¹ See, e.g., Susan Scutti, *No ‘Gay Gene’ Can Predict Sexual Orientation, Study Says*, CNN (Aug. 30, 2019, 1:12 PM), <https://www.cnn.com/2019/08/30/health/gay-gene-study-trnd/index.html>; *A Scientific Study Has Established That There Is No ‘Gay Gene,’* ECONOMIST (Aug. 31, 2019), <https://www.economist.com/science-and-technology/2019/08/31/a-scientific-study-has-established-that-there-is-no-gay-gene>.

²⁴² 10 U.S.C. § 654 (1993), *repealed by* Pub. L. No. 111–321, § 2(f)(1)(A), 124 Stat. 3516 (2010).

²⁴³ *Id.*

do not engage in same-sex relations.²⁴⁴ Such equivocal regimes implicitly draw a distinction between what individuals purportedly cannot control (being ‘born gay’) and what they purportedly can (acting upon their sexual attraction). And it is this quest for separating the immutable from the chosen that causes gay people to suffer from a full recognition of their dignitary rights. They are forced to lead lives with incomplete expressions of their personhood. Resting the extension of rights on the basis of immutability effectively excludes the volitional components of one’s sexual identity from protection and, in the process, impedes a complete acceptance (let alone celebration) of diverse sexualities. Indeed, applying heightened scrutiny to a trait regardless of its mutability sends a far more powerful message of inclusion from the judiciary than a reluctant tolerance grounded in immutability. As the *Obergefell* decision itself recognized, judicial recognition of the legal rights and inherent dignity of a disfavored group is a critical step for that group achieving acceptance into mainstream society.²⁴⁵ When legal protection becomes available to individuals whether they are acting on the basis of immutable biology *or* volitional choice (such as the very *decision* to marry), the message of respect becomes all the more powerful since it reflects affirmative acceptance, rather than passive tolerance.

²⁴⁴ See, e.g., *Same-Sex Attraction*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics/same-sex-attraction?lang=eng&_r=1 (stating that “[t]he Church distinguishes between same-sex attraction and homosexual behavior. People who experience same-sex attraction or identify as gay, lesbian, or bisexual can make and keep covenants with God and fully and worthily participate in the Church” but that “[s]exual relations between a man and woman who are not married, or between people of the same sex, violate one of our Father in Heaven’s most important laws and get in the way of our eternal progress”) (last visited Sept. 22, 2019).

²⁴⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (closing its penultimate paragraph by stating: “[t]hey ask for equal dignity in the eyes of the law. The Constitution grants them that right.”); see also Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HOUS. L. REV.: OFF THE REC. 157, 161 (2015) (“The expressive function of U.S. Supreme Court opinions is particularly powerful because most Americans take note of the decisions. The Court’s opinions take on a symbolic character because they are seen as ‘speaking on behalf of the nation’s basic principles and commitments.’”) (citing Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996)).

CONCLUSION

The legal fiction of racial immutability has grown obsolescent. Introduced by accident, the continued use of immutability in the equal-protection calculus has not only failed to reflect the realities of racial fluidity but has also impeded the development of a jurisprudence of acceptance—both with respect to race-related traits and other characteristics, such as sexual orientation, that can form key aspects of personal identity. That said, it is worth noting that the erstwhile emphasis on immutability, particularly vis-à-vis race, makes some sense when considered in context. In the early stages of the civil rights movement, the need to convince a (largely) skeptical white population about the moral and legal rectitude of prohibiting racial discrimination spurred the adoption of results-oriented compromises²⁴⁶—compromises that would make sense at the moment but might later cause problems. Framed in this light, the casting of race as immutable perhaps served a time-specific purpose. After all, the idea that people couldn't help their dark skin and their “unfortunate race”—a condescending phrase used repeatedly by the Supreme Court in the nineteenth century to refer to various non-white groups²⁴⁷—appealed to a widespread view that Molly Townes O'Brien has dubbed “white paternalism,”²⁴⁸—a form of proto-

²⁴⁶ As Derrick Bell famously posited with his interest-convergence theory, a majority race will generally support equality for minorities *only* when doing so advances its own interests. See Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91–106 (Derrick Bell ed., 1980). Bell's key example in support of his proposition was the strategic and symbolic value that *Brown v. Board of Education* provided to the white majority and the United States Government in waging the Cold War. See *id.*

²⁴⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1836) (referring to African-Americans as an “unfortunate race” who “the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted” deemed to be of “an inferior order, and altogether unfit to associate with the white race, either in social or political relations” and were therefore not interpreted to be “a part of the people” to which the Constitution refers as the American polity) (emphasis added); see also *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846) (summarizing the Court's interpretation of the history of Native American relations by claiming that the United States government “has exercised its power over this *unfortunate race* in the spirit of humanity and justice, and has endeavoured by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices”) (emphasis added).

²⁴⁸ Molly Townes O'Brien, *Justice John Marshall Harlan as Prophet: The Plessy Dissenter's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 755 (1998).

enlightenment that helped achieve valuable moves (such as Harlan's *Plessy* dissent) in the early stages of the civil rights movement but ultimately failed (and refused) to subvert white supremacy. But, as we have detailed in Part II, any potential value in the use of the immutability factor has long since receded.

That said, the integration of racial fluidity into equal-protection doctrine will not be without challenges with which both future scholarship and jurisprudence must grapple. First, courts will have to determine whether to throw out the concept of immutability altogether or retain it in a softened form that acknowledges some level of fluidity and choice in the racialization process. Troubled by the prevailing, restrictive definition of immutability (which appears to exclude traits that have any non-biological basis, involve any level of choice or constitute the product of one's life (as opposed to birth) circumstances) and the consequences of this view on equal-protection doctrine, some state courts and lower federal courts have reconceptualized immutability into a more pliable concept. In employing such a strategy, these courts have managed to circumvent and distinguish inconvenient Supreme Court precedent.

One of the earliest illustrations of this latter tact comes from the Ninth Circuit's 1988 decision in *Watkins v. U.S. Army*,²⁴⁹ when it considered an equal protection challenge to the military's decision to discharge a soldier on grounds of his sexual orientation. In an opinion ultimately withdrawn when the case was decided on narrower grounds *en banc*,²⁵⁰ the court effectively disregarded the then-binding *Bowers v. Hardwick* decision (and the Supreme Court's apparent endorsement of discrimination on the basis of sexual orientation in the case) and held that sexual orientation was a suspect class and that government distinctions based on it were subject to strict scrutiny—

²⁴⁹ 847 F.2d 1329, 1349 (9th Cir. 1988), *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989) (en banc).

²⁵⁰ The opinion was ultimately withdrawn en banc when the full court decided the case on narrower grounds. *See* *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc) (holding that the Army could not bar a soldier's reenlistment solely because of his homosexuality).

a scrutiny the Army's action failed to pass.²⁵¹ In its attempt to reconcile the Supreme Court's precedent on suspect classes, the panel chose to take a soft reading of the immutability factor: "Although the Supreme Court considers immutability relevant, it is clear that by 'immutability' the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class[.]"²⁵² the panel opined. "People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed."²⁵³ Then, invoking the dynamics of passing and covering and the role that individuals can have in how they are racialized, the panel added that:

People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes 'pass' for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. Reading the case law in a more capacious manner, 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment.²⁵⁴

Watkins's more-pliable notion of immutability was ahead of its time and, by the twenty-first century, had gained traction. In 2008, when the California Supreme Court considered whether denying sex-same marriage would conflict with the state's equal protection clause, it held in the affirmative, suggesting that "Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person

²⁵¹ *Watkins*, 847 F.2d at 1349 ("Having concluded that homosexuals constitute a suspect class, we must subject the Army's regulations facially discriminating against homosexuals to strict scrutiny.").

²⁵² *Id.* at 1347.

²⁵³ *Id.*

²⁵⁴ *Id.* (citing JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (1977)).

to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”²⁵⁵ By 2014, at least one Ninth Circuit panel would also regard a more flexible definition of immutability—one that does not require a trait be strictly unchangeable—as settled law of the Circuit, concluding, “We have recognized that ‘[s]exual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.’”²⁵⁶ This “new immutability,”²⁵⁷ has earned support in the academic literature as well.²⁵⁸

But, of course, the Supreme Court itself has never adopted such a softened view of immutability; while lower courts have attempted to impute a lax gloss on immutability, the actual language of Supreme Court rulings does not seem to support such a reading.²⁵⁹ In *Frontiero*, the Court defined an immutable trait as one “determined *solely* by the accident of birth.”²⁶⁰ Such a framing of immutability does not appear to lend itself to any kind of malleability, particularly as a result of one’s choices (as difficult as effectuating the change might be). Indeed, it is worth noting that no less than Stephen Reinhardt, long dubbed the ‘liberal lion’ of the Ninth Circuit for his famously

²⁵⁵ *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008).

²⁵⁶ *Latta v. Otter*, 771 F.3d 456, 464 n.4 (9th Cir. 2014) (internal citations omitted).

²⁵⁷ *See Clarke*, *supra* note 187, at 24.

²⁵⁸ *See, e.g.*, Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014) (“Maybe we need a softer definition of immutability. Rather than thinking of traits as locked identities, we can define immutability as a trait that is so central to our sense of self that it would be extremely difficult to change.”); Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: The Right to Choose “Immutable” Identity Characteristics*, 88 N.Y.U. L. REV. 373, 377 (2013) (suggesting that courts adopt the notion of “fundamental immutability” from asylum cases, such that “an immutable characteristic is not simply a quality one cannot change, determined at birth. Rather, as a baseline, it is an electable status that one should not be forced to change because it is fundamental to identity.”).

²⁵⁹ *See generally* Marc R. Shapiro, *Treading the Supreme Court’s Murky Immutability Waters*, 38 GONZ. L. REV. 409, 411 (2002) (noting that, “[t]ime and again, the Court’s opinions limit their evaluation of immutability to the analogizing of the proposed trait to characteristics previously classified as immutable. Thus, the Court has avoided a substantive, legal construction of the term.”).

²⁶⁰ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (emphasis added).

progressive jurisprudence²⁶¹ and his enduring support of gay rights,²⁶² actually logged the dissent in the *Watkins* decision, remarkably stating that he could not support the majority's interpretation of binding Supreme Court precedent. "Like the majority," he noted:

I believe that homosexuals have been unfairly treated both historically and in the United States today. Were I free to apply my own view of the meaning of the Constitution and in that light to pass upon the validity of the Army's regulations, I too would conclude that the Army may not refuse to enlist homosexuals.²⁶³

But, as Reinhardt went on to explain:

I am bound . . . as a circuit judge to apply the Constitution as it has been interpreted by the Supreme Court and our own circuit, whether or not I agree with those interpretations. Because of this requirement, I am sometimes compelled to reach a result I believe to be contrary to the proper interpretation of constitutional principles. This is, regrettably, one of those times.²⁶⁴

²⁶¹ See Sam Roberts, *Stephen Reinhardt, Liberal Lion of Federal Court, Dies at 87*, N.Y. TIMES, April 2, 2018, <https://www.nytimes.com/2018/04/02/obituaries/stephen-reinhardt-liberal-lion-of-federal-court-dies-at-87.html> (describing Judge Reinhardt as a "liberal lion").

²⁶² See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (affirming district court's finding that California constitutional amendment restricting marriage to opposite sex couples violated the equal protection and due process clauses of the Fourteenth Amendment); *Watkins v. U.S. Army*, 847 F.2d 1329, 1356, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting) ("Were it not for *Hardwick* (and other cases discussed *infra*), I would agree [that homosexuals must be treated as a suspect class], for in my opinion the group meets all the applicable criteria In my opinion, invidious discrimination against a group of persons with immutable characteristics can never be justified on the grounds of society's moral disapproval. No lesson regarding the meaning of our Constitution could be more important for us as a nation to learn. I believe that the Supreme Court egregiously misinterpreted the Constitution in *Hardwick*. In my view, *Hardwick* improperly condones official bias and prejudice against homosexuals, and authorizes the criminalization of conduct that is an essential part of the intimate sexual life of our many homosexual citizens, a group that has historically been the victim of unfair and irrational treatment. I believe that history will view *Hardwick* much as it views *Plessey v. Ferguson* And I am confident that, in the long run, *Hardwick*, like *Plessey*, will be overruled by a wiser and more enlightened Court.") (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

²⁶³ *Watkins*, 847 F.2d at 1353.

²⁶⁴ *Id.*

Thus, even Reinhardt suggested that the majority had deviated from binding Supreme Court precedent, even though Reinhardt strongly disagreed with such precedent.

Moreover, as Jessica Clarke has cautioned, even adoption of a pliable notion of immutability would continue to bear some unacceptable risks. Specifically, such a notion of immutability would still require protected traits to be “fundamental to one’s identity”—a position that not all individuals will (or even should) ascribe to their race, gender or sexual orientation.²⁶⁵ As Clarke points out, use of the new immutability standard actually flips traditional non-discrimination principles on their head. The new immutability protects identity traits because they are important, whereas traditional non-discrimination principles posit that “individuals should be judged according to their qualifications rather than extraneous identity traits such as race, sex, and disability” and that, therefore, these are “forbidden grounds for discrimination not because they are important, but because they are not.”²⁶⁶

Second, regardless of whether the Supreme Court ultimately adopts this more capacious definition of immutability or rids itself altogether of the immutability fiction, courts will have to develop new standards to distinguish between those mutable traits that will receive heightened scrutiny because they are so essential to personal identity that “it would be abhorrent for government to penalize a person for refusing to change them,”²⁶⁷ and those traits that will not. To take an example from our discussion of *Betts v. McCaughtry*,²⁶⁸ perhaps hairstyle is so intimately related to personal identity and the performative aspects of race that regulations of it will receive heightened scrutiny, while music may not be so imbued with racial meaning such that regulations related to it would not receive anything more than rational basis review from an equal-protection perspective.²⁶⁹ The formulation of such distinctions would inevitably force courts to make judgment calls and to delve into racial hermeneutics. But as challenging as

²⁶⁵ Clarke, *supra* note 187, at 39.

²⁶⁶ *Id.* at 42.

²⁶⁷ *Id.* at 5.

²⁶⁸ 827 F. Supp. 1400 (W.D. Wis. 1993).

²⁶⁹ However, it would undoubtedly receive heightened scrutiny under the First Amendment.

such a proposition might be, given the stubborn persistence of race as a key dividing point in American society through the centuries—even after the successes of the civil rights movement—such a move may be the only way for our law to truly challenge subordination practices related to race.

Third, once they acknowledge the mutability of race, courts will have to contend with how we might deal with the potential abuse of fluidity. On one hand, elective choices pertaining to race deserve protection and recognition. On the other hand, there is good reason to believe that disingenuous manipulation of race for the purposes of obtaining race-based benefits should not go unaddressed. Specifically, if courts acknowledge the fluidity of race, a growing number of individuals might be tempted to disingenuously claim racial affiliations. In the process, they might subvert the purpose and efficacy of remedial-race based programs—programs that serve the compelling government interests in rectifying both past and present racial discrimination and inequality. As a result, courts will have to carefully balance racial agency with fraud prevention.

One potential source of guidance for balancing these competing interests comes from the treatment of another fundamental identity trait which is mutable: religion. To ensure religious freedom, the state grants certain exemptions when religious beliefs would otherwise clash with a particular edict. Laws such as the Religious Freedom Restoration Act²⁷⁰ and the Selective Service Act²⁷¹ contain such exemptions. But such exemptions come with a risk: that the unscrupulous could potentially exploit them by concocting beliefs that are deemed religious in nature. To prevent the improper exploitation of such exemptions, courts have upheld the right to

²⁷⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (noting that the Religious Freedom Restoration Act “prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.”).

²⁷¹ *See United States v. Seeger*, 380 U.S. 163 (1965) (noting that the Universal Military Training and Service Act exempted from combat individuals who, by reason of their “religious training and belief,” conscientiously objected to participation in war in any form).

scrutinize attempts to qualify for such exemptions.²⁷² But, when exercising this right of review, courts take an important middle-ground position. They do not shirk from the project at hand. But, at the same time, in order to protect the sanctity of the freedom of belief, the Supreme Court has prohibited any inquiry into the veracity of the beliefs.²⁷³ Thus, courts limit their review just to the bona fides of the individual, *i.e.*, whether the purported belief of the individual is “sincerely held.”²⁷⁴ As Tseming Yang has noted, such a limit can provide a powerful check on opportunistic uses of self-identification.²⁷⁵ Judicial scrutiny of race fraud could benefit from a similar approach.

Such an approach has its disadvantages, however, as the case of Rachael Dolezal highlights. In 2015, Dolezal’s story made international headlines. The city of Spokane, Washington announced an investigation into whether Dolezal, the president of NAACP’s local chapter and instructor in the Africana Studies program at Eastern Washington State University, had violated the city’s code of ethics by deeming herself “African-American” on her application to serve on a local police ombudsman commission.²⁷⁶ Dolezal’s own mother called her daughter a fraud, stating that both she and Dolezal’s father were white and publicly releasing images showing Dolezal

²⁷² *Id.* at 185 (noting that, “while the ‘truth’ of a belief is not open to question [in religious exemption cases], there remains the significant question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case.”).

²⁷³ The Supreme Court has strictly forbidden inquiries into the factual credence of any religious belief. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) (“[W]e do not agree that the truth or verity of respondents’ religious doctrines or beliefs should have been submitted to the jury . . . [as] the First Amendment precludes such a course.”).

²⁷⁴ *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 726 (1981) (to grant religious-based exemption/benefit, “the State must necessarily inquire whether the claimant’s belief is ‘religious’ and whether it is sincerely held. Otherwise any dissatisfied employee may leave his job without cause and claim that he did so because his own particular beliefs required it.”); *see also Ballard*, 322 U.S. at 84 (allowing charge to jury to determine “whether or not the defendants honestly and in good faith believed the representations” but not whether their representations were actually true).

²⁷⁵ Yang, *supra* note 78, at 384.

²⁷⁶ Brendan O’Connor, *Spokane NAACP President’s Mom Says Daughter Pretending to Be Black*, GAWKER (June 11, 2015, 10:35 PM), <https://gawker.com/spokane-naacp-presidents-mom-says-daughter-pretending-t-1710788405>.

with blonde-hair, blue-eyes and fair skin as a child.²⁷⁷ Dolezal's antics became tabloid fodder and she paid a price for the unwanted attention and the revelations that came with it.²⁷⁸ She lost both her NAACP and teaching positions and faced widespread public ridicule.²⁷⁹ But Dolezal remained undeterred, even doubling down on her African-American identity. She is no longer known as Rachel Dolezal and has changed her name to Nkechi Amare Diallo.²⁸⁰

No matter how much some people might scoff at Dolezal's self-classification, she appears to have a sincere, genuine and good-faith belief that her racial identity is African-American. At the same time, granting her judicial recognition as an African-American raises serious concerns. As critics have rightfully noted:

By turning herself into a very, very, very, very light-skinned black woman, Dolezal opens herself up to be treated as black by white society only to the extent that they can visually identify her as such, and no amount of visual change would provide Dolezal with the inherited trauma and socioeconomic disadvantage of racial oppression in this country.²⁸¹

In the coda to her surreal interview with Dolezal after the release of Dolezal's book *In Full Color*,²⁸² Ijeoma Oluo poignantly recognizes the inherent privilege undergirding Dolezal's racial transformation, noting:

[I]t is white supremacy that told an unhappy and outcast white woman that black identity was hers for the taking. It is white supremacy that told her

²⁷⁷ Associated Press, *Disgraced NAACP Leader Rachel Dolezal Now Struggling to Get by: 'My Life is Not a Soundbite,'* ABC ACTION NEWS (Mar. 24, 2017, 7:44 AM), <https://www.abcactionnews.com/news/national/disgraced-naacp-leader-rachel-dolezal-now-struggling-to-get-by>.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Ijeoma Oluo, *The Heart of Whiteness: Ijeoma Oluo Interviews Rachel Dolezal, the White Woman Who Identifies as Black*, STRANGER, Apr. 19, 2017, <https://www.thestranger.com/features/2017/04/19/25082450/the-heart-of-whiteness-ijeoma-oluo-interviews-rachel-dolezal-the-white-woman-who-identifies-as-black>.

²⁸² For failing to report royalties from sales of her book while collecting assistance from the state, Dolezal was later charged with welfare fraud. See Matthew Haag, *Rachel Dolezal, Who Pretended to Be Black, Is Charged with Welfare Fraud*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/rachel-dolezal-welfare-fraud.html>.

that any black people who questioned her were obviously uneducated and unmotivated to rise to her level of wokeness. It is white supremacy that then elevated this display of privilege into the dominating conversation on black female identity in America. It is white supremacy that decided that it was worth a book deal, national news coverage, and yes—even this interview.²⁸³

To many, Dolezal's gambit unfortunately appears to perpetuate the worst form of race imperialism where even black identity itself is appropriated for white ends. Though expressing his openness to the possibility of considering Dolezal black, Jamielle Bouie remarked that he was troubled by the fact that “it feels like Dolezal is adopting the culture without carrying the burdens.”²⁸⁴ It did not help that, amidst the uproar, public records revealed that she had actually filed a lawsuit in 2002 against Howard University for discriminating against her—as a white woman.²⁸⁵

Even the most earnest belief in one's affiliation with a particular racial identity does not imbue someone with the shared experience of living as an individual upon whom society imposes that particular racial identity. Thus, while Dolezal should not suffer discrimination at the hands of her (chosen) race, there is good reason to argue that she should not enjoy the benefits of remedial action either. Such a bifurcation might be legally achievable by drawing a distinction between one's cis race and one's chosen race and by decoupling one's ascriptive race from one's preferred race.

²⁸³ Oluo, *supra* note 281. Civil rights activist Rosa Clemente added that, “[a]s people of color, no matter how hard we try, we cannot achieve whiteness, but the fact that a White woman can achieve Blackness and lie and take space and take resources and on top of it be belligerent when confronted is the epitome of White privilege.” See Taylor Lewis, *Is ‘Transracial’ Identity Real? 11 Opinions That Will Leave You Thinking*, ESSENCE (June 15, 2015), <https://www.essence.com/news/rachel-dolezal-transracial-identity-opinions/> (quoting Clemente).

²⁸⁴ Jamielle Bouie, *Is Rachel Dolezal Black Just Because She Says She Is?*, SLATE (June 12, 2015, 7:22 PM), <https://slate.com/news-and-politics/2015/06/rachel-dolezal-claims-to-be-black-the-naacp-official-was-part-of-the-african-american-community-but-did-she-accept-the-racial-hardships-too.html>.

²⁸⁵ *NAACP Imposter Sued School Over Race Claims*, SMOKING GUN (June 15, 2015), <http://www.thesmokinggun.com/documents/bizarre/rachel-dolezal-discrimination-lawsuit-786451>.

At the same time, courts may prefer to stay entirely out of the eligibility-determination game altogether. Randall Kennedy, for one, has argued that the benefits that come with granting individuals the freedom to racially self-identity far outweigh the potential risks of race fraud that may come with such deference.²⁸⁶ He also discounts the likelihood of widespread race fraud, noting:

[W]hites who may be tempted to pass for black for purposes of obtaining affirmative-action benefits refrain from doing so . . . [because] the perceived risks as a rule outweigh the perceived benefits. One risk, of course, is the reputational harm associated with being revealed as a passer; another is the risk that the masquerade may be all too successful and thus cause the white passer to suffer the racial penalties that ‘real’ blacks continue to face.²⁸⁷

It is possible that Kennedy failed to appreciate just how little shame some people may have in manipulating their racial identity for strategic gains and how, in a world of FERPA²⁸⁸ and other privacy protections, individuals may not be called to task for their (false) representations on paper. For example, Kennedy notes that “there are remarkably few instances on record in which authorities challenged the participation of individuals in affirmative-action programs on the basis of their not belonging to a given racial category of designated beneficiaries.”²⁸⁹ However, this fact does not prove the problem does not exist (or would not exist at even greater magnitude in a world where legal precedent also supported and protected racial fluidity decisions). If anything, it only suggests a deep reluctance on behalf of the bureaucratic and legal machinery of the state to get involved in the project of racial determination—a fact that would, to a sophisticated manipulator, even

²⁸⁶ RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 337 (2003) (“I, for one, believe that it would be better to tolerate some racial fraud, or even a considerable amount of it, under a regime of racial self-identification than to allow affirmative-action programs to be policed via the imposition on individuals of racial identity tests.”).

²⁸⁷ *Id.* at 338.

²⁸⁸ See Katie Warren, *Students in the College Admissions Scandal Were Told to Lie about Their Race on Their Applications*, BUSINESS INSIDER (May 18, 2019, 12:05 PM), <https://www.businessinsider.com/students-in-college-cheating-scandal-told-to-lie-about-race-2019-5> (detailing how students lied about their race on their college applications with the hope of gaining a competitive advantage).

²⁸⁹ See KENNEDY, *supra* note 286.

heighten the incentive to game the system since they have little fear of getting caught or facing sanctions.

There is certainly good reason for the state and its various branches (including the judiciary) to be weary of entering the fray on issues of racial determination. After all, our history as a nation is littered with tragic examples of when the government has done just that. But as this Article has argued, it no longer makes sense to continue to operate our constitutional jurisprudence on the assumption of racial immutability. It is an assumption that does not reflect reality and, at the same time, the continued fetishization of immutability in equal-protection doctrine has thwarted the evolution of civil rights protection and our movement from a jurisprudence of mere tolerance to one of acceptance. The death knell of the immutability assumption therefore can serve as a blow against racial subordination practices. As J. Allen Douglas has argued, the concept of racial immutability has, for too long, served the interests of white supremacy by enforcing racial divides and maintaining long-entrenched hierarchies.²⁹⁰ According to Douglas, courts supportive of the immutability regime have, either consciously or unwittingly, sought “to locate racial identity in the body in the form of an object of property—an immutable, natural ‘thing’ possessed—to ensure a means for ‘quieting title’ in whiteness”²⁹¹—property interests which our legal system has long served.²⁹² As a result, recognition of mutability has

²⁹⁰ J. Allen Douglas, *The “Most Valuable Sort of Property”: Constructing White Identity in American Law, 1880-1940*, 40 SAN DIEGO L. REV. 881 (2003). For example, as Douglas documents, in the *Plessy* era, courts often recognized defamation claims involving the improper denial of an individual’s whiteness, thereby creating “value in white honor and white subjectivity by etching racial boundaries around the right of reputation in whiteness.” *Id.* at 912.

²⁹¹ *Id.* at 899.

²⁹² See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993) (“[T]he set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain—by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law.”). As Harris argues, “[t]he exclusion of subordinated ‘others’ was and remains a central part of the property interest in whiteness and, indeed, is part of the protection that the court extends to whites’ settled expectations of continued privilege.” *Id.* at 1758.

the added potential to undo property interests in whiteness (or any racial identity). In the process, we can perhaps move closer to achieving the aspirational purpose of equal protection: the eradication of all forms of racial subordination.