The Legal Weaponization of Racialized DNA: A New Genetic Politics of Affirmative Action

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INTRODUCTION

A white man in Washington State tries to use the results of his DNA ancestry test to claim access to minority set-aside contracts.[1] A conservative federal circuit court judge in Texas invokes the work of an anti-racist evolutionary biologist to argue that since race is *not* genetic then racial categories are arbitrary and cannot be used as legitimate legal classifications for affirmative action programs.[2] A Democratic state attorney general employs correlations between race and the frequency of certain genetic variations affecting drug response to build a fraud case against a major pharmaceutical corporation.[3] And a candidate for the 2020 Democratic presidential nomination hires a MacArthur award-winning population geneticist to show the world that her ancestry includes Native American roots.[4] In these cases and others, genetic knowledge is increasingly being weaponized to make legal and political claims to racial identity in ways that have profound implications for race and the law.

The relationship between race, biology, and law has a long and fraught history in America.[5] In this latest chapter, we see some troubling and perhaps counter-intuitive developments. On the one hand, new genetic technologies are being used by conservatives to leverage the typically liberal understanding of race as a social construction to attack policies aimed at ameliorating racial inequality. On the other, liberals are making assertions about how race relates to genetics to pursue claims that, even as they might seem to further progressive goals, are also reinforcing discredited notions that race is genetic. In this "through the looking glass" world of genetic politics, conservatives are embracing the idea of race as a social construct while liberals are making claims that reinforce the idea of race as a genetic construct.

What forces are enabling or reinforcing this dynamic? At its most basic, it appears that conservatives are, in effect, arguing that if race is "merely" social, (that is if it is *not* genetic, as the liberals claim), then it is not real. As such, it is an arbitrary category that should not and cannot provide a legitimate basis for policies such as affirmative action. It should be noted that this new approach stands in stark contrast to conservative efforts mounted to undermine affirmative action in the 1990s by the likes of Richard Herrnstein and Charles Murray, whose controversial and influential book,

1. Christine Willmsen, *For Years He Identified as White. Now He's Using A DNA Test to Claim Minority Status for His Business*, NEWS TRIB. (Sept. 23, 2018), https://www.thenewstribune.com/news/business/article218754000.html.

2. Fisher v. Univ. Texas, 631 F.3d 213, 264 n.22 (5th Cir. 2011) (Garza, J., concurring).

3. Press Release, David Louie, Hawaii Department of the Attorney General, Attorney General Files Suit Against Manufacturers and Distributors of the Prescription Drug Plavix (Mar. 19, 2014), http://ag.hawaii.gov/wp-content/uploads/2014/01/News-Release-2014-09.pdf.

4. Annie Linskey, *Elizabeth Warren Releases Results of DNA Test*, BOS. GLOBE (Oct. 15, 2018), https://www.bostonglobe.com/news/politics/2018/10/15/warren-addresses-native-american-issue/YEUaGzsefB0gPBe2AbmSVO/story.html.

5. The literature on this is voluminous. For some representative work, *see, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1997); ARIELA GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2009); DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (2011); JONATHAN KAHN, RACE IN A BOTTLE: THE STORY OF BIDIL AND RACIALIZED MEDICINE IN A POST-GENOMIC AGE (2012) [hereinafter *Race in a Bottle*].

The Bell Curve, argued that inherent genetic differences could explain racial gaps in IQ scores (among other metrics).[6] In the aftermath of the Supreme Court's reaffirmation of affirmative action in the 2003 case of *Grutter v. Bollinger*,[7] it became evident that approaches grounded in assertions of inherent genetic difference among the races had their limits. And so, some conservatives turned to the idea of race as a social construct as opposed to a genetic trait as a means to carry forward the long running crusade against any form of racial preference or amelioration.

Liberals, in contrast, embraced advances in modern genetics and have looked to observed *correlations* between varying frequencies of certain genetic variations (or alleles) and socially identified racial population groups to make claims in a manner that, ironically, reinforce the very notions of genetic race that the liberal consensus has been trying to dismantle since World War II.[8] American liberals often fall prey to the seductive lure of neat technological fixes for complex and messy social problems that leads them time and time again to appeal to science to resolve thorny problems of racial justice.[9] In this strange apparent inversion of liberal and conservative stances on race and genetics, we might do well to think back to the 19th century when many abolitionists held firm to the Biblical idea of monogenesis for all the world's races while many of the leading evolutionary scientists of the day embraced polygenetic theories of the different descent of racial groups often in the service of justifying slavery.[10] Race and genetics make for strange political bedfellows in different eras.

Here we have a diverse array of actors vigorously constructing, contesting, and deploying conceptions of the relation between race and genetics to make legal and political claims. Understandings of race in relation to genetics are far from settled. This article explores how actors from both the political left and the political right have resorted to weaponizing racialized DNA to achieve their goals. This indicates that articulating race as a social construct in itself is no guarantee of a racially progressive agenda and employing genetic data to pursue seemingly racially progressive goals is no guarantee against reinforcing the dangerous idea that the human races are genetically distinct.

This article unfolds as a diagnostic exploration of this problem situated in the context of the post-genomic era since the completion of the Human Genome Project in 2003. It aims less to suggest specific policies or legal solutions than to describe and

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6. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1995).

7. Grutter v. Bollinger, 539 U.S. 306 (2003).

8. For post-war discussions of the relation between race and genetics, *see* JENNY REARDON, RACE TO THE FINISH: IDENTITY AND GOVERNANCE IN AN AGE OF GENOMICS 17–44 (2009); JOHN P. JACKSON & NADINE M. WEIDMAN, RACE, RACISM, AND SCIENCE: SOCIAL IMPACT AND INTERACTION 163–204 (2004).

9. On the seductive lure of technological fixes for racial problems, *see* JONATHAN KAHN, RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE 169–224 (2017) [hereinafter *Race on the Brain*].

10. Jonathan Marks, *Great Chain of Being*, *in* ENCYCLOPEDIA OF RACE AND RACISM 68–73 (Patrick L. Mason ed., 2d ed. 2008); TERENCE KEEL, DIVINE VARIATIONS: HOW CHRISTIAN THOUGHT BECAME RACIAL SCIENCE (2018).

analyze this emergent phenomenon and thereby equip others in diverse areas of law, policy, and scholarship to engage and respond to it better informed and with, perhaps, deeper insight into the dynamics they might need to address in their own distinct realms of analysis and practice. New genetic technologies do not resolve these legal and political issues. They become, rather, a sort of terrain upon which long standing debates are carried out in new ways. Or perhaps they are better understood as both already shaped by and in turn shaping these arguments. The scientific impetus to explore the relationship between race and genetics cannot be understood apart from evolving understandings of race itself as a means of allocating power and creating social order. These stories are the latest iteration of this long-standing process. We must be mindful of the new forms these old arguments may be taking.

I. RALPH TAYLOR'S STORY, PART ONE: USING DNA TO CLAIM MINORITY STATUS

As Lynwood, Washington insurance contractor Ralph Taylor tells it, sometime around 2009 or so, "I was in a bar. . . and some visually Caucasian guy. . .was talking about how he got money for being a minority, which piqued my interest." [11] This guy "had gotten a big chunk of money," so Ralph "looked into the different avenues and. . .found OMWBE," Washington State's Office of Minority and Women's Business Enterprises.[12] Ralph himself "looked Caucasian" but he had recently taken a DNA ancestry test that said he had some African ancestry, and this gave him an idea. Until that time, the forty-seven-year-old Taylor had always thought of himself as white, but he now began to look into using his DNA test a basis for claiming that his business, the Orion Insurance Group, was a minority owned business enterprise and hence eligible for funding via minority set-aside contracts.[13]

At first, there was some back and forth with the Washington State office about the sufficiency of his first DNA test, so in 2010 he took a test offered by AncestrybyDNA™, part of Genelex corporation. The test estimated that he was "90% European, 6% Indigenous American, and 4% Sub-Saharan African."[14] Despite the test showing he had more "Indigenous American" ancestry, he chose only to claim he was "Black" in his application for Minority Business Enterprise (MBE) status under Washington State Law. In 2013, after an initial rejection, Washington granted his application for MBE certification under state law.[15] The next step was to obtain federal certification as a Disadvantaged Business Enterprise (DBE). Under the DBE program the U.S. Department of Transportation sets aside a certain amount of funding from federal contracts to go to small businesses owned by

11. The Lars Larson Show, *Ralph Taylor: Should You Be Able to Use DNA to Get Minority Status for State Contracts?*, SOUNDCLOUD (Sept. 18, 2018), https://soundcloud.com/thelarslarsonshow/ralph-taylor-should-you-be-able-to-use-dna-to-get-minority-status-for-state-contracts.

12. *Id.*

13. *Id.*

14. Orion Ins. Grp. v. Wash. State Office of Minority & Women's Bus. Enter., No. 16-5582 RJB, 2017 WL 3387344, at *8–9 (W.D. Wash. Aug. 7, 2017); *see also* Willmsen, *supra* note 2.

15. Orion Ins. Grp., 2017 WL 3387344, at *6-7.

"socially and economically disadvantaged individuals."[16] According to the Code of Federal Regulations, "socially disadvantaged individuals" are those "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control."[17]

The federal DBE certification was particularly attractive to Taylor because it would allow him to gain more deals providing liability insurance to contractors under multi-million-dollar federal contracts. He noted that, under the federal certification, he could get access to insuring contractors on programs "like the Seattle Tunnel project . . . which would have been a substantial amount of income to [his] agency."[18] His application for DBE certification under the federal program was to be evaluated by the same state office that granted him MBE status, so he understandably assumed approval would be forthcoming. Taylor was, therefore, surprised and more than a bit put out when Edwina Martin-Arnold, the OMWBE certification analyst assigned to his case, denied his initial application in 2014 and requested that he submit additional evidence that he was a member of a disadvantaged group.[19] The problem, according to Taylor, was that Martin-Arnold "did not think [he] looked black enough on [his] driver's license" that was submitted as part of his application.[20] In due course, Taylor submitted his DNA test results along with some other genealogical records, but Martin-Arnold deemed them insufficient. And so, in 2016 Taylor sued the OMWBE and the U.S. Department of Transportation in federal court. [21]

On its face, this might seem like an example of some officious bureaucrat denying the claimed racial identity of an applicant based on a crude stereotyped assessment of his phenotype. It turns out however, that the federal guidelines direct an examiner to "require the individual to present additional evidence that he or she is a member of the group" if the examiner has a "well-founded reason to question the individual's membership in that group."[22] Washington State had no such directive, so the examiner would not have had similar grounds for questioning Taylor's MBE application (which, after all, had also been initially denied). In evaluating his application for federal recognition, Martin-Arnold, in looking at the totality of the materials (including the DNA test), concluded that she had a "well-founded reason to question" Taylor's claim of group membership.[23]

The federal guidelines address the understandable concern that when millions of dollars are stake some applicants may falsely claim membership in a disadvantaged group. Nonetheless, such situations also involve the uncomfortable reality that under

16. *Id.* at *7.

17. 49 C.F.R. § 26 app. E.

18. The Lars Larson Show, *supra* note 12.

19. *Orion Ins. Grp.*, 2017 WL 3387344, at *11.

20. Transcript of Record at 3, *Orion Ins. Grp.*, 2017 WL 3387344; *see also* Amended Complaint, *Orion Ins. Grp.*, 2017 WL 3387344.

21. *Orion Ins. Grp.*, 2017 WL 3387344, at *14.

22. 49 C.F.R. § 26.63(a).

23. *Orion Ins. Grp.*, 2017 WL 3387344, at *25.

any racial preference program, some person or office must have the authority, in effect, to review and adjudicate claims of racial membership.[24]

A. The New Role of DNA Testing in Determining Legal Racial Categories

Such controversies long predate Taylor's application. In 1975, not long after the first affirmative action hiring programs were implemented, Philip and Paul Malone, twin brothers from Boston, applied to be firefighters but were not hired because of their low civil service test scores. They reapplied in 1977, this time changing their self-identified racial classification from "white" to "black" and were hired the following year. This particular gaming of the system did not come to light until ten years later when the brothers applied for promotion and the commissioner, who knew the twins personally, saw that they listed their race as "black." A hearing ensued and the twins were dismissed for committing "racial fraud."[25] After the Malones' case, investigations within the fire and police departments of Boston and other cities uncovered similar cases of questionable claims about racial identity.[26] As recently as 2019, the *Wall Street Journal* reported the story of a college counselor who, as part of a scheme to get wealthy students into elite colleges, urged them to falsely identify as racial minorities in their application materials.[27]

Then there is the case of U.S. Republican House Minority Leader, Kevin McCarthy's brother-in-law, William Wages, who claimed Native American ancestry to win more than $7 million in no-bid federal contracts.[28] Wages asserted in 1998 that he was Cherokee Indian, but an investigation in 2018 by the Los Angeles Times found no Cherokees among his ancestors in birth and census records examined going back to the 1850s.[29] It turned out that Wages made his claim based on certification from the so-called "Northern Cherokee Nation," which is not a federally recognized tribe. As the Times noted, "All three Cherokee tribes with federal recognition consider the Northern Cherokee group illegitimate." "It's very much a con," said David Cornsilk, a Cherokee genealogist and a citizen of the Cherokee Nation, the largest of

24. Adjudicating racial identity, of course, exists in diverse legal realms beyond affirmative action and has deep historical roots in American legal practice. *See, e.g.*, LÓPEZ, *supra* note 6; GROSS, *supra* note 6. Indeed, the infamous 1896 separate but equal case of *Plessy v. Ferguson* hinged upon a tram conductor's characterization of Homer Plessy as Black. Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755 (2004).

25. Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 515–16 (1995).

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

27. Melissa Korn & Jennifer Levitz, *Students Were Advised to Claim to Be Minorities in College-Admissions Scandal,* WALL STREET J. (May 19, 2019), https://www.wsj.com/articles/students-were-advised-to-claim-to-be-minorities-in-college-admissions-scandal-11558171800.

28. Paul Pringle & Adam Elmahrek, *House Majority Leader Kevin McCarthy's Family Benefited from U.S. Program for Minorities Based on Disputed Ancestry,* L.A. TIMES (Oct. 14, 2018), https://www.latimes.com/local/california/la-na-pol-mccarthy-contracts-20181014-story.html [hereinafter *House Majority Leader Kevin McCarthy*].

29. Paul Pringle & Adam Elmahrek, *Minority Contractors Claiming to be "Native American" to Undergo Nationwide Review,* L.A. TIMES (Sept. 18, 2019), https://www.latimes.com/world-nation/story/2019-09-17/minority-contractors-native-american-review [hereinafter *Minority Contractors*].

the recognized Cherokee tribes.[30] After the exposure by the Times, Wages stopped identifying his company as Native-American owned in government records. [31]

What set Ralph Taylor's case apart from these cases of racial fraud is that he submitted the results of his 2010 AncestryByDNA test results to support his claim of racial group membership.[32] (Notably, Wages said he considered getting a DNA test to bolster his claim but said he opted not to because the tests were unreliable for Native Americans.[33] Given the absence of any documented Cherokee ancestry in his genealogical records going back to 1850, there may have been other reasons for avoiding such a test). Taylor was not simply checking a box, he was augmenting his claim with an appeal to genetic science. The issue, therefore, was not one of racial fraud, but of the sufficiency of the genetic evidence he presented to establish his claim.

The OMWBE found the DNA test results insufficient for two primary reasons. First, Genelex specified that the test results held a margin of error of 3.3%, meaning that Taylor's ancestry could be as little as 2.7% indigenous American and 0.7% Sub-Saharan African. The OMWBE further noted that from reviewing the information on the Ancestry by DNA website, it was unclear if the website's use of the term Sub-Saharan African corresponded to the definition of Black American in the CFR, which referred to "persons having origins in the Black racial groups of Africa."[34] Second, the sufficiency of the Genelex test was further undermined by Taylor's decision to submit *additional* DNA ancestry evidence in the form of a test his father took that estimated he was 44% European, 44% Sub-Saharan African, and 12% East Asian.[35] In considering the implications of the significant divergence between the father's and son's test results, the OMWBE noted:

> Mr. Taylor submitted a DNA test to prove he is 4% Sub-Saharan African and 6% Native American. The test results for Mr. Taylor and his father are highly inconsistent and incomplete. Half of a son's DNA comes from his father and half comes from his mother. OMWBE acknowledges that the pieces of DNA from each parent are random and will not equal exactly half from each parent. The two DNA tests between father and son should, however, be related. Without a complete picture of Mr. Taylor's mother's DNA, OMWBE contends that the tests are not reliable to determine ethnicity. This information fails to prove that Mr. Taylor is a member of a minority group, or regarded as a member of a minority group.[36]

The OMWBE focused primarily on issues of statistical error and divergence between the father's and son's test results. Ironically, Taylor may have hurt his case by submitting the additional test results from his father because it called into

30. Pringle & Elmahrek, *House Majority Leader Kevin McCarthy*, *supra* note 30.

31. *Id.*

32. Orion Ins. Grp. v. Wash. State Office of Minority & Women's Bus. Enters., No. 16-5582 RJB, 2017 WL 3387344, at *7–8 (W.D. Wash. Aug. 7, 2017).

33. Pringle & Elmahrek, *Minority Contractors*, *supra* note 29.

34. *Orion Ins. Grp.*, WL 3387344, at *27.

35. *Id.* at *10.

36. *Id.* at *26.

question the reliability of the technology overall. Yet the OMWBE left open the possibility that *more* DNA information—i.e., from the mother—might cure the reliability problem.

The company that provided Taylor's test, Genelex, also warrants a bit more scrutiny. As Kim TallBear notes, Genelex was advertising its services as early as 2004 to "confirm that you are of Native American descent. . .[if] your goal is to assist in validating your eligibility for government entitlements."[37] Such claims are particularly problematic in relation to Native American identity, where, as TallBear also notes, tribal membership is not determined with reference to genetics but involves varying and complex political and social histories that are grounded in tribal sovereignty claims and practices.[38] Yet it is evident from advertisements such as this, that Taylor was hardly the first to think about using DNA ancestry testing to make a claim for government benefits. He was, however, apparently the first to bring a federal lawsuit to challenge the denial of claims based, in part, on such testing.

In appealing the OMWBE decision to the US Department of Transportation, Taylor argued that the regulations defined "Black Americans" to include "persons with 'origins' in the Black racial groups of Africa," (this terminology being derived from the Census Bureau classifications), and that his DNA test showed such "origins".[39] The DOT, however, noted that the broader definition of a "socially and economically disadvantaged individual" also required that the person "have been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members [sic] of groups and without regard to his or her individual qualities."[40] Here the DOT was, in effect, noting the importance of social context and lived experience for the construction of racial membership sufficient to meet the purposes of the DBE program, which are "to level the playing field by providing small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally funded transportation contracts."[41]

Elaborating upon Taylor's claim about having genetic "origins" in Africa, the USDOT further noted that:

> Construing the narrower definition as broadly as Orion advocates would strip the provision of all exclusionary meaning. It is commonly acknowledged that all of mankind "originated" in Africa. Therefore, if any (Black) African ancestry; no matter how attenuated, sufficed for DBE purposes, then this particular definition would be devoid of any distinction-which was clearly not the Department's intent in promulgating it. There is little to no evidence that Mr. Taylor ever suffered any adverse consequences in business because of his genetic makeup. [42]

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37. KIM TALLBEAR, NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE 86 (2013).
38. *Id.* at 86-88.
39. *Orion Ins. Grp.*, 2017 WL 3387344, at *11.
40. *Id.*
41. *Disadvantaged Business Enterprise (DBE) Program*, U.S. DEP'T TRANSPORTATION (last updated Apr. 17, 2020), https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise.
42. *Orion Ins. Grp.*, 2017 WL 3387344, at *11.

Here the USDOT brought in the temporal aspect of the genetic construction of ancestry. The racial estimates provided by genetic ancestry tests are premised not only on "where" your ancestors might have been from but also "when" – that is, at what point in time we fix their purported place of origin. For example, a modern white Afrikaner whose ancestors might have arrived in South Africa as early as the 1600s would nonetheless likely code as "European" in an ancestry test because of temporal presumptions integrated into the comparative reference data bases used to estimate ancestry. Those presumptions might be based on understandings of human migration patterns predating the era of European colonial expansion but not going back far enough to recognize a common origin many millennia ago. Of course, all human populations have their origins in Africa many hundreds of thousands of years ago, but there are also estimates placing the most recent common ancestors of all current humans on earth around 1400 B.C.E., fewer than thirty-five hundred years ago.[43]

II. GAMING THE SYSTEM WITH DNA (OR NOT)

The USDOT, of course, was not employing references to the latest work in evolutionary biology, but rather basic common sense. It was looking at the purposes behind the legislation and its clear understanding of the racial groups presumed to be "disadvantaged" as socially constructed. This is evident in the regulations requirement in that the examiner considered Taylor's reference to his relatively small proportion of purportedly "African" DNA was simply too attenuated to sustain a claim of disadvantage as understood by the regulations or the court. He clearly had not suffered any social disadvantage by reason of being Black because he had never understood himself to be Black before 2010. Therefore, the DOT considered whether there was any evidence he had suffered disadvantage specifically by reason of his genetic makeup, which was, after all, at the core of his claim. Unsurprisingly, there was none.[44]

Elaborating on the prioritization of the social experience of genetics, the federal district court noted that when the initial claim of group membership is deemed questionable, the federal regulations specify that in evaluating whether or not an applicant truly belongs to a claimed disadvantaged group, the examiner must consider:

> whether the person has held himself out to be a member of the group over a long period of time prior to application for certification, whether the person is regarded as a member of the group by the relevant community, and may require the applicant to produce appropriate documentation of group membership.[45]

Having rejected the DNA evidence as insufficient to establish Taylor's group membership, the OMWBE requested further evidence relating to how Taylor actually lived his life and was perceived in his community to meet these concerns.

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43. Douglas L. T. Rohde, Steve Olson & Joseph T. Chang, *Modelling the Recent Common Ancestry of all Living Humans*, 431 NATURE 562, 562 (2004).

44. *See Orion Ins. Grp.*, 2017 WL 3387344, at *8-10.

45. *Id.* at *7 (quoting 49 C.F.R. § 26.63(a)(2) and (b)) (quotation marks omitted).

Such inquiries are clearly related to concerns about the sincerity of claims about belonging to a particular group when government benefits or preferences are at stake.[46] Ideas about using DNA ancestry tests to gain such advantages were prevalent as early as 2006 and were present in publications such as the *New York Times*, in which an article written by Amy Harmon featured Alan Moldawer and his adopted twin sons, Matt and Andrew, who "had always thought of themselves as white."[47] As Harmon tells it, when it came time for the boys to apply for college:

> Mr. Moldawer thought it might be worth investigating the origins of their slightly tan-tinted skin, with a new DNA kit that he had heard could determine an individual's genetic ancestry. The results, designating the boys 9 percent Native American and 11 percent northern African, arrived too late for the admissions process. But Mr. Moldawer, a business executive in Silver Spring, Md., says they could be useful in obtaining financial aid. [48]

Harmon went on to note that "given the test's speculative nature, [this was in the early days of commercial DNA ancestry ventures] it seems unlikely that colleges, governments and other institutions will embrace them.[49] Indeed, as recently as 2018, the college admissions counseling company, Ivy Coach, cautioned against trying to use DNA tests to bolster one's chances, noting that "college admissions officers weren't born yesterday. They know that there are students and parents out there hoping to game the system."[50]

Nonetheless, the odd case of Nicole Katchur indicates the continued possibility of using DNA tests to game the system. In 2018, Katchur (who identifies as Caucasian) filed a racial discrimination suit against the Thomas Jefferson University School of Medicine, alleging that the School's admission officer suggested she take a DNA ancestry test to see if she could qualify as Native American to garner better chances of being accepted. Katchur did not take a test and was denied admission.[51] Here the DNA test mattered in its absence but indicates the ongoing potential for using DNA tests to game the system and provided a basis for challenging admissions practices.

Some conservatives have eagerly seized upon the potential use of DNA to game the system as a new basis for challenging affirmative action in all its forms. Regarding Harmon's 2006 article, Jonah Goldberg scornfully wrote in *The National Review*:

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46. Concerns about gaming the system of affirmative action echo similar concerns expressed decades earlier regarding claims of conscientious objection to the military draft. For a foundational article on this issue, *see* T. Oscar Smith & Derrick Bell, *The Conscientious-Objector Program – A Search for Sincerity*, 19 UNIV. PITT. L. REV. 695, 695 (1958).

47. Amy Harmon, *Seeking Ancestry in DNA Ties Uncovered by Tests*, N.Y. TIMES (Apr. 12, 2006), https://www.nytimes.com/2006/04/12/us/seeking-ancestry-in-dna-ties-uncovered-by-tests.html.

48. *Id.*

49. *Id.*

50. *DNA Testing in College Admissions,* IVY COACH (May 7, 2018), https://www.ivycoach.com/the-ivy-coach-blog/college-admissions/dna-testing-college-admissions/.

51. Katchur v. Thomas Jefferson University, 354 F. Supp. 3d 655, 659 (E.D. Penn. 2019); Scott Jaschik, *DNA Testing, Race and an Admissions Lawsuit*, INSIDE HIGHER EDUC. (Jan. 28, 2019), https://www.insidehighered.com/admissions/article/2019/01/28/lawsuit-raises-questions-about-dna-testing-race-and-admissions.

> Can't people see how unbelievably absurd the racial quota game is when you can game the system to advantage kids who were completely unaware of their mixed genetic "identity." The system's going to come crashing down soon. Better get your racial spoils while you can.[52]

In response to the Katchur case, an article was posted on *Minding the Campus*, (a subsidiary of the conservative National Association of Scholars"),[53] suggesting that Katchur's case highlighted the racial bias inherent in admissions programs and the illegitimacy of the Supreme Court's decision upholding affirmative action in *Grutter v. Bollinger*.[54] After the OMWBE denied his application, Taylor would go on to use his genetic ancestry test as a basis for challenging the entire edifice of racial preferences in keeping with these conservative critiques.

In contrast to Taylor's approach, Deadria Farmer-Paellman saw DNA ancestry tests as a means to help right a great historical wrong.[55] Farmer-Paellmann was an African American activist seeking reparations for the harms of slavery. Reparations is a long fought and complicated issue conceptualized in many different ways, from demands for recognition and apology to more policy-driven arguments for general programs to improve the lot of African Americans.[56] Farmer-Paellman came up with a distinctive approach that was far more specific. In 2000, she uncovered archival evidence of insurance companies that had written policies for slave owners on the lives of their slaves. In 2002, she filed a claim against FleetBoston Financial Corporation, Aetna, and CSX for the return of lost wages and wealth.[57] In 2004, this suit was dismissed on several grounds, one of the most central being a lack of standing to bring a claim. Among the reasons for finding no standing was a failure to establish a sufficiently direct link between the plaintiffs and the alleged harm. As the court noted, "Plaintiffs fail to allege any facts in their Complaint that link the specifically named Defendants to the alleged injuries suffered by the Plaintiffs; nor does the Plaintiffs' Complaint allege a connection between any of the named Defendants and any of the Plaintiffs' ancestors."[58]

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52. Jonah Goldberg, *Are You 11% Genetic Victim?*, NAT'L REV. (Apr. 12, 2006), https://www.nationalreview.com/corner/are-you-11-genetic-victim-jonah-goldberg/.

53. *About Us*, MINDING THE CAMPUS, (last visited Nov. 14, 2021) https://www.mindingthecampus.org/about/; Patricia Cohen, *Conservatives Try New Tack on Campuses*, N.Y. TIMES (Sept. 21, 2008), https://www.nytimes.com/2008/09/22/education/22conservative.html.

54. John Rosenberg, *Can A University Be Found Liable For Telling The Truth About Racial Preference?*, MINDING THE CAMPUS (Jan. 30, 2019), https://www.mindingthecampus.org/2019/01/30/can-a-university-be-found-liable-for-telling-the-truth-about-racial-preference/.

55. *See generally* ALONDRA NELSON, THE SOCIAL LIFE OF DNA: RACE, REPARATIONS, AND RECONCILIATION AFTER THE GENOME 107–40 (2016).

56. *See generally*, CHARLES P. HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS (2009); BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (2003); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

57. NELSON, *supra* note 56, at 125-30.

58. *In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721, 749 (N.D. Ill. 2005), *affirm'd in part as modified, rev'd in part*, *In re* African-American Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006).

To address this problem, Farmer-Paellmann approached geneticist Rick Kittles, whom she had encountered in the 1990s through their work on the African Burial Project in lower Manhattan. Kittles had recently founded a DNA testing company called African Ancestry with the aim of using new genetic technology to connect African Americans back to their roots in Africa.[59] Together, Kittles and Farmer-Paellmann considered whether genetic ancestry tracing technology might be used to address the standing issue by providing a link "to prove your authenticity . . . .to suggest you should receive reparations."[60] In a subsequent complaint they, therefore, alleged that "scientific testing in the form of DNA testing has proven beyond doubt the direct relationship between the instant plaintiffs and the instant defendants,"[61] and prayed that the court would declare "that the DNA testing conducted by and of each of the plaintiffs is sufficient to establish the standing and/or direct connection between plaintiffs and Defendants." [62]

Ultimately, the court dismissed this second complaint, again largely on standing grounds.[63] With respect to the new genetic evidence, the court noted that "there may well be no perfect method of determining exactly who is a descendant of a slave, and thus a member of the group entitled to receive reparations,"[64] and concluded that "genetic mapping, or DNA testing. . .alone is insufficient to provide a decisive link to a homeland."[65] The court elaborated on the notion of "genetic standing" and its limitations:

> Plaintiffs face insurmountable problems in establishing "to a virtual certainty" that they have suffered concrete, individualized harms at the hands of Defendants. "[A]n essential prerequisite to bringing suit is the plaintiff's ability to establish with precision her relationship to the injury and the defendant." In terms of slavery reparations, the "'traditional' model. . .seeks suit against a defendant or defendants on behalf of a plaintiff class comprised of descendants of slaves." In such situations, plaintiffs "assume that a familial relationship between the ancestor victim and the descendant plaintiff—what might be called hereditary or genetic standing—is sufficient to bring suit." An assumption such as this is difficult to implement in practice. "The notion that standing can be inherited (the 'genetic' theory of standing) is. . .legally. . .suspect; and the notion that groups, rather than individuals, have standing to sue, is legally insupportable."[66]

The court here was not entering into the fraught area of adjudicating racial identity. It focused instead on the limitations of genetic science for establishing a basis for standing to bring a particular kind of historically informed legal claim.

59. NELSON, *supra* note 56, at 130-31.

60. *Id.* at 131.

61. Complaint with Jury Demand, Farmer-Paellmann v. Fleetboston Fin. Corp., No. 04 CV 2430, 2004 WL 5400675, at *16 (S.D.N.Y. Mar. 29, 2004).

62. *Id.* at 27.

63. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 780.

64. *Id.* at 733.

65. *Id.* at 747.

66. *Id.* at 733-34 (citations omitted).

In contrast to apparently bad faith or opportunistic uses of DNA testing to claim tactical advantage, Farmer-Paellmann's appeal to DNA here was consistent with her long-held assertions of racial and ancestral identity. Unlike Taylor, she was not using DNA here to make a novel claim of membership in a racial group, but for the more focused purpose of establishing direct ancestral ties to enslaved Africans sufficient to establish standing to pursue her case. Her use of DNA testing may have been tactical in the sense of creating a new avenue to pursue her prior claim, but it was fully consistent with it and hence should be understood as an attempt to use DNA either to game or undermine the system. Technically speaking, the claim was not about race per se but about ancestry, a very particular ancestry to specific enslaved individuals. As such, her claim did not formally reify race as genetic, nor did it directly implicate issues of race as a social construct. Nonetheless, in juxtaposing the distinctively racialized ancestry of slave descendants with genetic technology, it inevitably contributed to a frame for perceiving the connections between race and genetics could have legal and policy implications.

III. RALPH TAYLOR'S STORY, PART TWO: USING GENETICS TO CHALLENGE THE FOUNDATIONS OF RACE-BASED AFFIRMATIVE ACTION

Returning to Taylor's case, he conceded that he had neither held himself out nor regarded himself as a member of a covered group before 2010 but rather "grew up thinking of himself as caucasian."[67] In response to the OMWBE's request for additional information to support his claim of being Black, Taylor stated that he subsequently had joined the NAACP, subscribed to Ebony magazine, and had "taken a great interest in Black social causes."[68] The OMWBE found such assertions to be insufficient to meet the regulatory standard for inclusion as a member of a recognized racial group under the regulation and so it denied his application.[69] The tenuousness of such claimed personal identification with the Black community is underscored by Taylor's own admissions outside of court that his initial interest in claiming a Black identity was to gain access to federal funds.[70] The federal District Court ultimately agreed with the OMWBE's reasoning and upheld its actions, dismissing all of Taylor's claims in 2017.[71]

Undeterred, Taylor appealed to the Ninth Circuit and in the interim had his California birth certificate amended to change his father's race from "Caucasian" to "Black, Native American, Caucasian."[72] At oral argument, Judge Fletcher found this additional bit of evidence less than dispositive, noting that California did not require any evidence to support the request and in any event finding it *post hoc* to the case at

67. Orion Ins. Grp. v. Wash. State Office of Minority & Women's Bus. Enters., No. 16-5582 RJB, 2017 WL 3387344, at *6 (W.D. Wash. Aug. 7, 2017).

68. *Id.* at *10.

69. *Id.* at *11.

70. The Lars Larson Show, *supra* note 12; Caroline Modarressy-Tehrani, *A DNA Test Revealed This Man Is 4% Black. Now He Wants to Abolish Affirmative Action*, HUFFINGTON POST (Sept. 19, 2019), https://www.huffpost.com/entry/dna-test-affirmative-action_n_5d824762e4b0957256afa986.

71. *Orion Ins. Grp.*, 2017 WL 3387344, at *56-57.

72. *Id.*

hand. Fletcher also noted in passing that while DNA testing might have evidentiary value in certain forensic contexts where DNA from a crime scene was being matched with a suspect, the value of DNA ancestry testing in affirmative action contexts was highly questionable.[73] In some respects, this echoes the court in Farmer-Paellmann's reparations case commenting on the limitations of DNA ancestry testing in legal proceedings. In any event, the Court of Appeals had little trouble affirming the District Court's dismissal of Taylor's claims, noting that neither the OMWBE nor the U.S. Department of Transportation acted in an arbitrary or capricious manner in rejecting Taylor's claims.[74]

The reference to an absence of arbitrary or capricious action is common in appellate review. It is, nonetheless, significant here because a secondary aspect of Taylor's argument involved his using the DNA evidence to challenge the very legitimacy of the racial classifications being employed by the OMWBE and U.S. DOT. While he may have originally sued in order to get access to federal funds, his claim evolved into something of a crusade against affirmative action programs.[75] This ties Taylor's story to other conservative attempts to undermine affirmative action programs (discussed below)[76] that contrast the purported arbitrary nature of socially based racial classifications to assertedly more robust or "real" classifications based on genetic science.

After the OMWBE rejected his initial application for federal certification of Orion Insurance as a minority owned business enterprise, Taylor shifted tack and started arguing that the rejection of the evidence he presented, particularly his DNA ancestry evidence, showed that the use of racial categories in affirmative action programs was itself arbitrary and capricious, or alternatively that the federal regulations specifying the categories were unconstitutionally vague.[77] Taylor's complaint was grounded in the initial assertion that "that OMWBE decision was arbitrary and capricious because it did not find him to be 'Black enough' based on his appearance on his driver's license."[78] He went on to argue that his DNA test showed that this initial phenotype-based determination was erroneous. The District Court found, however, that in developing this claim Taylor's "reliance on [his] genetic makeup, without regard to his appearance, is misplaced and does not demonstrate that OMWBE acted arbitrarily or capriciously in finding that there was insufficient evidence that Mr. Taylor was a member of either the Black or Native American groups."[79]

Related to his claim of arbitrary and capricious action, Taylor asserted a potentially more powerful and far-reaching claim that the definitions of "Black American" and "Native American" as used in the DBE program and the Code of Federal

73. Transcript of Oral Argument, *Orion Ins. Grp.*, 2017 WL 3387344.

74. Orion Ins. Grp. v. Wash. State Office of Minority & Women's Bus. Enters., 754 Fed. Appx 556, 558 (9th Cir. 2018) (noting that "[t]his disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.").

75. Modarressy-Tehrani, *supra* note 71.

76. *See* discussion *infra* Parts B-C.

77. *Orion Ins. Grp.*, 2017 WL 3387344, at *42–43.

78. *Id.* at *29.

79. *Id.*

Regulations were themselves void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clause.[80] This claim, if upheld, would not only have had implications for Taylor, but could have undermined the viability of the entire DBE program and, indeed, potentially *any* program using racial classifications.

Taylor's argument was premised, in part, on the idea that the genetic information from his ancestry test provided a clear and objective measure of race, whereas the criteria that led to the denial of his application were based on vague and amorphous standards of social understandings of race. He argued, for example, that he:

> was denied inclusion in the Black and Native American minority categories because OMWBE believed he had insufficient minority DNA, though they had no written guideline or policy delineating a DNA limit under which a person would not be considered a minority.[81]

He also argued that "genotype is a more stable indicator of race than phenotype,"[82] the latter being susceptible to change (e.g., "a Caucasian person can sit in the sun for a few years and look more Black, or someone like Michael Jackson can get skin treatments to look more Caucasian"[83]) while the genotype is unchanging. His brief also drew upon an antisemitic canard that Jews are a genetic race, asserting that "people considering themselves German were likewise swept into the holocaust because they had Jewish blood (genotype), not because of how they looked (phenotype)."[84] In all of this, there is an eerie echo of racist laws of hypodescent from the Jim Crow era, that declared a person Black for purposes of the law if they had "one drop" of Black blood.[85] In any event, it reifies race as genetic, while dismissing social understandings of race as untenable and epiphenomenal.

Unconvinced, the court dismissed Taylor's claims, noting that, "considering the purpose of the law, the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit."[86] The Court here was willing to accept contextual and common sense understanding of both the purpose of the law and the socially understood boundaries of the group categories to which it applied. The Court's recognition that racial categories can constitutionally be employed in a commonsense manner grounded in contextual social understandings of race may seem obvious, but it is critical. It goes to the heart of broader conservative efforts to use advances in genetic science and testing to undermine precisely such commonsense administration of affirmative action programs.

80. *Id.* at *43 (noting that "[i]t is again not clear whether Plaintiffs intend to assert this claim against the State Defendants, and whether they intend to make the claim via the APA or 42 U.S.C. § 1983.").

81. Reply Brief for Appellants, Orion Ins. Grp. v. Wash. State Office of Minority & Women's Bus. Enters., No. 17-35749, slip op. (9th Cir. Dec. 19, 2018).

82. *Id.*

83. *Id.*

84. *Id.* at 18.

85. *See, e.g.*, David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 108 AM. HISTORICAL REV. 1363 (2003).

86. Orion Ins. Grp. v. Wash. State Office of Minority & Women's Bus. Enters., 2017 WL 3387344, at *14 (W.D. Wash. Aug. 7, 2017).

A. A New Genetic Politics of Affirmative Action?

Legal scholar Mary Ziegler noted this trend in 2018, arguing that since the early 2010s, "anti affirmative-action amici and activists have developed a new argument: a claim that if race is a social construct, race-conscious remedies are arbitrary, unfair, and likely to reinforce existing stereotypes."[87] Ziegler focuses in particular on the cases of *Schuette v. Coalition to Defend Affirmative Action*[88] and *Fisher v. University of Texas*.[89] In *Schuette*, the Supreme Court upheld an amendment to the Michigan state constitution that forbade the use of racial preferences by any university system or school district.[90] Ziegler draws attention to the fact that in the plurality opinion in *Schuette*,

> the Court. . .questioned whether it was possible any longer for the racial categories used in affirmative-action programs to have any value. "[I]n a society in which [racial] lines are becoming more blurred," Schuette explains, "the attempt to define race-based categories . . . raises serious questions of its own."[91]

Similarly, Ziegler notes that the conservative dissenters in *Fisher*, a case challenging the use of racial categories as part of the admissions process at the University of Texas, built upon the argument from *Schuette* "insisting that racial categories are 'ill suited for the more integrated country that we are rapidly becoming.'"[92] Ziegler astutely observes that

> Far from denying claims that race is a construct, opponents of affirmative action now use those claims to their advantage. For anti-affirmative-action amici and activists, the idea that race is a social construct now militates in favor of color-blindness. Since race is a social construct, it is argued to be devoid of meaning. Any use of race, in this account, becomes an unfair and incoherent allocation of government benefits.[93]

As understandings of race as a social construction gained ascendance, conservatives adapted their arguments against using racial categories in law or policy accordingly.

The idea of race as a social versus genetic construct has a complex and contested history. The ascendance of the social constructionist view of race was grounded in the work of anti-racists on the left who have been working for decades to discredit the biological understandings of race used to rationalize racial hierarchy.[94] This view seemed at its apogee in 2000 at the White House Ceremony celebrating the completion of the first draft of the human genome, when President Clinton declared "I believe one of the great truths to emerge from this triumphant expedition inside

87. Mary Ziegler, *What Is Race?: The New Constitutional Politics of Affirmative Action*, 50 CONN. L. REV. 279, 279 (2018).

88. Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014).

89. Fisher v. University of Texas, 136 S. Ct. 2198 (2016).

90. *Schuette*, 572 U.S. at 291.

91. Ziegler, *supra* note 88, at 282 (citing *Schuette*, 572 U.S. at 307).

92. *Id.* (citing *Fisher*, 136 S. Ct. at 2230).

93. Ziegler, *supra* note 88, at 283.

94. *See, e.g.*, REARDON, *supra* note 9, at 17-45; ROBERTS, *supra* note 6, at 3–26.

the human genome is that in genetic terms, all human beings, regardless of race, are more than 99.9 percent the same."[95] Following President Clinton, geneticist Craig Venter asserted that this accomplishment illustrated "that the concept of race has no genetic or scientific basis."[96]

The following decade, however, saw the steady rise of race-based studies in genetics, biomedicine and pharmaceutical development promoting the idea that because statistical correlations of different frequencies of certain genetic variations seemed to cluster by racial groups, that genetic constructions of race have merit.[97] As Dorothy Roberts has noted in this period:

> The liberal faith in scientific objectivity has generated an approach to the genetic definition of race that sounds remarkably similar to the conservative one. Like conservatives, liberals separate racial science from racial politics to retain a supposedly scientific concept of race as a genetic category.[98]

In biomedicine this was perhaps most clearly evident in the case of BiDil, which in 2005 became the first drug ever approved by the FDA with a race-specific indication—to treat heart failure in a "Black" patient.

Brought to market by a small company called NitroMed, the drug had the support of the Congressional Black Caucus, the NAACP, and the Association of Black Cardiologists as a means to address purported health disparities in mortality from heart failure. Notably, however, it was also embraced by Newt Gingrich and Sally Satel, a doctor affiliated with the conservative American Enterprise Institute. For the likes of Satel, who wrote a high-profile piece in the New York Times Magazine titled, "I am A Racially Profiling Doctor,"[99] BiDil was used as evidence that race-based health disparities had more to do with biology than with racism and social injustice.[100] The more liberal proponents of BiDil saw it both as a way to help a community long victimized by the biomedical establishment and as a stepping-stone to personalized genomic medicine. For them, the idea was that even if they did not accept the idea of race as genetic, they nonetheless saw it as a useful proxy for certain important genetic variations. Here, a well-meaning liberal attempt to address racial health disparities could also be flipped by conservatives to undermine the premise that such disparities were caused by social forces rather than biology.[101]

As for the drug itself, it turns out that BiDil was simply a combination of two preexisting generic drugs, hydralazine and isosorbide dinitrate, that had been used for

95. Press Release, The White House Office of the Press Secretary, Remarks by the President, Prime Minister Tony Blair of England (via satellite), Dr. Francis Collins, Director of the National Human Genome Research Institute, and Dr. Craig Venter, President and Chief Scientific Officer, Celera Genomics Corporation, on the Completion of the First Survey of the Entire Human Genome Project (June 26, 2000), http://www.ornl.gov/sci/techresources/Human_Genome/project/clinton2.shtml.

96. *Id.*

97. KAHN, *Race in a Bottle, supra* note 6, at 193-224; ROBERTS, *supra* note 6, at 287-308.

98. ROBERTS, *supra* note 6, at 293.

99. Sally Satel, *I am a Racially Profiling Doctor*, N.Y. TIMES (May 5, 2002), https://www.nytimes.com/2002/05/05/magazine/i-am-a-racially-profiling-doctor.html.

100. KAHN, *Race in a Bottle, supra* note 6, at 75–101, 216-17; ROBERTS, *supra* note 6, at 181–86.

101. KAHN, *Race in a Bottle, supra* note 6, at 157–92.

decades to treat hypertension. Combining them into a single pill for co-administration showed significant effectiveness in treating heart failure. This was first discovered in the 1980s in clinical trials that did not sort out the impact by race. The drug became racialized in the 1990s primarily in order to obtain a new race-specific patent to effectively extend the life of the pre-existing non-racial patent by thirteen years. The trial upon which FDA approval was based enrolled only self-identified African Americans, so the results said nothing about whether the drug worked differently in African Americans than in any other group. Even while being promoted to address issues of racial justice, the case of BiDil is also an example of conflating race and genetics to gain tactical advantage in the market.[102]

By juxtaposing Ziegler's article with the case of BiDil, we can see that even as some conservatives have come to embrace the idea of race as a social construct in order to challenge affirmative action, some liberals have come to accept the utility of using social race as a proxy for genetics as a tactic to realize the promise of personalized genomic medicine. This strange political inversion has no specific cause but is testament to how both race and genetics operate in fluid, contestable domains that can be variously deployed to serve diverse and sometimes conflicting ends.

For most political purposes, it seemed that the language of race as a social construct had triumphed; yet in the realm of scientific inquiry and biomedical practice race has continued to be used as a proxy for genetic populations. Roberts has further observed about this phenomenon in the context of biomedical practice:

> With the new distinction between biological and social race. . . conservatives now have a way to speak about racial difference while maintaining a color blind approach to social policy. They find it acceptable to refer to race explicitly as long as it has a biological meaning because that use of race is purportedly scientific and unbiased. . .Genomic science, conservatives argue, frees us from political correctness so we can act on racial differences in genetics that determine our health. In this ingenious twist of political logic, those who criticize racial biomedicine because of its impact are seen as interfering with health out of loyalty to racial ideology.[103]

Where Roberts shows how some conservatives invoke the idea of genomic race to undermine progressive efforts to address health disparities, Ziegler provides a critical perspective on other conservatives who invoke the idea of social race to undermine any progressive attempts to use racial categories in law and policy. Ziegler, though, does not fully appreciate how conservatives are distinctively employing genetic concepts to buttress these claims.

Extending Roberts' idea of the conservatives' "ingenious twist of political logic" beyond biomedicine to affirmative action more broadly, I would characterize the implicit conservative framing as being something along the lines of: Race as a social construct is not "real" and hence cannot be the basis of legitimate legal policies; conversely, race as a genetic construct is real, and further shows the arbitrary and

102. For a full discussion of the case of BiDil, see *id.*
103. ROBERTS, *supra* note 6, at 292.

unconstitutionally vague nature of using race as a social construct in law and policy. Such conservative framings have been enabled and reinforced by the dynamic Roberts identified (evident in the story of BiDil) whereby "liberals separate racial science from racial politics to retain a supposedly scientific concept of race as a genetic category."[104]

This framing also informs Taylor's claims. After he was denied access to benefits as a disadvantaged person operating a business, he essentially attempted to burn down the entire edifice of the DBE program, arguing that the racial categories it employed were unconstitutionally vague. He did this not simply by asserting that "race is a social construct. . .devoid of meaning,"[105] but also by taking the additional step of juxtaposing the supposedly arbitrary social categories of race against the purportedly more real, objective, and scientific construction of racial membership afforded by his genetic ancestry test. Such use of genetics to undermine affirmative action receives scant attention in Ziegler's article but adds an important dimension to the broader phenomenon she identifies. Beyond Taylor's case, we see this most prominently in the genealogy of the *Fisher* affirmative action case.

B. Judge Garza and Fisher v. University of Texas

In 2008, Abigail Fisher and Rachel Michalewicz each filed suit against the University of Texas at Austin after they were denied admission to the undergraduate program there.[106] The plaintiffs, both characterized by the court as "Caucasian female[s]," challenged the University's affirmative action program, contending that the "admissions policies and procedures currently applied by Defendants discriminate against Plaintiffs on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, and federal civil rights statutes."[107] The Federal District Court, applying the standard set forth in *Grutter v. Bollinger*[108] for evaluating affirmative action programs in higher education, found no liability and granted summary judgement to the University.[109]

The plaintiffs would go on to pursue the case up through the Fifth Circuit Court of Appeals[110] and finally to the Supreme Court, where, ultimately, they would fail to prevail.[111] Along the way, Judge Emilio Garza, a conservative jurist appointed to the Fifth Circuit by George H.W. Bush in 1991, would write a concurring opinion with a curious allusion to biological race and a remarkable footnote citing liberal anti-racist scholars of race and genetics.[112] Garza was no fan of affirmative action programs and made it clear that he disagreed with the holding in *Grutter* even as he felt bound

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104. *Id.* at 293.
105. Ziegler, *supra* note 88, at 283.
106. Fisher v. Univ. of Tex. II, 645 F. Supp. 2d 587 (W.D. Texas 2009).
107. *Id.* at 590.
108. Grutter v. Bollinger, 539 U.S. 306 (2003).
109. *Fisher*, 645 F. Supp. 2d at 612-13.
110. Fisher v. Univ. of Tex., 631 F. 3d 213 (5th Cir. 2011).
111. Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016).
112. *Fisher,* 631 F. 3d at 264 n.22 (Garza, J., concurring).

to apply its principles. Nonetheless, he wrote separately in hopes that his reasoning might provide a basis for the Supreme Court to reconsider its logic and "rectify the error" of *Grutter*.[113] A key component of his argument was his assertion that:

> The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races. A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decisionmakers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions. The University of Texas, for instance, segregates student admissions data along five racial classes. *See, e.g., 2008 Top Ten Percent Report* at 6 (reporting admissions data for White, Native–American, African–American, Asian–American, and Hispanic students). That is not how society looks any more, if it ever did.[114]

Garza upends the constructivist critique of race essentialism that had challenged white supremacy. He appeals to the authority of "science" not to challenge racial hierarchy but to challenge the use of the race concept to challenge racial hierarchy.

This brings us back to Ziegler's observation about how conservatives have begun to flip the liberal idea that race is a social construction against liberal affirmative action policies by arguing that social construction is somehow equivalent to or synonymous with incoherence and arbitrariness.[115] Ziegler, however, overlooked Garza's telling footnote,[116] quoting a 2004 article by prominent law professor, Larry Alexander who, with his colleague Maimon Schwarzschild, cited philosophers of science to support their contention that "racial (and ethnic) classifications are unscientific, arbitrary, and often nearly meaningless."[117] Perhaps most telling is the footnote's additional citation to Joseph Graves, Jr.'s 2001 book, *The Emperor's New Clothes: Biological Theories of Race and the Millennium*.[118] Graves is not a philosopher of science. He is an evolutionary biologist who was the first African American to receive a Ph.D. in evolutionary biology in this country. In the book, Graves makes it clear that his goal "is to show the reader that there is no biological basis for the separation of human beings into races and that the idea of race is a relatively recent social

113. *Id.* at 247.

114. *Id.* Notably, none of the briefs or arguments before the court mentioned the issue of genetics or the biological basis of race, indicating that this argument was introduced *sua sponte* by Garza.

115. Ziegler, *supra* note 88, at 279-338.

116. *Fisher*, 631 F.3d at 264 n.22 (Garza, J., concurring).

117. Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 21 (2004). Both Alexander and Schwarzchild are listed as "contributors" in events sponsored by the conservative Federalist Society. *Prof. Lawrence Alexander*, FEDERALIST SOC'Y (last visited Nov. 14, 2021), https://fedsoc.org/contributors/lawrence-alexander; *Prof. Maimon Schwarzchild*, FEDERALIST SOC'Y (last visited Nov. 14, 2021), https://fedsoc.org/contributors/maimon-schwarzschild. The previous year, Yale law professor, Peter Schuck anticipated this argument in his critique of affirmative action in his book, *Diversity in America*, wherein he stated: "Scientists have long discredited the notion of race that underlies affirmative action policy, and the latest DNA research provides further evidence, were any needed, of its artificiality and incoherence." PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 144 (2003).

118. JOSEPH L. GRAVES, JR., THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM (2001).

and political construction."[119] His project is unabashedly anti-racist. He is confident that "demolishing the idea of biological race lays bare the fallacies of racism."[120] Indeed, Graves was a signatory to two subsequent amicus briefs in the *Fisher* case filed in support of the University of Texas' affirmative action program.[121]

Graves himself later wrote a rejoinder to Garza and other similarly minded conservatives who would seek to use his scholarship to undermine affirmative action. Noting that people he characterized as "color-blind racists" had "co-opted" scientific findings to assert that "racism can no longer exist, since we have no biological races," Graves argued that the mere scientific fact that "the human species does not really contain biological races . . . has absolutely nothing to do with the ongoing racial discrimination faced by persons with dark skins in the United States."[122] Directly responding to Garza's citation of his work, Graves asserts that,

> The problem with Garza's reasoning is precisely that it confuses biological and socially defined racial categories (and their impacts). Garza is correct in pointing out the nonexistence of biological races. Indeed, he cited important scholarly literature supporting that fact (including my own work). However, the past-discrimination that the University of Texas (and other affirmative action) plans attempts to redress are based on how socially defined races suffered past and are suffering ongoing discrimination in American society. It is also not just the government that divides Americans into socially defined racial groups, it is virtually all lay Americans who continue this practice.[123]

Garza tried to leverage the scholarship of the anti-racist, pro-affirmative action evolutionary biologist Graves, to argue that if racial categories have no firm biological basis then they cannot be used as a basis for coherent state policy. But it was not simply that race as a social construct was arbitrary; it was that it was arbitrary *in comparison to* and because it had *no grounding in* biology. The reference to genetic science gives this argument its distinctive bite. The logic is clear: if race *were* genetic, then perhaps there would be a way to use racial categories in a manner that was not arbitrary; but *because* race is a social construct, the use of racial categories in law and policy is inherently arbitrary. The appeal to scientific authority is foundational to this new challenge to affirmative action. Ultimately, Garza was no more successful in convincing his fellow judges that the absence of a genetic basis for race made it an untenable legal category than was Taylor in his case. In both instances the decision makers, in effect, echoed Graves's pragmatic understanding of the historic use and impact of racial categories in social and legal domains.

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119. *Id.* at 1.

120. *Id.* at 2.

121. Brief for American Social Science Researchers as Amici Curiae Supporting Respondents, Fisher v. Univ. of Tex., 631 F. 3d 213 (5th Cir. 2011); Brief for American Social Science Researchers as Amici Curiae Supporting Respondents, Fisher v. Univ. of Tex, 136 S. Ct. 2198 (2016).

122. Joseph L. Graves, Jr., *Why the Nonexistence of Biological Races Does Not Mean the Nonexistence of Racism*, 59 AM. BEHAV. SCIENTIST 1474, 1474 (2015).

123. *Id.* at 1481.

What Garza did here stands in marked contrast to how the Supreme Court dealt with the relationship between social and genetic constructions of race in the 1987 case of *Saint Francis College v. Al-Khazraji.*[124] In that case, Majid Ghaidan Al-Khazraji, a professor at Saint Francis College, filed a suit alleging that by denying him tenure the College had discriminated against him on the basis of his Arabian race in violation of his civil rights, specifically, 42 U.S.C. § 1981.[125] The Supreme Court has construed section 1981 to forbid all "racial" discrimination in the making of private as well as public contracts.[126] One central issue in this case was whether § 1981, which became law in the 19th century, should be construed so as to deem discrimination against "Arabs" as racial discrimination. In determining that it should, Justice White in his opinion for the Court, looked back to 19th century understandings of racial grouping to conclude that Arabs would indeed have been considered a distinct race, separate from "Caucasians" in the 19th century when the law was adopted.[127] In a telling footnote, White observed that,

> There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance.[128]

White went on to cite the work of such eminent anti-racist scholars as Stephen J. Gould, Ashley Montague, and Sherry Washburn. Nonetheless, as legal scholar Khiara Bridges has noted, White's opinion did not involve a legal recognition of the argument that racial categories had no coherent basis in biology.[129] Rather, noting that the same footnote also emphasizes that "these observations and others have led some, *but not all*, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."[130] Bridges argues that White hedges his bets and allows for the fact that there may in fact be a biological basis for race while arguing that for the purposes of constructing section 1981, what mattered was not biology but social understandings of race in the 19th century.[131]

The relationship between legal and scientific constructions of race lies at the heart of Garza's opinion as well. In contrast to White, however, Garza invokes the authority of science to undermine the legitimacy of legal classifications based on social

124. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).
125. *Id.* at 605.
126. *Id.*
127. *Id.* at 608-09.
128. *Id.* at 608 n.4.
129. Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 53–54 (2013).
130. Saint Francis College v. Al-Khazraji, 481 U.S. at 614 n.4 (Emphasis added).
131. Bridges, *supra* note 130, at 53-54.

understandings of race. Adopting Garza's approach to race would not only lead to overturning *Grutter*, it would involve a radical reconfiguration of the relationship between legal and scientific authority in the field of race relations.

C. Garza's Approach to Race Proliferates

While repudiated by Graves, (and largely ignored by the other judges and the Supreme Court), Garza's arguments found a sympathetic ear among other conservative legal scholars. Most notably, as the appeals process in *Fisher* worked its way through the courts subsequent to Garza's special concurrence in the 2011 case (the case went up to the Supreme Court in 2013[132], back down to the 5th Circuit in 2014,[133] and back up again to the Supreme Court in 2016[134]), amicus briefs filed by Judicial Watch[135] and by the American Center for Law and Justice[136] took up Garza's genetic argument and expanded upon it.

Garza's argument first reappears in the 2012 amicus brief of Judicial Watch, which describes itself as "a conservative, non-partisan educational foundation, which promotes transparency, accountability and integrity in government, politics and the law."[137] Judicial Watch has a long history, going back to its founding in 1994, of pursuing investigations and litigation to attack liberals and promote conservative policies. A key early supporter was Richard Mellon Scaife, a deeply conservative Pittsburgh billionaire who bankrolled various anti-Clinton crusades, including investigations of "Filegate" during President Bill Clinton's administration, and seeking emails related to Secretary Hillary Clinton's role during the killings at the U.S. Embassy in Benghazi.[138]

In its brief, Judicial Watch begins by referring to race as an "intellectually impoverished concept" that when introduced into law foments "racial and ethnic resentment and intolerance."[139] It goes on to explain that race is an impoverished concept because "inherently ambiguous social constructs that have no validity in science."[140] Or, as it put in their later brief with direct reference to the legal standard of strict scrutiny requiring state use of racial categories to be narrowly tailored to serve a compelling state interest:[141]

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132. Fisher v. Univ. of Tex., 570 U.S. 297 (2013).

133. Fisher v. Univ. of Tex., 758 F.3d 633 (2014).

134. Fisher v. Univ. of Tex., 136 S.Ct. 2198 (2016).

135. Brief for Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae Supporting Petitioner, Fisher v. Univ. of Tex., 136 S.Ct. 2198 (2016); Brief for Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae Supporting Petitioner, Fisher v. Univ. Tex., 570 U.S. 297 (2013).

136. Brief for Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae Supporting Petitioner, Fisher v. Univ. of Tex., 136 S.Ct. 2198 (2016); Brief for the American Center for Law and Justice in Support of Rehearing en Banc, Fisher v. Univ. of Tex., 136 S.Ct. 2198 (2016).

137. *About*, JUDICIAL WATCH (last visited NOV. 15, 2021), https://www.judicialwatch.org/about/#mission.

138. Alex Leary, *Meet the Conservative Group That's Driving Clinton's Email Scandal*, TAMPA BAY TIMES (Oct. 7, 2016), https://www.miamiherald.com/news/politics-government/election/article106738447.html.

139. Brief for Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae Supporting Petitioner, at 2, Fisher v. Univ. Tex., 570 U.S. 297 (2013) (No 11-345) [hereinafter *Brief for Judicial Watch*].

140. *Id.*

141. Adarand Constructors v. Pena, 515 U.S. 200 (1995).

> Government policies such as the policy enacted by the University, which seeks to classify applicants by crude, inherently ambiguous, and arbitrary racial and ethnic categories to promote diversity can never be narrowly tailored to further a compelling government interest. Attempts to categorize individuals by racial and ethnic groups necessarily lead to absurd results.[142]

This broad argument has implications not only for affirmative action in higher education, but for the use of racial categories in any law or state policy.

Judicial Watch appealed to genetics not only to make its specific case for Abigail Fisher but also to attack the controlling Supreme Court precedent of *Grutter v. Bollinger*, which allowed for the use of racial categories as a "plus" factor in a holistic admissions process to help achieve a diverse student body.[143] Pointedly, Judicial Watch noted that,

> In the same year that marked the completion of the Human Genome Project, the Court [in Grutter] upheld the Law School's use of race – a concept that has been rejected by science and for centuries has been used to divide, impoverish, oppress, and enslave people – as a "plus" factor weighing in favor of admission. *Id.* at 335-43. In its ruling, the Court assumed that race was a meaningful proxy for diversity without addressing the issue in any direct way. The Court also assumed that race presented a fixed, natural, and unambiguous means of distinguishing between groups of people such that individual Law School applicants could be assigned a particular racial classification and awarded – or not awarded – a "plus" factor based on race.[144]

The explicit invocation of the Human Genome Project (HGP) is telling. The HGP stood as a symbol of scientific and technological prowess; a transformative scientific advancement akin to the Copernican or Darwinian revolutions.[145] As one recent article in the journal *Nature Reviews Genetics* put it, "the Human Genome Project changed everything."[146] Beyond conventional legal arguments, Judicial Watch was trying to leverage the authority of science to challenge the empirical underpinnings of the holding in *Grutter*. Perhaps developing a diverse student body was indeed a compelling state interest sufficient to justify the use of race in university admissions, but the lack of a scientific foundation to the racial categories out of which such diversity was to be constructed meant that the use of such categories could never be narrowly tailored to serve that end, and so all race-based programs must fail the test of strict scrutiny.

To support such sweeping contentions, Judicial Watch moved beyond Garza's initial references to scholars such as Graves to cite public statements on the non-

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142. *Brief for Judicial Watch, supra* note 140 at 3.

143. *Grutter v. Bollinger*, 39 U.S. 306 (2003).

144. *Brief for Judicial Watch, supra* note 140 at 3-4.

145. *See, e.g.*, Press Release, White House Office of the Press Secretary, *supra* note 96; Edward R. B. McCabe, *2009 Presidential Address: Beyond Darwin? Evolution, Coevolution, and the American Society of Human Genetics*, 86 AM. J. HUMAN GENETICS 311, 311–15 (2010).

146. Richard A. Gibbs, *The Human Genome Project Changed Everything*, 21 NATURE REVIEWS GENETICS 575 (Oct. 2020).

biological nature of race from the American Anthropological Association (AAA).[147] It also quoted an extensive discussion of "'Race' as a Biological Fiction," from an opinion by liberal judge and civil rights pioneer Jack Weinstein (being part of the litigation team in *Brown v. Board of Education*), which noted that:

> DNA technology finds little variation among "races" (humans are genetically 99.9% identical), and it is difficult to pinpoint any "racial identity" of an individual through his or her genes. International gene mapping projects have only "revealed variations in strings of DNA that correlate with geographic differences in phenotypes among humans around the world," the reality being that the diversity of human biology has little in common with socially constructed "racial" categories.[148]

Clearly, Judicial Watch is taking the genetic ball from Judge Garza and running with it. The appeal to science is foundational to its assault on affirmative action. This is also evident in the brief's assertion, following its discussion of the AAA statements that, "although science may have rejected race long ago, law and public policy, and in particular the University's admission policy, have yet to catch up. It is time that they did so. Race has no place in either."[149] Judicial Watch thus presents the use of racial categories in law and policy as untenable not simply because they are vague but because they are unscientific. It grounds their purported vagueness or arbitrariness precisely in the fact that "science" has rejected them.

D. The Liberal Response

Perhaps simply to taunt pro-affirmative action liberals, in its 2015 brief Judicial Watch also highlighted the controversies around Senator Elizabeth Warren's claim of Native American ancestry as further illustrating the point "that racial categories are generally too crude to convey accurate and useful information about individuals and groups."[150] Judicial Watch feigned sympathy for Warren noting that, "based on nothing more than 'family lore' and 'high cheekbones,' Ms. Warren claimed, perhaps quite sincerely, that she was 1/32nd Cherokee and therefore a Native American and a minority."[151] The brief went on to note that "many people predictably expressed doubt that classifying Senator Warren as a "Native American" based on a system of racial self-identification made any sense, much less served a legitimate purpose." It then considered what might happen if someone with Warren's claims applied for admission to the University of Texas and asks: "How much additional "holistic diversity" would UT have achieved by deciding to admit these hypothetical Elizabeth

147. *Brief for Judicial Watch, supra* note 140 at 5-6, 8.

148. *Id.* at 23 (citing McMillan v. City of New York, 253 F.R.D. 247, 250 (E.D.N.Y. 2008) (Weinstein, J.)).

149. *Id.* at 6.

150. Brief for Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae Supporting Petitioner, at 5, 17-18, Fisher v. Univ. of Texas at Austin, 136 S.Ct. 2198 (2016) (.

151. *Id.*

Warrens based at least in part on their self-identification with a particular race or ethnic group?'"[152]

The irony of this appeal in the example of liberal icon Senator Warren is further heightened by the fact that two years later, as she was preparing to run for the Democratic nomination for President, Warren herself had a DNA ancestry test performed for her by MacArthur prize-winning population geneticist Carlos Bustamante. Warren clearly was trying to make use of the authority of genetic science to quell the controversy surrounding her claims of Native American ancestry. The results, while not exactly robust, did indicate that Warren likely had a Native American ancestor in the range of 6 to 10 generations ago.[153] Notable is that both the conservative Judicial Watch and the liberal Warren were looking to leverage the authority of genetic science to make claims about racial identity. While Warren was careful to maintain that her assertion of genetic ancestry was in no way related to any claims of legal tribal membership, there was nonetheless an implicit understanding that genetic constructions of racial membership somehow validated her social claims. Judicial Watch was using the same logic to make a counter-argument—namely, absent such genetic constructions, racial categories had no coherent meaning. Both share a privilege of genetic over social constructions of racial identity.

Echoing Clinton's and Venter's statements from the ceremony marking the completion of the first draft of the human genome, the briefs from the American Center for Law and Justice (ACLJ)[154] highlighted the idea that "there is likewise no difference in kind between black, white, Asian, or other ethnic groups of human beings. There is one race – the human race."[155] In 1990, the televangelist Pat Robertson founded the ACLJ as a conservative counterbalance to the American Civil Liberties Union.[156] The most notable thing about the ACLJ briefs, perhaps, is that they were submitted by Jay Sekulow, who would soon gain prominence as one of President Donald Trump's lead personal attorneys during his first impeachment trial.[157] Sekulow was so enamored by the brief's arguments that he later published an article in *University of Miami Business Law Review* largely recapitulating their main points.[158]

Arguing that "racial categories are both arbitrary and porous," one ACLJ brief contended that the University of Texas "cannot use race to attain a 'critical mass' of minority students if it cannot even intelligibly define what a minority student is.

152. *Id.*

153. Linskey, *supra* note 5.

154. Brief for the American Center for Law and Justice as Amici Curiae Supporting Petitioner, at 1, Fisher v. Univ. of Texas at Austin, 136 S.Ct. 2198 (2016); Brief for the American Center for Law and Justice as Amici Curiae Supporting Rehearing En Banc, at 1, Fisher v. Univ. of Texas at Austin, 2014 WL 4058032.

155. Brief for the American Center for Law and Justice as Amici Curiae Supporting Rehearing en Banc, at 1, Fisher v. Univ. of Texas at Austin, 2014 WL 4058032.

156. Elizabeth Williamson, *In Jay Sekulow, Trump Taps Longtime Loyalist for Impeachment Defense*, N.Y. TIMES (Jan. 17, 2000), https://www.nytimes.com/2020/01/17/us/politics/jay-sekulow-trump-impeachment.html.

157. *Id.*

158. Jay Alan Sekulow & Walter M. Weber, Fisher v. University of Texas at Austin*: The Incoherence and Unseemliness of State Racial Classification*, 24 U. MIAMI BUS. L. REV. 91 (2016).

Hence, the deliberate use of race-conscious admissions cannot be a narrowly tailored means to achieve diversity."[159] To further buttress Judge Garza's opinion, the ACLJ quoted extensively from the 1987 Supreme Court civil rights case of *St. Francis College v. Al-Khazraji*, where in an opinion for a unanimous Court, Justice White observed that

> Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits.[160]

In the 2020 case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[161] the conservative Pacific Legal Foundation (PLF) has taken up the argument that racial categories are inherently arbitrary and therefore cannot be narrowly tailored to serve a compelling government interest sufficient to survive strict scrutiny judicial review. The PLF did not make an explicit reference to genetic science but framed their amicus brief to the court with the opening assertion that "racial classifications are *inherently* arbitrary."[162] While focusing more on the social diversity within racial groups, the PLF makes it clear that the fundamental problem of affirmative action is that "there is no sound system for classifying on the basis of race."[163] The First Circuit Court of Appeals, largely following the Supreme Court precedent in *Fisher*, affirmed the lower court's ruling upholding the admissions plan and did not address the issue of the arbitrariness of racial categories put forth by the PLF. Nonetheless, the case is headed to the Supreme Court where a new 6-3 conservative majority might take the opportunity to revisit and perhaps overturn or significantly modify *Grutter*.

The conservative characterization of racial categories as arbitrary depends critically not simply on the fact that they are socially constructed, but that they are socially constructed *in contrast* to purportedly "real" genetic population groupings. Ironically, these conservatives invoke genetic science to undermine the legal foundations of affirmative action in much the same manner that liberal self-styled "behavioral realists" invoke the cognitive sciences behind implicit bias to try to reinforce and extend affirmative action. Behavioral realists are an interdisciplinary group of scholars who have tried to reinvigorate antidiscrimination law by drawing upon research in the social and natural sciences about the cognitive foundations on individual attitudes and biases. Acknowledging the difficulty of overturning existing legal

159. Brief for the American Center for Law and Justice as Amici Curiae Supporting Rehearing En Banc, at 2, Fisher v. Univ. of Texas at Austin, 2014 WL 4058032 (No. 11-345).

160. *Id.* at 5 (quoting St. Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987)).

161. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 980 F.3d 157 (2020).

162. Brief for the Pacific Legal Foundation as Amici Curiae Supporting Appellants, at 12, Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 2020 WL 1469644 (1st Cir. 2020) (emphasis added).

163. *Id.* at 13.

precedent that focuses on discriminatory intent rather than impact, behavioral realists instead turn to empirical scientific measurements of "implicit bias" to argue that "intent" (rather than legal doctrine) must be reconfigured to incorporate unconscious intent as a basis for assessing the legality of particular actions or systems.[164]

As conservatives, such as Garza or Judicial Watch compare genetically grounded population groupings to purportedly incoherent social constructions of race, so too do liberal behavioral realists contrast the science of implicit social cognition to what they see as relatively uninformed people or commonsense understandings of how human make judgments or form biased intent. As Jerry Kang and Mahzarin Banaji put it:

> Behavioral realism identifies naïve theories of human behavior latent in the law and legal institutions. It then juxtaposes these theories against the best scientific knowledge available, to expose gaps between assumptions embedded in law and reality described by science. When behavioral realism identifies a substantial gap, the law should be changed to comport with science.[165]

While behavioral realists are far more rigorous in their exploration, development, and understanding of the relevant science, they nonetheless share a common tactic of presenting apparent rigor and robustness of scientific findings as superior to, or more "real" than, "naïve" common sense understandings of social experience – whether it be in the form of racial bias (for the liberal behavioral realists) or of race itself (for the conservatives). Each denigrates or marginalizes the qualitative, interpretative, and narrative bases of interpretation necessary to understand and address racial categories in social and historical contexts, while elevating the scientific findings of "true" empirical reality as a means to challenge existing Supreme Court precedent. They share the idea that if a legal standard is controlled by precedent you don't like, you challenge the empirical assumptions underlying the logic of the holding. It is a high-tech version of the old saw, "if the law is against you, argue the facts."[166]

Behavioral realists have a sincere belief in the relevant cognitive science and have taken the time and trouble to actually master it. The fact that conservatives may be more cynically exploiting the liberal embrace of science to serve their ends points up the fact that elevating biology as somehow more "real" than society is a double-edged sword. Conservatives can exploit the tactic of casting common sense social constructions as "naïve" or less real than scientific claims insofar as it hearkens back to the classic statement of Tory British Prime Minister Margaret Thatcher who notably declared in 1987 that "there is no such thing as society."[167]

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164. KAHN, *Race on the Brain, supra* note 10, at 5–7.

165. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063, 1065 (2006).

166. "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell." Attributed to the poet, Carl Sandberg, *see* Joseph L. Smith, *Law, Fact, and the Threat of Reversal from Above*, 42 POLITICS RSCH. 226, 226 (2014).

167. *Interview for* Women's Own *("no such thing as society")*, MARGARET THATCHER FOUND. (Sep. 23, 1987), https://www.margaretthatcher.org/document/106689.

IV. BEYOND AFFIRMATIVE ACTION

Beyond affirmative action in education, Judicial Watch and other prominent conservatives, such as Ward Connerly, have raised similar arguments about race and genetics to challenge the continued use of racial and ethnic categories in the U.S. Census. Connerly is founder and president of the American Civil Rights Institute, "a national, not-for-profit organization aimed at educating the public about the need to move beyond race and, specifically, racial and gender preferences."[168] In the 1990s Connerly played a major role in the passage of California's Proposition 209, which effectively eliminated affirmative action programs from all state institutions.[169] In 2004, he led the campaign for Proposition 54, or the "Racial Privacy Initiative". This proposition would have prevented the state of California from classifying individuals by race, ethnicity, color, or national origin at all.[170] In these campaigns Connerly did not make much reference to biology or genetics. Echoing the color-blind ideology of many anti-affirmative action advocates, he focused primarily on the idea that racial classifications themselves were antithetical to ideals of American equality and individualism.[171]

By 2017, Connerly had added another arrow to the quiver of his color-blind ideology: genetics. In a *Washington Post* editorial reviving the ideas of his "Racial Privacy Initiative," Connerly (together with Mike Gonzalez of the conservative Heritage Foundation) attacked the idea of using racial categories in the U.S. Census. Calling for President Trump to make changes to the 2020 Census, Connerly and Gonzalez argued that the current system of racial and ethnic classification "doesn't just ignore science. It also completely overlooks a burgeoning "mixed-race" population that resents arbitrary racial straitjackets."[172] Like Taylor and Garza before them, they invoked science to assert the arbitrariness of social categories. They advocated "getting rid of the official categories and asking simple national-origin questions ("are your ancestors from Ecuador, Germany, Japan? Check as many boxes as apply") and, perhaps, questions on races identified by anthropologists instead of bureaucrats."[173] There is an echo here of Judicial Watch's appeal to the AAA statements on Race in its amicus brief in *Fisher*. They then invoke genetic science explicitly, noting that "Today, you can spit into a vial, send it to genomics companies and discover that you are not "Irish," as you thought, but instead 60 percent English. Or you could be roughly 30 percent German, 45 percent Slavic, 15 percent Native American and

168. *Ward Connerly*, FEDERALIST SOC'Y (last visited NOV. 16, 2021), https://fedsoc.org/contributors/ward-connerly.

169. Mary C. Waters, *Counting and Classifying by Race: The American Debate*, 29 TOCQUEVILLE REV. 1, 98 (2008).

170. *Id.* at 9.

171. *See* K. BROWN MICHAEL ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 55, 85 (2003); Richa Amar, *Unequal Protection and the Racial Privacy Initiative*, 52 UCLA L. REV. 1279, 1285 (2004).

172. Ward Connerly & Mike Gonzales, *It's Time the Census Bureau Stops Dividing America*, WASHINGTON POST (Jan. 3, 2018), https://www.washingtonpost.com/opinions/its-time-the-census-bureau-stops-dividing-america/2018/01/03/a914a176-f0af-11e7-97bf-bba379b809ab_story.html.

173. *Id.*

10 percent Bantu. The census's official categories ignore this rich diversity."[174] The precision of these genetic estimates of ancestry contrasts strongly to highlight the asserted arbitrariness of the broad racial and ethnic categories of the current Census. Note the irony of Connerly and Gonzalez embracing "diversity," a concept that lies at the heart of modern affirmative action jurisprudence and practice. Again, there appears to be an attempt to turn the liberals' own terms against them.

In 2017, Judicial Watch submitted comments to the Office of Management and Budget opposing a proposal to add a new category of "Middle Eastern and North African" to its "Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity," (which includes the Census). Marshalling arguments that echoed both Connerly and its own briefs in *Fisher*, Judicial Watch again invoked statements from the American Anthropological Association in arguing that the proposal would lead to "less precise and more arbitrary data" because "human race and ethnicity are inherently ambiguous social constructs that have no scientific validity."[175] Judicial Watch then asserted that "science [has shown] the concept of race to be hollow."[176] At first blush this may sound like a simple restatement of the idea that race has no "scientific validity" but in taking the additional step of asserting that the concept of race itself is "hollow" it is reinforcing the idea that if a concept of category is merely social (i.e. not scientific) it has no legitimacy whatsoever. Legitimacy, in this schema, can only come from "science". This plays into the larger conservative program of delegitimizing the use of racial categories in any and all contexts.

It is noteworthy that Robert Popper, the director of Judicial Watch's "Election Integrity Project," filed the comments on its behalf. Popper also submitted an amicus brief to the Supreme Court in the case of *United States Department of Commerce v. New York*, arguing for the inclusion of a citizenship question on the census.[177] Consider the relation between voting rights and the use of racial categories. Challenging the collection of racial data would undermine the ability of the federal government to track race-based discrimination in voting rights (among many other areas of civil rights), while adding a citizenship question to the census is widely understood as likely leading to undercounting undocumented, largely non-white, immigrants and hence diluting the representation of (and allocation of federal benefits to) the states wherein they reside.[178] Without the ability to collect data by race, there would be no way to identify racial discrimination in voting, housing,

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174. *Id.*

175. Robert D. Popper, *Comment in Response to 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. Red. 12242 (March 2017), OMB 2016-0008 and OMB-2017-0003 ("Notice and Comments"),* JUD. WATCH (Apr. 30, 2017), https://www.judicialwatch.org/wp-content/uploads/2017/06/Federal-Data-on-Race-and-Ethnicity-letter.pdf.

176. *Id.*

177. Brief for Judicial Watch as Amici Curiae Supporting Petitioners at 2, U. S. Department of Commerce v. New York, 139 S. Ct. 2551 (2019) (No. 18-966).

178. Adriel I. Cepeda Derieux et al., *"Contrived": The Voting Rights Act Pretext for the Trump Administration's Failed Attempt to Add a Citizenship Question to the 2020 Census*, 38 YALE L. & POL'Y REV. 322, 324-25 (2020).

employment, education, or policing; no way to identify health disparities or develop policies and practice to address them.[179] All this, it seems, would suit conservatives just fine.

V. LEGALLY RACIALIZING INDIGENEITY VIA GENETICS

The recent scientific consensus that race is not viable as a genetic construct has not stopped diverse actors – from both the left and the right – from using concepts of genetic ancestry to make legal claims regarding the status and rights attendant upon certain claims of indigenous identity. In the years since the completion of the Human Genome Project, a complex and fraught series of legal contests have played out in the United States around issues of race, genetics, and indigeneity. As anthropologist Jennifer Hamilton has observed,

> The legal history of Indian identity in the United States is both complex and often contradictory. . .At various times throughout U.S. legal history, establishing who is and is not Indian has been central to determining collective and individual identities. These identities are, in turn, tied to questions of land and resource distribution, property, inheritance, treaty payments, state and federal benefits, civil and criminal jurisdiction, tribal membership, and certain political rights.[180]

Tribal membership determination is a critical attribute of sovereignty.[181] Scholars of genetics and indigenous identity, such as Kim TallBear and Krystal Tsosie, and Native American tribal leaders themselves have made clear that tribal identity is not determined genetically.[182] As TallBear puts it: "The tribe is not strictly speaking a genetic population. It is at once a social, legal, and biological formation, with those respective parameters shifting in relation to one another."[183]

In 2004, around the time that Alexander and Schwarzchild were publishing their article on how modern genetics undermined the logic of race-based affirmative action, Rick Kittles (who was also at that time working with Farmer-Paellmann on the reparations case), approached several leaders of the Cherokee Freedmen to offer his services in the quest for recognition and inclusion as members of the federally recognized tribes of the Cherokee Nation.[184] The Freedmen were descendants of black slaves kept by the Cherokee until 1866, when they gained their freedom and were granted tribal citizenship. In 1983, the Cherokee tribe adopted a rule effectively

179. For a brief discussion of the myriad ways in which the collection of racial data can impact federal programs and rights, *see* KAHN, *Race in a Bottle, supra* note 6, at 27-29.

180. Jennifer Hamilton, *The Case of the Genetic Ancestor*, *in* GENETICS AND THE UNSETTLED PAST: THE COLLISION OF DNA, RACE, AND HISTORY 266, 271 (Keith Wailoo, Alondra Nelson & Catherine Lee eds., 2012).

181. TALLBEAR, *supra* note 38, at 55–56; Will Chavez, *Cherokee Nation Responds to Senator Warren's DNA Test*, CHEROKEE PHOENIX (Oct. 16, 2018), https://www.cherokeephoenix.org/Article/index/62699.

182. *See, e.g.*, TALLBEAR, *supra* note 38; Krystal Tsosie & Matthew Anderson, *Two Native American Geneticists Interpret Elizabeth Warren's DNA Test*, CONVERSATION (Oct. 22, 2018), https://theconversation.com/two-native-american-geneticists-interpret-elizabeth-warrens-dna-test-105274; Chavez, *supra* note 182.

183. TALLBEAR, *supra* note 38, at 83-84.

184. Brendan Koerner, *Blood Feud*, WIRED (Sept. 1, 2005), https://www.wired.com/2005/09/seminoles/.

limiting citizenship to individuals who could trace direct descent from an ancestor listed on the Dawes Roll, a 1906 federal census of U.S. Indians that largely excluded Freedmen. As a result, thousands of black members were expelled from the tribe and denied access to benefits and reparations money. In the following years diverse Freedmen brought a series of lawsuits trying to obtain tribal membership and the attendant benefits, all to no avail as U.S. courts have generally avoided meddling in such affairs.[185]

Kittles's services took the form of free DNA ancestry tests, which many Freedmen embraced "in hopes that science would succeed where rhetoric, litigation, and historical documents have failed."[186] Ultimately, Kittles's tests proved less than definitive, finding that the degree of Indian ancestry among the Freemen was on average around 6%, about the same as an East Coast African American population.[187] And so, in the end, little was changed by the appeal to genetics. Nonetheless, in the years since Kittles approached the Freedmen, some twenty-five different companies have emerged offering DNA ancestry tests to help consumers discover their ancestral origins. Of these, five offer a test solely for Native American heritage that they claim might be used for asserting legitimacy in a tribal enrollment process.[188]

The Freedmen's attempt to use DNA tests to gain access to the material benefits of tribal membership may sound similar to what Taylor would try to do several years later in Washington State. But in this case, there was a clear and long history of the Freedmen holding themselves out as being tribal members. Complicating matters further, TallBear notes that the entire concept of blood quantum as a basis for determining tribal membership has a complex and contested history. It was U.S. federal agents in the 19th century who "settled upon blood as a mechanism to break up collectively held Native American land bases."[189] The Cherokee policy of 1983 was not grounded in blood quantum per se, or genetics, but in lineal descent from someone listed on the Dawes Roll; yet the Dawes Roll, in turn, was constructed around ideas of blood quantum.[190] Other scholars note that the very concept of "Native American DNA" is scientifically misleading because "the genetic markers commonly used to identify this type of ancestry are also found in other populations at lower frequencies."[191]

A. The Indian Child Welfare Act

One gets a fuller sense of the double edge of invoking genetics in such contexts by considering that a decade or so after the Freedmen tried to use genetics to gain access to membership in particular sovereign Native American tribes, conservative activists

185. *Id.*
186. *Id.*
187. *Id.*
188. Hina Walajahi, David R. Wilson & Sara Chandros Hull, *Constructing Identities: The Implications of DTC Ancestry Testing for Tribal Communities*, 21 GENETICS MED. 1744, 1746 (2019).
189. TALLBEAR, *supra* note 38, at 55.
190. *Id.* at 58–59.
191. Walajahi, Wilson & Hull, *supra* note 189, at 1747.

would apply a similar genetic logic in an attempt to undermine the sovereign power of Native American tribes more generally. In 2017, a non-Native American couple filed suit in federal court to have the Indian Child Welfare Act (ICWA) declared unconstitutional. The couple, Chad and Jennifer Brackeen, sought to adopt "A.L. M., an "Indian child" under the terms ICWA. The child's biological mother was an enrolled member of the Navajo Nation and his biological father was an enrolled member of the Cherokee Nation.[192] ICWA was passed in 1978 "to address rising concerns over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[193] ICWA does not bar non-Native American families from adopting or fostering Native American children outright but requires them to show "good cause" that the child can't or shouldn't be adopted by other Native Americans before gaining custody.[194] More specifically, the Act requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." [195] Under the law, an "Indian Child" is defined as, "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[196]

In 2018, Judge Reed O'Connor, of the Federal District Court for the Northern District of Texas, found in favor of the plaintiffs and struck down ICWA as unconstitutional. At the core of his ruling was his assertion that the classifications used in ICWA were "racial" in nature and therefore had to satisfy strict scrutiny to satisfy Constitutional equal protection review.[197] To make this finding, O'Connor had to distinguish this case from the 1974 case of *Morton v. Mancari,* where the Supreme Court upheld a Bureau of Indian Affairs (BIA) hiring standard that gave preference to Indian applicants under the less stringent "rational relation" standard concluding that it was a political, rather than a racial preference. [198] O'Connor focused on the term "biological child" to make this distinction, finding that the definition of "Indian Child" used in ICWA was not based on the political identity of any tribe but on whether "the child is related to a tribal ancestor by blood."[199] Citing *Adarand Constructors v. Pena*,[200] he concluded that "the ICWA's jurisdictional definition of "Indian children" uses ancestry as a proxy for race and therefore "must be analyzed by a reviewing court under strict scrutiny." [201] He essentially found that being based

192. Brackeen v. Zinke, 338 F. Supp. 3d 514, 525 (N.D. Tex. 2018), *reversed*, Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019).
193. *Brackeen*, 937 F.3d at 416 (citations omitted).
194. *Id.* at 417.
195. *Id.* (citing 25 U.S.C. § 1915(a)).
196. *Id.* (citing 25 U.S.C. § 1903(4)).
197. *Brackeen*, 338 F. Supp. 3d at 533-34.
198. Morton v. Mancari, 417 U.S. 535 (1974).
199. *Brackeen*, 338 F. Supp. 3d at 533.
200. Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).
201. *Brackeen*, 338 F. Supp. 3d at 534.

in biology the preference amounted to a racial preference —both casting race as a biological construct and using the reference to biology as grounds for recasting the preference from a political one (based on tribes being semi-sovereign entities under U.S. law) to a racial one.

In reaching this conclusion, O'Connor echoed arguments made the previous year by the conservative Pacific Legal Foundation (PLF) in filings made in support of writs of certiorari seeking Supreme Court review of two ICWA related cases.[202] In these briefs, the PLF argued that the strict scrutiny standard of *Adarand* should apply to ICWA because it "regulates Indian children based solely on their genetic association and descendancy,"[203] and that "because ICWA equates "Indian" with the tribe's blood quantum rules, it equates tribal interests with genetic interests, and therefore dictates that "biology" and not "social, legal, or political identification, makes a person Native American."[204]

Like Judge O'Connor in *Brakeen,* the PLF was arguing that being based in genetics, the category of "Indian Child" had to be construed as racial in character. Yet, less than a decade prior to this, in 2008, the PLF was arguing in the case of *Hawaii v. Office of Hawaiian Affairs*,[205] that genetic science actually showed racial classifications themselves to be arbitrary.[206] *Hawaii v. Office of Hawaiian Affairs* involved the question of whether Congress stripped the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution in 1993 to apologize for the role that the United States played in overthrowing the Hawaiian monarchy in the late 19th century.[207] In its amicus brief, the PLF (together with the Cato Institute and the Center for Equal Opportunity) focused on whether this resolution required the State of Hawaii to reach a political settlement with native Hawai'ians regarding the status of contested lands. Central to its argument that it did not, was its contention that the category of "native Hawai'ian" was an incoherent and divisive racial classification and hence could not be constitutionally employed without meeting strict scrutiny.[208] Anticipating some of the arguments later used by Judge Garza in *Fisher*, the PLF argued that "considerable doubt exists whether race can even be quantified

202. Motion for Leave to File and Brief Amicus Curiae for the Pacific Legal Foundation Supporting Petitioners, S. S. v. Colorado River Indian Tribes, 138 S.Ct. 380 (2017) (No. 17-95); Brief for the Pacific Legal Foundation as Amici Curiae Supporting Petitioners, Renteria v. Superior Court of California, Tulare County, 138 S.Ct. 986 (2018).

203. Motion for Leave to File and Brief Amicus Curiae for the Pacific Legal Foundation Supporting Petitioners, at 9–10, S. S. v. Colorado River Indian Tribes, 138 S.Ct. 380 (2017) (no.17-95).

204. Brief for Pacific Legal Foundation as Amici Curiae Supporting Petitioners, at 11, Renteria v. Superior Court of California, Tulare County, 138 S.Ct. 986 (2018) (No. 17-789).

205. Haw. v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

206. Brief for the Pacific Legal Foundation, the Cato Institute, and the Center for Equal Opportunity as Amici Curiae Supporting Petitioners, at 18–19, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (No. 07-1372).

207. Haw. v. Office of Hawaiian Affairs, 556 U.S. at 166 (2009). For a fuller discussion of this history, *see* Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631 (2017).

208. Brief for the Pacific Legal Foundation, the Cato Institute, and the Center for Equal Opportunity as Amici Curiae Supporting Petitioners, at 18–19, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (No. 07-1372).

scientifically,"[209] and that "there is no taxonomic basis in biology or physiology to support racial distinctions used by the U.S. Census."[210] It concluded that "because there is no single Hawaiian tribe or nation that can make this determination, the state and federal governments have answered this question with arbitrary distinctions."[211] The genetically based arguments here were less fully developed than they would become in hands of Garza and Judicial Watch, (and in the PLF's own later briefs), but the seed was planted .

Returning to *Brakeen,* O'Connor's opinion with respect the racial nature of the classifications in ICWA was overturned at the 5th Circuit Court of Appeals by a panel of three judges in 2019,[212] but a rehearing en banc has been granted.[213] In January 2020, a trio of conservative legal organizations, the Goldwater Institute, the Cato Institute and the Texas Public Policy Foundation, filed an amicus brief in support of the plaintiffs' rehearing en banc, that foregrounded genetics, stating as their opening argument that "as used in ICWA, 'Indian child' is a racial category because it depends on genetics."[214] This argument is developed by focusing on the reference to "biological child" in the Act's definition of "Indian Child" but ignores the preceding section stating that an Indian child may also be defined simply by membership in a tribe.[215] As Abi Fain and Mary Kathryn Nagle make clear in their analysis of similar arguments made by the Goldwater Institute in the related 2015 case of *A.D. v. Washburn,* "ICWA's "Indian child" definition renders the identity of an "Indian child" contingent upon the political citizenship of one of the child's biological parents—not ancestor—or the biological parent's decision to enroll his or her child, if the child is already a tribal citizen at the time of the adoption proceedings."[216] This distinction was central to the 5th Circuit's overturning of O'Connor's opinion, wherein it concluded that "contrary to the district court's determination, that ICWA's definition of 'Indian child' is a political classification subject to rational basis review."[217]

The case may be on its way to the Supreme Court. If Justice Alito's opinion in the 2013 ICWA case of *Adoptive Couple v. Baby Girl*[218] is any indication, O'Connor's opinion could well be reinstated. In that case the reach rather than the constitutionality of ICWA was at issue. In his opinion for the Court, Alito held that ICWA did

209. *Id.* at 20.

210. *Id.*

211. *Id.* at 21.

212. Brackeen v. Bernhardt, 937 F.3d 406, 416 (5th Cir. 2019).

213. Brackeen v. Bernhardt, 937 F.3d 406, 416 (5th Cir. 2019), *reh'g en banc,* 942 F.3d 287 (5th Cir. 2019).

214. Brief for the Goldwater Institute, Cato Institute, and Texas Public Policy Foundation as Amici Curiae Supporting Plaintiff-Appellees on Rehearing En Banc, at 2, Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2020) (No. 18-11479).

215. 25 U.S.C. § 1903(4)(a).

216. Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 873 (2017).

217. Brackheen v. Bernhardt, 937 F.3d 406, 428–29 (5th Cir. 2019).

218. Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

not apply to a situation where the relevant parent never had custody of the child.[219] Alito, however, opened his opinion by declaring that "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."[220] The degree of Cherokee ancestry was never at issue in the case, yet Alito set the entire frame for his opinion around the idea of biological descent as the basis for Indian identity and tribal membership. In highlighting the small percentage number, he implies there is something absurd about this result. And Alito was not alone in his concerns. Fain and Nagle observe that "several Supreme Court Justices [in *Adoptive Couple v. Baby Girl*] began to question whether a Tribal Nation could grant citizenship to a child of a tribal citizen if the child lacks sufficient blood quantum. As Chief Justice Roberts asked, "is there at all a threshold" at which the child of a tribal citizen can no longer be considered eligible for citizenship in a Tribal Nation?"[221] In foregrounding what is, in effect, a blood quantum basis for characterizing tribal identity, Alito's opinion certainly could be read as laying the groundwork for adopting conservative arguments that ICWA employs racial rather than political classifications.

This is not just about ICWA. The genetic argument has potentially far-reaching implications for tribal sovereignty. Sarah Kastelic, the executive director of the National Indian Child Welfare Association, has noted that in challenging ICWA, conservative think tanks such as Goldwater and Cato, "have a broader agenda about state rights and subverting or dismantling tribal sovereignty as part of their agenda."[222] This is one reason why some Native Americans reacted with such vehemence to Senator Elizabeth Warren's appeal to a DNA ancestry test to support her claims of Indian ancestry; connecting genetics to tribal identity can be (indeed is being) used to undermine tribal sovereignty.[223]

Judge O'Connor's opinion in *Brakeen v. Bernhard* effectively brought ICWA under the same standard of strict scrutiny review as the racial preferences employed in affirmative action cases. These are the racial preferences other conservative think tanks such as Judicial Watch have been challenging as incoherent. The point is not that some conservatives believe race is genetic and others believe it is social. It is that conservative activists will tactically deploy either conception of race if it serves their interest of undermining what they perceive to be as any sort of racial preferences aimed at remedying past injustices.

219. *Id.* at 641.

220. *Id.*

221. Fain & Nagle, *supra* note 217, at 803 (citing Transcript of Oral Argument at 42–43, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013)).

222. Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care.

223. Stephanie Pappas, *What Does Elizabeth Warren's 'Native' Ancestry Mean?*, LIVE SCI. (Oct. 16, 2018), https://www.livescience.com/63848-elizabeth-warren-native-american-ancestry-explained.html; Kim TallBear @KimTallBear, TWITTER (Oct. 15, 2018, 2:43 PM), https://twitter.com/KimTallBear/status/10520174670 21651969/photo/1; Tsosie & Anderson, *supra* note 183.

B. *All Biopolitics is Local: Race, Genetics, and the Case of Plavix in Hawai'i*

The tactical deployment of genetics in relation to race to gain legal or political advantage is not the sole province of conservative activists. As we have already seen in the example of Senator Elizabeth Warren or the drug BiDil, liberals too can invoke the authority of racialized genetic science to try to bolster their agendas. In 2014, David Louie, the Democratic Attorney General for Hawaii sued drug manufacturer Bristol-Myers Squibb (BMS) in state court for "false, deceptive, and unfair labeling and promotion of their prescription antiplatelet drug, Plavix."[224] Foundational to the claim was an assertion that BMS knew (and failed to disclose) that the drug had diminished efficacy in individuals who had a particular genetic variation in the CYP2C19 liver enzyme that rendered them poor metabolizers of the drug.[225] As a result, Hawaii claimed it was, among other things, forced to cover unwarranted drug costs for prescriptions made to individuals for whom the drug would not work. [226]

As it turns out, a number of states had brought similar claims, focused more on issues under False Claims Act for fraudulently marketing prescription blood thinner to physicians as more effective than aspirin.[227] BMS tried to have Hawaii's suit removed to federal court and consolidated in this larger multidistrict litigation.[228] Louie opposed this motion arguing vigorously to keep his suit separate and local. While highlighting the specific state laws providing the basis for his suit,[229] Louie also made genetics central to his argument. In the initial complaint he framed the issue in terms of correlations between racial groups and the frequency of the genetic variation that led to poor metabolization of Plavix, stating that

> East Asians and Pacific Islanders are particularly prone to be CYP2C19 poor metabolizers. It has been reported that 55% of East Asians and up to 79% of Pacific Islanders are poor metabolizers. According to the 2010 U.S. Census, Asians constitute 38.6% of Hawaii's population, Pacific Islanders constitute 10% of Hawaii's population, and 23.6% of Hawaii's population consists of individuals with a mixed racial background. *Thus, Plavix's diminished effectiveness is especially prevalent among Hawaii consumers.*"[230]

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224. Complaint at 1, Haw. ex rel. Louie v. Bristol-Myers Squibb Co., Civil No. 14-1-0708-03, 2014 U.S. Dist. LEXIS 109252 (D. Haw Aug. 5, 2014); *see also*, Haw. ex rel. Louie v. Bristol-Myers Squibb Co., 2014 U.S. Dist. LEXIS 97323, at 1 (D.V.I. Mar. 31, 2016).

225. Complaint at 9, Haw. ex rel. Louie v. Bristol-Myers Squibb Co., Civil No. 14-1-0708-03, 2014 U.S. Dist. LEXIS 109252 (D. Haw Aug. 5, 2014).

226. *Id.* at 1.

227. *In re* Plavix Marketing, Sales Practice and Products Liability Litigation (No. II), 332 F. Supp. 3d 927 (D.N.J. 2017).

228. Haw. ex rel. Louie v. Bristol-Myers Squibb Co., 2014 U.S. Dist. LEXIS 97323.

229. Complaint at 4, Haw. ex rel. Louie v. Bristol-Myers Squibb Co., Civil No. 14-1-0708-03 (D. Haw Aug. 5, 2014) ("The State brings this action exclusively under the law of the State of Hawai'i. No federal claims are being asserted, and to the extent that any claim or factual assertion set for herein may be construed to have stated any claim under federal law, such claim is expressly and undeniably disavowed and disclaimed by the state.").

230. *Id.* at 9; *see also* Press Release, David Louie, Hawaii Department of the Attorney General, Attorney General Files Suit Against Manufacturers and Distributors of the Prescription Drug Plavix (Mar. 19, 2014.), http://ag.hawaii.gov/wp-content/uploads/2014/01/News-Release-2014-09.pdf; Bristol-Myers Squibb Co. v. Connors, 444 F.Supp.3d 1231, 1234 (D.Haw. 2020) ("In the state action, the State claims that any Plavix

In resisting removal and consolidation, the Attorney General argued that their case was "unlike other cases in the Plavix MDL [Multi-District Litigation] due to factors specific to Hawaii's significantly larger East Asian and Pacific Island Populations compared to other states." Here racialized genetics served not only as the basis for the claim itself, but also critically for distinguishing Hawaii's case from the cases being brought by other states. It worked. After BMS made a motion for consolidation, Hawaii succeeded in getting the case remanded to state court.[231] After further proceedings, the state succeeded in its claim and in February 2021, Judge Dean Ochiai of Hawaii's First Circuit Court awarded the State $834 million in damages.[232]

Many well-meaning advocates of addressing racial health disparities, have pointed to the Hawaii case as an example of the need to racially "diversify" genetic research, again reinforcing the idea that race is genetic. For example, Hawaii's Plavix lawsuit came up in testimony before the Food and Drug Administration at a meeting on the importance of "diversity" in drug trials. In his statement at the meeting, Dr. Ho Tran, President and CEO of the National Council of Asian and Pacific Islander Physicians, referred to the suit as indicating the "importance for at least the knowledge of how it affects certain populations, you know, for the Asian."[233] An editorial in the journal *Personalized Medicine*, pointed to the Hawaii Plavix lawsuit as an example of a situation where a drug manufacturer might "be negligent in not alerting physicians, particularly those who treat minority populations where these genetic variances are prevalent."[234] In a separate interview, one of the co-authors of the editorial, Esteban Burchard, a professor of bioengineering at the University of California, San Francisco[235] who has long emphasized the important of racial diversity in genetic research,[236] brought up the Hawaii case as an example of the "impact of race on medication effectiveness," noting that in lobbying to get Plavix covered by Hawaii's Medicare formulary, BMS simply "overlooked . . . that most of Hawaii is Asian and Pacific Islanders."[237]

Burchard is an interesting illustration of legal scholar Dorothy Roberts's contention that "like conservatives, liberals separate racial science from racial politics to

label that does not have a warning about the ineffectiveness of the drug among *certain populations* and the need for genetic testing to identify patients in that population is false or misleading.") (emphasis added).

231. *Mealey's PI/Product Liability- Plavix MDL Judge Denies Discovery Enforcement for Hawaii State Court Case*, MEALEY'S DAILY NEWS UPDATE, June 30, 2016.

232. Haw. ex rel. Connors v. Bristol-Myers Squibb Co., No. 14-1-0708-03 (D. Haw. Feb. 15, 2021).

233. FOOD & DRUG ADMINISTRATION, OFFICE OF MINORITY HEALTH COLLECTION, ANALYSIS & AVAILABILITY OF DEMOGRAPHIC SUBGROUP DATA PUBLIC MEETING 221 (2014).

234. Alan HB Wu, Marquitta J. White, Sam Oh & Esteban Burchard, *The Hawaii Clopidogrel Lawsuit: The Possible Effect on Clinical Laboratory Testing*, 12 PERSONALIZED MED. 179, 180 (2015).

235. *Esteban G. Burchard, MD, MPH*, UCSF PROFILES (LAST VISITED NOV. 16, 2021),, https://profiles.ucsf.edu/esteban.burchard .

236. *See, e.g.*, Katerine A. Drake, Joshua M. Galanter & Esteban Gonzalez Burchard, *Race, Ethnicity and Social Class and the Complex Etiologies of Asthma*, 9 PHARMACOGENOMICS 453 (2008); Carlos D. Bustamante, Francisco M. De La Vega & Esteban G. Burchard, *Genomics for the World*, 475 NATURE 163 (2011).

237. Patricia Salber, *Why Race Matters in Medicine*, LINKEDIN (Jan. 24, 2016), https://www.linkedin.com/pulse/why-race-matters-medicine-pat-salber-md-mba /.

retain a supposedly scientific concept of race as a genetic category."[238] Burchard himself identifies as Mexican or Hispanic and has a strong interest in promoting racial justice in health care. Yet, when Roberts asked him in 2008 whether "by focusing on minority health [in his genetic research], you're reinforcing the idea that minorities are biologically different,", he responded, "I think populations *are* biologically different . . .So for example, cystic fibrosis, that is a Caucasian mutation, only in Caucasians. We are finding it now in African Americans and Puerto Ricans. And that is because of the intermixing of populations."[239] What Burchard did here, as in his embrace of the example of Plavix, was to conflate or confuse genetic concepts of "population" with social concepts of "race." His example of cystic fibrosis, a genetic condition, is instructive. Certainly, the incidence of CF is higher on average in people who are Caucasian than in non-Caucasian populations. But in 2002, six years before his conversation with Roberts, the World Health Organization had published a report on the worldwide incidence of CF that makes clear the importance of taking care about conflating population categories with racial categories.[240] For example, the report notes a wide variation in the incidence of CF across European countries, ranging from 1 in 1800 births in Ireland to 1 in 25,000 in Finland. [241] The report also noted that "reports from South Africa show the presence of CF in persons of pure African descent, thus demonstrating that the earlier observation of the presence of CFTR mutations in African Americans was not simply due to a mixture of European genes."[242] The incidence of CF in this South African population was 1 in 7056, roughly equivalent to the reported incidence in Sweden of 1 in 7300.[243] Thus, both within Europe and across the world, incidence of CF mutations varies greatly and does not correlate neatly with racial groupings.

Such claims and concerns as Burchard's are not in themselves opportunistic exploitations of race and genetics. In some cases, they may be born of sincere concern to address health disparities. Certainly, the relative frequencies of many sorts of genetic variations may differ across any two given populations—but race need not enter into it. As sociologist Troy Duster has noted,

> It is possible to make arbitrary groupings of populations (geographic, linguistic, self-identified by faith, identified by others by physiognomy, etc.) and still find statistically significant allelic variations between those groupings. For example, we could examine all the people in Chicago, and all those in Los Angeles, and find statistically significant differences in allele frequency at *some* loci. Of course, at many loci, even most loci, we would not find statistically significant differences.[244]

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238. ROBERTS, *supra* note 5, at 293.

239. *Id.*

240. *The Molecular Genetic Epidemiology of Cystic Fibrosis: Report of a Joint Meeting of WHO/IECFTN/ICF (A/ECFS, Genoa, Italy*, WHO HUM. GENETICS PROGRAMME (June 19, 2002), https://apps.who.int/iris/bitstream/handle/10665/68702/WHO_HGN_CF_WG_04.02.pdf?sequence=1&isAllowed=y.

241. *Id.* at 15.

242. *Id.* at 1.

243. *Id.* at 15.

244. Troy Duster, *Buried Alive: The Concept of Race in Science*, *in* GENETIC NATURE/CULTURE: ANTHROPOLOGY AND SCIENCE BEYOND THE TWO-CULTURE DIVIDE 265 (Alan H. Goodman, Deborah Heath & M. Susan Lindee eds., 2003).

Given that it is theoretically possible for researchers to find differences in allele frequencies between Chicagoans and Los Angelinos, it is hardly surprising that they may find differing frequencies of CYP2C19 alleles in East Asians or Pacific Islanders. Nonetheless, this sort of racialized framing makes it seem as though race itself is responsible for the variation rather than merely correlated with it. This brings us back to the possible exploitation of the idea of genetic race to undermine efforts to address inequities.

CONCLUSION: THE TACTICAL DEPLOYMENT OF RACE AND GENETICS IN A POST-GENOMIC ERA

The conservative embrace of social constructionism in affirmative action has been tactical. Following the publication of Richard Herrnstein and Charles Murray's book, *The Bell Curve,* in 1994[245] the idea that race-based genetic differences accounted for differences in standardized test scores gained greater traction among opponents of affirmative action.[246] Of course, the idea inherent differences among the races has been central to the construction of white supremacist racial order of the United States from its inception,[247] but *The Bell Curve* brought to idea of *genetic* difference to a broad popular audience (especially after being featured in *The New Republic*[248]) at a time of intense debate over affirmative action policies in the United States. Nonetheless, less than a decade after the publication of *The Bell Curve*, the Supreme Court had reaffirmed the validity of affirmative action in *Grutter v. Bollinger*.[249] In its amicus brief filed in support of the University of Michigan, the American Association of Law Schools directly addressed *The Bell Curve*, arguing that any racial gap in recorded test scores

> is *not* due to different levels of aptitude, as measured by IQ scores, in the respective gone pools of blacks and whites, notwithstanding the much-publicized claim to that effect in Richard Herrnstein & Charles Murray. The Bell Curve: Intelligence and Class Structure in American Life (1995). *See* Richard E. Nisbett, Race, Genetics, and IQ, *in* The Black White Test Score Gap 86, 89 (Christopher Jencks & Meredith Phillips eds., 1998) (finding "almost no support for genetic explanations of the IQ difference between blacks and whites.")[250]

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245. Herrnstein & Murray, *supra* note 7.

246. *Id.* at 447-509; *see e.g.,* THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA (Steven Fraser ed.,1995); CHRISTINE MA & MICHAEL SCHAPIRA, AN ANALYSIS OF RICHARD J. HERRNSTEIN AND CHARLES MURRAY'S THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 25–34 (2017); Matthew Yglesias, *The Bell Curve is About Policy. And It's Wrong*, VOX (Apr. 10, 2018), https://www.vox.com/2018/4/10/17182692/bell-curve-charles-murray-policy-wrong; Ryan Fortson, *Affirmative Action, The Bell Curve, and Law School Admissions*, 24 SEATTLE U. L. REV. 1087 (2001).

247. GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 49–96 (2015).

248. Charles Murray & Richard J. Herrnstein, *Race, Genes and I.Q. — An Apologia*, NEW REPUBLIC (Oct. 31, 1994), https://newrepublic.com/article/120887/race-genes-and-iq-new-republics-bell-curve-excerpt.

249. Grutter v. Bollinger, 539 U.S. 306 (2003).

250. Brief for the Association of American Law Schools as Amici Curiae Supporting Respondents, at 24 n.14, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

The Supreme Court upheld the use of racial categories in admissions programs in *Grutter* less than two years after Craig Venter, standing beside President Clinton at the White House declared that the completion of the first draft of the human genome made it clear "that the concept of race has no genetic or scientific basis."[251] The Court itself made no reference to *The Bell Curve* or genetics in its opinion.

Less than a year later, Alexander and Schwarzschild wrote the law article that would provide the basis for Garza's genetically informed arguments in *Fisher*.[252] Before the corpse of Herrnstein and Murray's genetically based assault on "racial preferences" had even cooled, the conservative pivot to leverage findings from genetic science and embrace social constructionism as a means to undermine affirmative action had begun.

On a more mundane level we see a similar dynamic at work in Ralph Taylor's case. He began by trying to use the results of his DNA ancestry test to claim membership in a group that would qualify Orion Insurance as a Disadvantaged Business Enterprise. When the state failed to find his genetic evidence sufficient and required additional evidence relating to his social standing and practices, he pivoted to attack the entire premise of racial preferences as arbitrary.[253] From someone who began his quest inspired by a "Caucasian looking guy" who had gotten "a big chunk of money" by claiming to be a minority,[254] Taylor evolved into a self-styled crusader "fighting for a greater good, exposing flaws with affirmative action programs,"[255] embraced by conservative talk show hosts and highlighted on white supremacists websites such as *VDARE* and *American Renaissance*.[256]

One area where the idea of race as genetic persisted and even gained traction in conservative circles after the completion of the HGP has been in the arena of health care policy where the purported "reality" of race as genetic has been used to obscure the social reality of racism as a major contributor to health disparities. In this case, rather than using the idea of race as a social construct to challenge minority preferences, conservatives used the idea of race as genetic to shift the framing of health disparities so as to undermine racially ameliorative policies. This was perhaps most evident in the conservative assault on the Institute of Medicine's (IOM) 2003 Report, "Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care" which chronicled an array of health disparities and connected them directly to social and economic issues of equity, access, and racism.[257] In December 2003, the

251. Press Release, White House Office of the Press Secretary, *supra* note 96.

252. Alexander & Schwarzschild, *supra* note 118.

253. Modarressy-Tehrani, *supra* note 71.

254. The Lars Larson Show, *supra* note 12.

255. Modarressy-Tehrani, *supra* note 71.

256. The Lars Larson Show, *supra* note 12; Steve Sailer, *Flight From White: Businessman Tries To Prove He's Non-White For Minority-Owned Business Money*, VDARE (Sept. 19, 2018), https://vdare.com/posts/flight-from-white-businessman-tries-to-prove-he-s-non-white-for-minority-owned-business-money; Gregory Hood, *Norwegian Girl Disappointed to Discover She's 'So White'*, AM. RENAISSANCE (Apr. 24, 2020), https://www.amren.com/commentary/2020/04/norwegian-girl-crushed-to-discover-shes-so-white/.

257. UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003).

Department of Health and Human Services (DHHS) issued a report on health disparities, supposedly based on the IOM Report. The DHHS report, however, dismissed the "implication" that racial differences in care "result in adverse health outcomes."[258] It turned out that top officials in the Bush administration had directed DHHS researchers to drop their initial conclusion that racial disparities were "pervasive in our healthcare system," and to delete or recharacterize findings of "disparity" as mere evidence of health care "differences."[259] For example, an earlier version of the report mentioned the term "disparity" thirty times in the key findings section, while the final report mentioned it only twice and left the term undefined.[260] DHHS officials accompanied this push to use the term "difference" to emphasize "the importance of. . .personal responsibility" for health outcomes.[261] Ultimately, DHHS Secretary Tommy Thompson backtracked when word of the report's manipulation was leaked by concerned DHHS staff. This case exemplifies a dynamic identified by anthropologists George Ellison and Ian Reese Jones, whereby "the 'geneticization' of individual identity shifts responsibility for genetic conditions onto individuals," and the "collective geneticization of social identities shifts responsibility for social inequalities in health on shared values, beliefs and behaviours."[262]

The key theme connecting the tactical embrace of race as social in affirmative action and embracing it as biological in health disparities is the effort to deny the idea that race should be invoked in relation to addressing social inequalities. It is not simply about law or policy but about the ends to which those laws and policies are applied. This connects the racial essentialist arguments of *The Bell Curve* to the social constructionist arguments of Garza and Judicial Watch. The former look to the "reality" of race to make *racism* seem irrelevant to policy; the latter look to social constructionist statements to make the case to make *race* seem irrelevant. Thus, in *The Bell Curve* or the Bush administration's response to the IOM Report, racial disparities are cast as due to biology not racism: there is no racism, they declare, and so the racial status quo is validated. For Garza and Judicial Watch, affirmative action is invalid because there is no coherent category of *race*. Again, the racial status quo is validated, in part because making race relevant is presented as in itself racist, not simply in the old reverse discrimination sense, but in the sense of a being a scientifically invalid concept. The apparent inconsistency of the conservative embrace of race as genetic in some contexts and as social in others is made coherent when we understand that the underlying purpose is to maintain a pre-existing racial status quo.

The arguments are grounded in false premises. The assertions in the realm of biomedicine concerning purported genetic basis for health disparities ignore not only

258. Maxwell Gregg Bloche, *Health Care Disparities–Science, Politics, and Race*, 350 NEW ENG. J. MED. 1568, 1568 (2004).

259. *Id.*

260. *See* Shankar Vedantam, *Racial Disparities Played Down*, WASH. POST (Jan. 14, 2004), https://www.washingtonpost.com/archive/politics/2004/01/14/racial-disparities-played-down/42832bcb-aae6-4e40-8947-9407cb11f102/.

261. Bloche, *supra* note 259, at 1568.

262. George Ellison & Ian Ress Jones, *Social Identities and the 'New Genetics': Scientific and Social Consequences*, 12 CRITICAL PUB. HEALTH 265, 267 (2002).

the scientific consensus that race is not genetic—so clearly stated by Craig Venter and President Clinton at the White House ceremony celebrating the completion of the first draft of the human genome—they also fly in the face of voluminous epidemiological evidence that such disparities are product not of genetics but of social, historical, and environmental forces. As epidemiologist Nancy Krieger succinctly puts it, health disparities are "biological expressions of race relations."[263] The alternative claim that because race is not genetic, because it is "merely" social, it therefore is not "real," suffers from the delusion that social constructions somehow do not exist or have an impact. Certainly, this would come as a surprise to anyone who uses money, which, after all, is a social construct valuable only because we, as a society, have deemed it so.[264] There is no inherent value to a dollar bill, yet it exists, it has a worth, and people know how to exchange and use it. That its value may be fluid, may change across time and space, does not make it any less real. Similarly, that a social construction such as race, might be fluid, changing over time and space, or subject to contestation does not make it arbitrary or incoherent. Indeed, over our history these characteristics have given race a distinctive power and adaptability in both law and society. Nonetheless, while these spurious arguments have as yet achieved limited success, they are out there like a loaded gun, waiting to be picked up and fired by a sympathetic court or policy maker. Eternal vigilance is the price of adapting to new challenges to racial justice.

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263. Nancy Krieger, *If "Race" Is the Answer, What Is the Question?—On "Race," Racism, and Health: A Social Epidemiologist's Perspective*, SOC. SCI. RSCH. COUNCIL (June 7, 2006), http://raceandgenomics.ssrc.org/Krieger/.

264. *See, e.g.*, Sal Restivo & Jennifer Croissant, *Social Constructionism in Science and Technology Studies*, *in* HANDBOOK OF CONSTRUCTIONIST RESEARCH 213, 222 (Jaber F. Gubrium & James Holstein eds., 2008); ANN PETTIFOR, JUST MONEY: HOW SOCIETY CAN BREAK THE DESPOTIC POWER OF FINANCE (2014). As Sociologist Phillip Cohen put it:

> That race is a "social construction" does not imply that it does not exist. We need to dispel that confusion for two reasons. First, at the risk of stating the obvious, things that are socially constructed are still constructed-they exist socially. The vast, historically persistent, life-and-death consequences of race in human societies cannot be ignored or dismissed as figments of our collective imagination. Race was not the cause of Africans being stolen from their homes and sold into slavery in the Americas; it was a result of that process.

Philip Cohen, *How Troubling Is Our Inheritance? A Review of Genetics and Race in the Social Sciences*, 661 ANNALS AM. ACAD. POL. & SOC. SCI. 65, 71 (2015).