

INCORPORATING RACE

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Common law courts have for centuries regarded corporations as artificial persons—colorless, invisible, intangible persons. Yet, recently some courts have ruled that corporations can and do possess racial identities “as a matter of law.” This Article explores the practical and theoretical implications of this ruling, both for our understanding of corporate personality and of race. In doing so, the Article develops an economic model of race based on representations and interpretations of racial signals and commitments. This model is used to suggest an approach to antidiscrimination law that avoids racial essentialism and an approach to corporate law that complicates shareholder primacy.

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INTRODUCTION

Perfectly ordinary events sometimes come together to produce extraordinary legal questions. This was one of those occasions. It began when Major Joseph B. Johnson, a former slave, acquired land encumbered with covenants restricting transfer to “colored persons.”¹ Such covenants were common at the time, almost a half century before the U.S. Supreme Court would rule their enforcement unconstitutional.² But because the property was purchased in the name of Johnson’s corporation—“a corporation composed exclusively of negroes,” chartered to “develop a pleasure park for the amusement of colored people”³—a court was asked to determine whether the corporation itself was a “colored person.” In *People’s Pleasure Park Co. v. Rohleder*, the court concluded that the corporation was a person only in law, and “in law, there can be no such thing as a colored corporation.”⁴ And so Johnson was allowed to retain the property.

This conclusion outraged locals and deeply troubled the era’s leading corporate law scholars.⁵ Yet there was absolutely nothing exceptional in the application of law. Common law courts had for centuries regarded corporations as artificial persons—colorless, invisible, intangible per-

1. Johnson was “[b]orn and raised a slave in Richmond [and was] in his late teens when the city fell to Union troops in 1865.” Peter J. Rachleff, *Black Labor in the South* 87 (1984). He would later command the Virginia Sixth Negro Regiment during the Spanish-American War, earning the rank of Major. Willard B. Gatewood, Jr., *Virginia’s Negro Regiment in the Spanish-American War*, 80 *Va. Mag. Hist. & Biography* 193, 194 (1972).

2. See *Barrows v. Jackson*, 346 U.S. 249, 253–54 (1953) (holding that state court damage awards for violation of racially restrictive covenants were prohibited by Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 18–20 (1948) (holding that enforcements of racially restrictive covenants violate Fourteenth Amendment).

3. *People’s Pleasure Park Co. v. Rohleder*, 61 S.E. 794, 795–96 (Va. 1908); see also *People’s Pleasure Park Company Charter* (certified Mar. 20, 1906) (on file with the *Columbia Law Review*).

4. *Petition for Rehearing at 4, People’s Pleasure Park*, 61 S.E. 794 (No. 135); see also *People’s Pleasure Park*, 61 S.E. at 796–97 (ruling for *People’s Pleasure Park*).

5. See, e.g., I. Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporate Problems* 27 (1927) [hereinafter *Wormser, Disregard*] (“The decision entirely overlooks that the sole purpose of organization of the corporation was obviously to evade and circumvent the title restriction.”); see also discussion *infra* Part III.B.

sons.⁶ The imagined personhood of corporations had not before been extended to race, nor would it be for years to come.

Recently, however, courts have declared that corporations can and do possess racial identities “as a matter of law.”⁷ It is tempting to reconcile this turnabout with *People’s Pleasure Park* by pointing to postmodern conceptions of race and to the highly personified nature of modern American corporations. These points are not without merit. The idea that natural race distinctions are no longer thought to exist, while at the same time private corporations thrive, would likely have shocked eighteenth-century American lawyers.⁸ Legal understandings of race and corporate existence have certainly evolved over time, but they stand today not so far from where they were when *People’s Pleasure Park* was decided. The critical difference between now and then lies not so much in variable conceptions of racial identity and corporate personality, but rather in the way, once conceived, courts regulate race and corporations.

The courts’ current recognition of race in corporations may seem odd, but it is no more striking than the Supreme Court of Virginia’s refusal (at the turn of the prior century) to treat the *People’s Pleasure Park* Company as if it was black. This court, after all, recognized and gave

6. On “colorless,” see *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 708 (2d Cir. 1982) (Pierce, J., concurring) (arguing that “colorless corporate ‘person’” should have cause of action under Fourteenth Amendment for racial discrimination claims); Arthur W. Machen, Jr., *Corporate Personality*, 24 *Harv. L. Rev.* 253, 256 (1911) (“Some writers make the real corporate organism a mere colorless, lifeless ‘subject of rights.’”). On “invisible” and “intangible,” see *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”); see also *id.* at 667 (Story, J., concurring) (describing corporation as “an artificial person, existing in contemplation of law, and endowed with certain powers and franchises . . . subsisting in the corporation itself, as distinctly as if it were a real personage”). The corporate persona fiction has been traced to Roman law by some scholars, but since Roman jurists did not use the expression “*persona ficta*,” there remains controversy over the attribution to Rome. There is greater agreement, however, that Pope Innocent IV was the first to explicitly formulate the fiction theory in the mid-thirteenth century. See Frederick Hallis, *Corporate Personality: A Study in Jurisprudence* 6–7 n.3 (1930) (describing Innocent’s role); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *Yale L.J.* 655, 665 (1926) (same); Martin Wolff, *On the Nature of Legal Persons*, 54 *Law Q. Rev.* 494, 496 (1938) (same).

7. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004) (finding that corporation can acquire “an imputed racial identity”); see also *Bains LLC v. Arco Prod. Co.*, 405 F.3d 764, 770 (9th Cir. 2005) (finding that corporation “undoubtedly acquired an imputed racial identity”); *Pourier v. S.D. Dep’t of Revenue*, 2003 SD 21, ¶ 21, 6 N.W.2d 395, 404 (holding corporation was “enrolled member” of Indian tribe), *aff’d in part, rev’d in part on other grounds*, 2004 SD 3, 674 N.W.2d 314, *cert. denied*, 541 U.S. 1064 (2005).

8. Thomas Jefferson, for instance, would probably be taken aback by these circumstances, for he firmly believed in “the real distinction which nature has made” among the races, and he “looked skeptically” on the budding corporate expansion, which his longtime adversary John Marshall had bolstered from the Supreme Court. Joyce Appleby, *Thomas Jefferson* 76, 85–86 (2003) (quoting Thomas Jefferson, *Notes on the State of Virginia* 141 (1800)).

countenance to black blood, black churches, black cemeteries, black books (even Bibles), and much more.⁹ Southern courts at this time imbued race into things and persons with great facility. So, whatever the reason that inspired the court to render the People's Pleasure Park Company raceless, it was certainly not an inability to perceive racial content in nonhuman objects and constructs.¹⁰ Nor is an appeal to corporate formalism satisfying. No, the court possessed a nuanced understanding of the practical structure of race and of corporations, and it was that understanding that determined the outcome of the case. The decision was determined by an unstated but prevalent concern for equality rights and creditors' rights in the race-contingent world of Jim Crow, as well as the court's ever pressing concern about managing race.

Looking at the courts' treatment of race in the corporate context over time offers broad insight into the practice of attributing race to persons, legal and natural. From this perspective, I advance the following three arguments, while suggesting an economics approach to race and social identity. First, there are no legal, and currently few practical, reasons why corporate persons cannot be associated with racial identities. Second, the state's participation in this practice should be restrained, but cannot (nor ought to) be eliminated. Third, legal persons adopt and are ascribed identities for the same reasons as natural persons: Identities signify commitments of persons to other persons, communities, beliefs, and conventions. Indeed, in much the same way that Jacob Levy saw the importance of commitment for culture, so too must the importance of commitment for identity be recognized.¹¹ Once viewed as such, a straightforward economic approach to racial identity (as signals and manifestations of commitments) can be demonstrated. These three points combined, if made to work in a legal institution, suggest a legal understanding of race more in line with current social scientific and humanist understandings. The law should demand that race be recognized as something existing in interactions and give it importance (in law) only to the extent that it is connected to legally cognizable harm resulting from such interactions, without appealing to elusive essentialist notions of race.¹²

9. See *infra* text accompanying notes 94–100.

10. The claim that these courts were constrained by biological conceptions of race, and therefore could not imagine a colored corporation, is unpersuasive. The Supreme Court's knowledge of the state's role in constructing race was made quite clear in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896): “[T]he question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, . . . [b]ut these are questions to be determined under the *lexus of each State*” *Id.* (emphasis added).

11. Jacob T. Levy, *The Multiculturalism of Fear* 112 (2000) (“To have a culture whose exit is entirely costless . . . is to have no culture at all.”).

12. For example, Nancy Fraser argues that the failure to recognize or the act of discouraging performances constitutes a harm. See Nancy Fraser, *Justice Interruptus: Critical Reflection on the “Postsocialist” Condition* 11–39 (1997).

Race is, as Erving Goffman long ago suggested, best thought of as a symbolic interaction,¹³ recognizable through patterns of representation and interpretation that render the race characteristic both visible and veiled. Because race is deployable in this sense, we can wear or discard our racial identities like masks. The corporation, as a corporate person, a *persona ficta*, itself constitutes another mask that allows persons to conceal and display their identities.¹⁴ The economic and legal implications of this practice are first considered in Part I of this Article, which lays the groundwork for an economic understanding of race. The analysis is further developed in Part II, which applies it to the practice of attributing racial identities to corporations and natural persons. Part III examines the prior political and economic constraints on corporate racial identity, looking at *People's Pleasure Park* and a number of other cases and statutes, such as the so-called Gold Laws of preapartheid South Africa and the Day Law of Kentucky in the postbellum South. Part IV then turns to the fundamental issues of race management and further explains the prior weight against racing corporations. Part V focuses on the current legal regime that recognizes race within corporations, revealing some cautionary connections to the Nuremberg Laws of Nazi Germany, but also some promising developments in the doctrine. Part VI situates this developing legal doctrine within the modern political economic context. The Article then briefly concludes.

I. IDENTITY, SOCIAL CATEGORIES, AND COMMITMENT

Take two individuals engaged in a transaction—imagine, for example, that one seeks to purchase a home from the other. In the standard economic model, the value that each party derives from the transaction is entirely independent of the other party's identity. Indeed, a party's value, in the standard model, is independent of her own identity.¹⁵ Like the standard economic model, much legal doctrine obscures the salience of identity *qua* identity,¹⁶ though when confronted directly with the issue,

13. Erving Goffman, *The Presentation of Self in Everyday Life* 252–54 (rev. ed., Anchor Books 1959) (1956).

14. "Persona" literally means "mask" in Latin. 11 *Oxford English Dictionary* 597–98 (2d ed. 1986).

15. Economics Nobel Laureate George Akerlof and collaborator Rachel Kranton responded to this latter deficiency by advancing a theoretical model that responds to how "identity, a person's sense of self, affects economic outcomes." George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 *Q.J. Econ.* 715, 715 (2000).

16. Identity is often unseen in legal doctrine, aside from a particular individual's ability to satisfy a legal obligation. For instance, the doctrines of impossibility and impracticability recognize that the death or disabling illness of a promisor (e.g., a particular artist) or of a promisee (e.g., a particular subject) may excuse the legal obligation of a party or an estate. See James P. Nehf, 14 *Corbin on Contracts* §§ 75.1–75.2 (Joseph M. Perillo ed., rev. ed., Matthew Bender 2001). Outside of such contexts, identity recedes to the shadows of a dominant view of discrete arms-length transacting between parties who are assumed to be indifferent to the identity of the other. "The essence of personal relations in the discrete transaction is what sociologists call nonprimary

law does give substance to the importance of identity.¹⁷ Courts are, for example, likely to weigh identity in transactions that are premised on “elements of personal trust”¹⁸ or that subsequently become “‘impregnated’ [with] ‘personal and confidential’” qualities.¹⁹ Furthermore, the law gives weight to identity through various doctrinal conventions in the law of trade secrets,²⁰ business organizations,²¹ trusts,²² contracts,²³ patents,

relations[,] *i.e.*, it does not matter *who* the other party to the transaction is.” Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a “Rich Classificatory Apparatus,”* 75 *Nw. U. L. Rev.* 1018, 1034 (1981).

17. See *Winchester v. Howard*, 97 *Mass.* 303, 305 (1867) (“[E]very man has a right to elect what parties he will deal with. . . . ‘You have a right to the benefit you contemplate from the character, credit and substance of the person with whom you contract.’” (quoting *Humble v. Hunter*, (1848) 12 *Q.B.* 310, 317)); Note, *Personal Prejudice and the Doctrine of the Undisclosed Principal*, 44 *Harv. L. Rev.* 1271 *passim* (1931) (arguing that party’s right to choose her counterparty is embedded in contract law and that personal animosity should be credible basis on which to rest nullification of contracts). On the other hand, one commentator has observed that “[t]he right to an attitude which may be the result of personal idiosyncrasy [sic] or emotional reaction is not a legally or equitably protected right.” Note, *Non-Disclosure of Principal as a Defense to Specific Performance*, 75 *U. Pa. L. Rev. & Am. L. Reg.* 761, 769–70 (1927) [hereinafter *Non-Disclosure*].

18. *Non-Disclosure*, *supra* note 17, at 762–63.

19. *Town & Country House & Home Serv., Inc. v. Newbery*, 147 *N.E.2d* 724, 725 (*N.Y.* 1958) (quoting plaintiff’s complaint).

20. Courts use the route-nonroute distinction—which highlights the importance of individual identity in the performance of services—as a factor in determining whether customer lists and the like are to be treated as trade secrets. “A nonroute customer is one whose demand varies, and who is likely to purchase from several suppliers. Courts have been less prone to give relief in this area because there is no particular relationship developed between a customer and a salesman which is enduring.” *Abbott Labs. v. Norse Chem. Corp.*, 147 *N.W.2d* 529, 540 (*Wis.* 1967) see also *Corroon & Black-Rutters & Roberts, Inc. v. Hosch*, 325 *N.W.2d* 883, 887 (*Wis.* 1982) (citing *Abbott* and discussing route-nonroute distinction as applied to insurance agents), superseded by statute, Act of Apr. 15, 1986, ch. 236, § 6, 1985 *Wis. Legis. Serv.* 1198, 1199–1201 (West), as recognized in *Minuteman, Inc. v. Alexander*, 434 *N.W.2d* 773, 777 (*Wis.* 1989).

21. The corporate opportunity doctrine (and the related partnership doctrine) recognizes the possibility—though with some general hostility—that a third party’s refusal to deal with the firm or an individual may serve as a defense to an appropriation of a business opportunity. See *Monin v. Monin*, 785 *S.W.2d* 499, 500 (*Ky. Ct. App.* 1989) (“We conclude the trial court’s reasoning is flawed in that it ignores Sonny’s duties to the partnership.”); *Energy Res. Corp. v. Porter*, 438 *N.E.2d* 391, 394–95 (*Mass. App. Ct.* 1982) (acknowledging that corporate inability to exploit opportunity provides defense while rejecting application of defense based upon lack of sufficient evidence).

22. The standard trust law presumption that a trust does not fail for lack of a trustee allows the court to appoint trustees without regard to the trustee’s specific identity or personality. Restatement (Third) of Trusts § 34 (2003). However, when the identity of the trustee is regarded as essential to the purpose of the trust, then the trust will fail for want of a trustee. See 2 *Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts* § 101.1 (4th ed. 1987).

23. Contract law allows, for instance, avoidance of obligations in cases when identity is a basic assumption of the agreement. See *Gwin v. Tusa*, 111 *So.* 339, 339 (*La.* 1927); *Adams v. Gillig*, 92 *N.E.* 670, 672–73 (*N.Y.* 1910); *Williams v. Kerr*, 25 *A.* 618, 619 (*Pa.* 1893); Restatement (Second) of Contracts § 153 cmt. g (1981).

and bankruptcy.²⁴

Cases involving the law of agency perhaps offer the clearest statements on the legal significance of identity.²⁵ In the typical case, an agent, acting on behalf of her principal, enters into an agreement with a third party. At the time of formation the third party is taken to be unaware either of the principal's existence or of the principal's identity. Postformation, once the principal has been identified, the third party "objects to the race, religion, personality, political affiliations, genealogy, sex, or character, of the principal,"²⁶ and sues to rescind an otherwise enforceable agreement. When resolving these disputes, courts often draw a distinction between a third party's personally motivated refusal to deal with an identified principal and an economically motivated desire to deal differently with that principal.²⁷ Economic and opportunistic challenges to enforcement—including claims that one would have demanded different or better terms from a subsequently identified principal—are normally given short shrift.²⁸ However, refusals to deal based on a per-

24. The federal patent law providing that nonexclusive licenses are personal and nondelegable—and hence nonassignable without the licensor's consent—exists to address concerns that licensors have over the identity of their licensees; that is, concerns over not just the identity of the individual licensees (such as a corporate personality), but also the identity of the owners and agents of the corporate and other business licensees. This identity-contingent legal practice raises an interesting issue when firms go into bankruptcy, because bankruptcy reorganization typically changes the ownership of the firm (effectively allowing the creditors to take over). While § 365 of the Bankruptcy Code, 11 U.S.C. § 365 (2000), generally gives the bankruptcy trustee authority to assign contracts (including licenses), § 365(c) purports to enforce the federal patent restraint. There is currently a circuit split over whether the identity of the new residual owners of a corporate personality in bankruptcy represents a distinct identity. See *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750, 754–55 (9th Cir. 1999) (holding that debtor in possession cannot assume executory contract where "identity of the nondebtor party is material"); *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (finding that court "cannot simply presume as a matter of law that the debtor-in-possession is a legal entity *materially* distinct from the prepetition debtor").

25. See Restatement (Second) of Agency § 304 (1958), which is reiterated in the Restatement (Third) of Agency § 6.11(4) (Tentative Draft No. 4, 2003).

26. See Non-Disclosure, *supra* note 17, at 767.

27. See, for example, *Cole v. Hunter Tract Improvement Co.*, 112 P. 368, 368–69 (Wash. 1910), where a black purchaser obtained title to a lot from a developer who was unwilling to sell to blacks.

28. For example, the seller in *Cole* appears to have attempted to convince the court that it was his economic wellbeing, not racial prejudice, that was at issue here; the seller "introduced evidence tending to show, that if sales of lots in this addition were made to people of that race it would depreciate the value of the [rest of the development]." *Id.* at 368. The court supported the black purchaser, declaring that the race of the purchaser, though clearly relevant to the seller, "[was] not of the essence of the contract" and "[did] not come as near being related to the rights of the parties under the contract as a mistake in the value of the thing sold would." *Id.* at 369. Several more recent holdings support the proposition that a third party will not be permitted to void a contract with an undisclosed principal merely by asserting that he would have demanded a higher price or better terms had he known of the specific principal's existence. See *Finlay v. Dalton*, 164 S.E.2d 763, 766 (S.C. 1968); *Warr v. Carolina Power & Light Co.*, 115 S.E.2d 799, 804 (S.C. 1960).

sonal aversion to other parties are often afforded legal deference.²⁹ In nodding to this consideration, courts simultaneously recognize the significance of individuals' identities and the social categories of others with whom they transact.

A. *Signifying Effects of Corporate Racial Attribution*

Seizing the connection between identity and social categories helps us to clarify the nature of raced corporations. While it is true that racial identity—as a matter of law and otherwise—can be attributed to corporate personalities, it would be a serious mistake to reify race or personhood in the corporate context. The attribution of race to a corporate entity is best understood as an act, or better yet a performance, which signifies the identity of the attributor and commits, or seeks to commit, the attributor or the corporation (or both) to certain ideas, associations, persons, or practices. This performance may be undertaken by corporate agents promoting the entity or by third parties undermining it. For example, in *Bains LLC v. Arco Products Co.*, the plaintiff-firm, a trucking company owned by three East Indian Sikh brothers, “alleged that it had been subject to racial discrimination.”³⁰ The court agreed, finding based on

Even in cases where economic considerations related to identity do not appear opportunistic, courts have shown reluctance to void agreements. For example, in *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 105 N.E. 88, 90 (N.Y. 1914), Judge Cardozo enforced an agreement between a firm and an undisclosed principal, which happened to be a business competitor that suspected the firm would not have dealt with it knowing its identity. See also *Miller v. Fulmer*, 25 Pa. Super. 106, 111 (Super. Ct. 1904) (finding declaration by purchaser that he intends to use for one purpose but secretly intends another is not in itself sufficient for fraudulent misrepresentation).

29. See Restatement (Third) of Agency § 6.11(4) (Tentative Draft 2000); Restatement (Second) of Agency § 304; see also Non-Disclosure, *supra* note 17, at 763–69. Indeed, legal recognition of personal animosity as a bar to enforcement was implicit in the passage of the 1866 Civil Rights Act, which sought to provide blacks with the same legal capacity “to make and enforce contracts [as] white citizens.” 42 U.S.C. §§ 1981–1982 (2000) (originally enacted as Act of Apr. 9, 1866, ch. 31, § I, 14 Stat. 27, 27). Racial animosity among private actors served as a potential bar to contract enforcement until the late 1960s, when § 1981 and § 1982 were applied to private action in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 419–22 (1968). For a discussion of this case, see George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303, 330–37. Other forms of personal distaste—more idiosyncratic and noncategorical—are also recognized as salient by courts. One example is *Kaufman v. Sydeman*, 146 N.E. 365 (Mass. 1925), where the third party’s aversion to the principal was based on past personal animosity involving termination of a business relationship between the principal and a relative of the third party. The court refused to enforce the contract, for the sale of cloth, against the third party, asserting that, at least as far as a court of equity was concerned, “one cannot be held to have contracted with a person whom he has refused to accept as party to the contract.” *Id.* at 367. Also at issue in such cases is whether the agent or the principal knew or had reason to know that the third party would not have dealt with the principal, evoking concerns of nondisclosure, misrepresentation, fraud, or the vague doctrine of unclean hands.

30. 220 F. Supp. 2d 1193, 1196 (W.D. Wash. 2002) (emphasis added), *aff’d in part*, vacated in part, 405 F.3d 764 (9th Cir. 2005). The firm alleged that it was discriminated

the racist conduct of third parties toward the company,³¹ that it had “undoubtedly acquired an imputed racial identity.”³² The same court in *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, looked mainly to the actions and performances of shareholders and managers of the plaintiff-corporation to conclude that it too had acquired a racial identity.³³ In *Bains*, the third party acts of racial attribution signified the identities of those individuals, while at the same time committing (in their eyes and the eyes of others) the plaintiff-firm to a mumbled set of beliefs about East Indians. In *Thinket*, it was the corporate owners and agents who committed the entity to certain practices, while also communicating their own identities and commitments.

B. Signaling Identity and Commitments

George Herbert Mead was among the first to claim explicitly that language and communication are “essential for the development of the self.”³⁴ There is now considerable consensus about this view, although there is no single agreed-upon communicative channel through which identity is understood to be developed and expressed. Stephen Greenblatt, for example, draws on Ben Johnson’s comedy *Volpone* to ad-

against “while performing under the contract and that the contract had been terminated in violation of 42 U.S.C. § 1981.” *Id.* “Plaintiff’s owners and employees were consistently referred to by derogatory racial epithets, were made to use slower pumps than other drivers, made to wait longer to fill their trucks, subjected to higher security measures, and generally treated differently than non-Indian drivers. . . . Eventually, without notice, Defendant terminated Plaintiff’s contract.” *Id.*

31. The unseemly conduct of Arco’s agents—including interfering with the truck drivers’ efforts to perform their jobs and referring to them with derogatory slang names such as “rag-heads,” “f—— indians,” and “towel-heads”—was “pervasive and continuous” and “impacted on the profitability of the company. . . . Moreover, immediately after the termination of the contract, [one Arco employee] crowed that he had been responsible in part for ‘kick[ing] those rag heads out’ of the facility.” *Id.* at 1199.

32. *Bains*, 405 F.3d at 770. The court noted that “while not all of [the company’s] drivers were Sikhs, even the non-Sikh drivers testified that they were treated poorly by Davis [Arco’s agent] based on their association with what Davis saw as a Sikh company.” *Id.* For example, “Davis asked both Patrick Dauer and A.C. Morgan, the only two Caucasian Flying B drivers, ‘How did you get hooked up with these f——s?’” *Id.* at 767.

33. 368 F.3d 1053, 1059 (9th Cir. 2004). In concluding that the corporation had a racial identity, the court in *Thinket* relied significantly on the fact that it was wholly owned by African Americans and that its managers sought and received government certification to characterize the entity as a federally recognized minority-owned business. *Id.* See *infra* notes 238–258 and accompanying text for a fuller discussion of the Court’s practices in these and related cases.

34. George H. Mead, *Mind, Self, & Society: From the Standpoint of a Social Behaviorist* 135 (13th prt. 1965). Mead actually used the phrase “the language process,” by which he clearly meant communication: “The importance of what we term ‘communication’ lies in the fact that it provides a form of behavior in which the organism or the individual may become an object to himself.” *Id.* at 138. “[H]e becomes an object to himself only by taking the attitudes of other individuals toward himself within a social environment or context of experience and behavior in which both he and they are involved.” *Id.*

vance a performative understanding of identity: “Volpone transforms himself into a theater in which he is both actor and audience. . . . He hears what he sounds like [and] sees what he looks like to others For ourselves . . . this kind of self-consciousness is . . . our peculiar way of regarding and manipulating our identities.”³⁵ Kwame Anthony Appiah, on the other hand, looks to the narrative structure in identity, observing that the available labels which characterize social categories such as “woman,” “man,” “black,” “white,” “gay,” “straight,” etc., “operate to mold what we may call *identification*,”³⁶ identification with the social category defined by L implies “thinking of yourself as an L shapes your feelings[,] . . . your actions . . . [and] carries ethical and moral weight.”³⁷ But if performances and narratives are *how* identities are communicated and thereby realized, then commitments, I will suggest, are *what* identity performances and narratives communicate. Social identities communicate a person’s commitments to groups, communities, institutions, conventions, beliefs, and ideals. Without commitments, performances and narrative

35. Stephen J. Greenblatt, *The False Ending in Volpone*, 75 *J. Eng. & Germanic Philology* 90, 94–95 (1976). “Volpone is consummately a man who has created his own identity [through literal performances] [H]e is liberated even from himself, uncommitted to a single, fixed role.” *Id.* at 95. A still stronger notion of performative identity has been offered by Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 163–80 (2d ed. 1999) [hereinafter *Butler, Trouble*]. See also Erving Goffman, *Frame Analysis* 124 (1974) (discussing effect of performance on identity); Ian F. Haney Lopez, *White by Law: The Legal Construction of Race* 111–53 (1996) [hereinafter *Haney Lopez, White by Law*] (discussing law’s role in defining race); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *Yale L.J.* 109, 156–58 (1998) (arguing that performing one’s race proved central in mid-nineteenth century Southern racial determination trials); John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *Yale L.J.* 817, 820 (2000) (arguing that performing one’s race proved central to racial determination in immigration litigation).

36. Kwame Anthony Appiah, *The Ethics of Identity* 66 (2005) [hereinafter *Appiah, Identity*].

37. *Id.* at 68. Glenn Loury and Hanming Fang develop an economic model of personal and collective (not social) identity based on individual narratives: The way persons “elect to represent themselves to one another affects the productivity of their subsequent economic interactions.” Glenn C. Loury & Hanming Fang, “Dysfunctional Identities” Can Be Rational, 95 *Am. Econ. Rev.* 104, 104 (2005). “We think of an agent’s identity as the mechanism she uses to convert personal history into a more simplified account of herself. A group’s ‘collective identity’ is any self-representational mode of this sort which has been adopted in common by (most of) the agents in that group.” *Id.* Seyla Benhabib similarly suggests that the self is defined and created by a narrative unity: “As Hannah Arendt has emphasized, from the time of our birth we are immersed in a ‘web of narratives,’ of which we are both the author and the object.” Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 198 (1992). For Benhabib, there is a narrative structure to our actions and identity, though she would likely reject the individual choice presumption in Loury and Fang’s formulation: “When the story of a life can only be told from the perspective of others, then the self is a victim and sufferer When the story of a life can only be told from the standpoint of the individual, then the self is a narcissist and a loner” *Id.*

are no more interpretable as identity than an actor's reading of lines on a stage.

I approach racial performances and narratives as communicative means of signifying identity and committing persons. Rejecting the standard economic approach, I assume in this Article that parties transact from a self- and other-regarding perspective, which is to say that identity matters. Identities matter not because individuals have "tastes" for certain identities and not for others,³⁸ but because identities commit and reflect commitments; and commitments affect economic outcomes.

Identities, of course, are not perfectly observable to others, so individuals may have incentives to signal or conceal—through identity performances—their identities.³⁹ But an individual's capacity to undertake certain identity performances cannot be taken for granted, rather it varies depending on her attributes and internal prescriptions. In economic terms, this means that identity performances are differentially costly for individuals to undertake.⁴⁰ These costs may be such that performances

38. Cf. Gary S. Becker, *The Economics of Discrimination* 14 (2d ed. 1971) (advancing the taste-for-discrimination approach). Roland Fryer and Matthew Jackson offer an alternative model showing that identities may matter, even without tastes for one social identity or another, simply because of the cognitive demands of sorting identities—particularly those less frequently encountered. Roland G. Fryer, Jr. & Matthew O. Jackson, *A Psychological Model of Categories and Identification in Decision Making* (Nat'l Bureau of Econ. Research, Working Paper No. 9579, 2004), available at <http://www.nber.org/papers/w9579> (on file with the *Columbia Law Review*); see also Akerlof & Kranton, *supra* note 15, at 716–17 (offering prescription-driven model of identity). I have no quarrel here with these understandings of the salience of racial identity; certainly race can matter for many reasons simultaneously. My objective is merely to develop the previously unaddressed (at least within the economics literature) role of commitment in racial identity.

39. For example, an individual whose social identity derives from the self-categorization "white supremacist," and who has internalized the prescriptive norms of that category, will suffer some loss of welfare by selling her home to someone she categorizes as black, irrespective of the validity of that categorization. The homeowner may not sell to the prospective black buyer or she may demand greater compensation from the buyer. Given this costly possibility, the buyer may seek to influence the homeowner's categorization of the buyer's race. In other words, if *j*'s strategies are influenced by how she categorizes *i*, then *i* may have an incentive to manipulate the social category in which *j* places her by emphasizing or deemphasizing available attributes. Knowing that her social category matters to a prospective transacting partner, a party will have an incentive to manipulate her attributions. See Fryer & Jackson, *supra* note 38, at 23–24. She will also have the incentive to signal her identity so as to influence the other person's categorization of her and thus her value from the transaction. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *Yale L.J.* 1757, 1760–61 (2003) (book review) (observing that individuals have strong incentives to manage their race and other aspects of their identity in professional settings). From an economic perspective, *i*'s strategy fits into the standard signaling model when the behavior is costly. However, when the behavior is not costly to *i*, but in fact beneficial, then the strategy is better understood in terms of an identity model.

40. Consider here Bruce Ackerman's categorization of "discrete" and "anonymous" minorities, where "discrete" refers to minority groups whose "members are marked out in ways that make it relatively easy for others to identify them . . . [while members of

can credibly signal one's identity, and hence one's commitments. If so, then others may rely on that signal in taking subsequent action.

I develop this signaling model of race more formally elsewhere, but the description above is sufficient to convey the full economic intuition, and for present purposes, it is enough to initially suggest a radically different antidiscrimination approach for courts. Instead of looking for an individual's traits or attributes (immutable or not), courts should view race and racial discrimination in terms of signals and their interpretations—that is, race can be seen as an interaction between individuals, and not as some essential quality within individuals. Thus, if one observes a signal (say, of racial identity) and takes some action based on that signal, courts may find racial discrimination based purely on the interaction around the signal without any reference to any true or underlying racial essence. This view of antidiscrimination law is described in greater detail in Part V, but for the present, let us maintain our focus on the economics of corporate racial identity.

II. ECONOMICS OF CORPORATE RACIAL IDENTITY

Persons, including corporate persons, have strong incentive to define and manage their own identities, racial and otherwise. The People's Pleasure Park Company—though “composed exclusively of negroes” and established to serve “colored people”—explicitly contrived to dissociate race from its business form. It did this, a hundred years ago, in order to avoid the disabilities associated with being black in the Jim Crow South. Some black-owned businesses, however, still struggle to avoid being disabled by black identity. The contemporary detriment of being pigeonholed or straitjacketed by race is a nontrivial liability for many black entrepreneurs and their businesses.⁴¹ These entrepreneurs therefore often seek to limit the perception of their enterprises as “black,” which may put

anonymous groups can] avoid easy identification.” Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 729 (1985). But cf. Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093, 1105 n.72 (1982) (“As a matter of language, ‘discrete’ means separate or distinct . . .”). To illustrate his point, Ackerman observes, “there is nothing a black woman may plausibly do to hide the fact that she is black or female. . . . In contrast . . . [a] homosexual, for example, can keep her sexual preference a very private affair” Ackerman, *supra*, at 729. But the costs of engaging in performances that reveal or conceal identity is not merely a function of one's observable attributes; it is also a function of one's internalized regulatory constraints on performances. So it may be very costly for a homosexual to keep her sexual preference private and not so costly for someone who considers herself to be “black”—but does not meaningfully identify with the black community—to pass as “white.”

41. The continuing disadvantage of being constrained by black (corporate) identity in business has not gone unnoticed in the trade and popular presses. See, e.g., Ellis Cose, *The Rage of a Privileged Class* 65 (1993) (describing “pigeonholing” generally and its associated financial and psychic costs); Roger O. Crockett, *Invisible—and Loving It*, *Bus. Wk.*, Oct. 5, 1998, at 124, 124 (describing black business owners' plight when seeking to separate and conceal their race from their business); Gerda D. Gallop, *The State of Small Black Business*, *Black Enterprise*, Nov. 1998, at 63, 68 (describing how minority corporate

them directly at odds with *Thinket's* suggestion that federally-certified minority-owned corporations have racial character "as a matter of law."⁴² A black-owned corporation that does not wish to be viewed in the light cast by *Thinket* will now have a disincentive to seek federal certification or to use the corporate form.⁴³ This sets up an undesirable prospect, as federal certification serves an important function for black-owned businesses (even for those that do not wish to be viewed exclusively as "black businesses"), and black-owned businesses seemingly are already underutilizing the corporate form. Table 1 shows that only an estimated 8.8% of all black-owned enterprises are incorporated, compared to 21% for all firms, 24.1% for Asian and Pacific Islander-owned firms, and 12% for Hispanic-owned firms. Black-owned firms are the least likely to take advantage of incorporation. This pattern might be exacerbated if incorporation, as a matter of law, no longer provides the racial anonymity so long desired—at least in certain contexts—by black entrepreneurs.

On the other hand, some corporations explicitly seek to adopt and emphasize the racial (or other) identity of their owners, agents, or customers.⁴⁴ For these corporations, adoption of a racial identity may further their corporate goals of profit maximization, marketshare dominance, employee and customer loyalty, or some other objective. Emphasizing race in this way allows for identification with and hence commitment to a racial category. Commitments of this sort can be costly, but they can also be valuable. Individuals and firms, through their choices and internal prescriptions, are best situated to assess the desirability of such commitments and to act upon them.

A. Choices and Prescriptions

Economists Roland Fryer and Steve Levitt provide a good illustration of the benefits and costs of identity commitments in their work on naming patterns in some African American communities.⁴⁵ The growth in the assignment of distinctively "Black" names to children in these communities is a little difficult to explain economically, given the pervasive

suppliers are "often lumped together with diversity initiates in human resources departments").

42. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004).

43. Managers of these corporations may worry that other firms will be less likely to enter into contracts with them because of their imputed racial identity. On the other hand, once there is a relationship, contracting partners may be less likely to behave in ways that could be viewed as discriminatory.

44. For example, while the internet's "cool anonymity proves an advantage to [some] minority business owners, allowing them to bypass real-life tensions by masking their racial identity," other web-based minority business operations are "explicitly race-based." Crockett, *supra* note 41, at 124, 128. "For a segment of ethnocentric black businesses . . . the Internet's vast reach is more compelling than its anonymity." *Id.* at 128.

45. Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 199 Q.J. Econ. 767, 767-71 (2004).

TABLE 1: DISTRIBUTION OF LEGAL BUSINESS FORMS FOR ALL FIRMS
AND BY OWNERS' RACE^a

Organizational Form	All firms	Black	Hispanic	American Indian & Alaska Native	Asian & Pacific Islander
Total Incorporated	21.0%	8.8%	12.0%	9.7%	24.1%
C corp.	11.5%	5.2%	6.5%	4.8%	14.0%
Subchapter S corp.	9.5%	3.6%	5.5%	4.9%	10.1%
Partnership	5.9%	1.7%	2.3%	2.3%	4.5%
Ind. Proprietorship	72.6%	89.5%	85.6%	87.9%	71.0%
Other	0.5%	0.1%	0.1%	0.1%	0.4%
Total	100.0%	100.0%	100.0%	100.0%	100.0%

^a U.S. Census Bureau, U.S. Dep't of Commerce, 1997 Economic Census: Company Statistics Series 3-14, 475-80 (2001). The legal organizational form "Other" includes cooperatives, estates, receiverships, and businesses classified as unknown legal forms of organization. These data are based on the 1997 economic census and surveys of minority- and women-owned business enterprises reported in the 1997 Economic Census and the 1997 Survey of Minority Enterprises, both conducted by the U.S. Census Bureau (Census). Census takes an economic census every five years, in years ending in two and seven. These are the most current available data. The 2002 data are scheduled to be released in the first two quarters of 2006. These data include all nonfarm businesses filing 1997 tax forms with receipts of \$1000 or more. Census specifically relied on Internal Revenue Service (IRS) electronic files for all companies submitting a 1997 Form 1040, Schedule C (individual proprietorship or self-employed person), a Form 1065 (partnership), Form 1120 (corporation tax forms), and Form 941 (Employer's Quarterly Federal Tax Return). Based on administrative records from the IRS and the Social Security Administration (SSA), as well as data from several other sources (including trade presses and prior surveys), Census identified the probability that a business was minority-owned. This was accomplished by taking Social Security Numbers (SSNs) from the tax file and merging these SSNs with data (provided by the SSA) on the individual business owners' country of birth, current surname, original surname, mother's maiden surname, and father's surname, as well as reported race data in the categories: (a) Asian, Asian American, or Pacific Islander; (b) Hispanic; (c) Black; (d) Northern American Indian or Alaskan Native; and (e) White. Six separate sampling frames were used in the surveys of minority- and women-owned business enterprises. Descriptions of the methodologies for both the economic census and the surveys of minority- and women-owned business enterprises can be found in the 1997 Economic Census and the 1997 Survey of Minority Enterprises.

view that individuals with such names are penalized in labor markets and other social settings outside of the black community.⁴⁶ Fryer and Levitt attempt to account for this behavior by proposing and testing a number of theoretical models, including an ignorance model (i.e., ignorance

46. This phenomenon is most evident in resume audit studies, where two identical resumes—differing only in that one has a stereotypically Black name at the top while the other has a more "traditional" name—are sent to prospective employers. Studies have repeatedly shown that individuals bearing stereotypically Black names are less likely to get callbacks for job interviews. See, e.g., Barbara D. Bart et al., *What's in a Name?*, 12 *Women Mgmt. Rev.* 299, 302-06 (1997); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *Am. Econ. Rev.* 991, 991-92 (2004).

among black parents),⁴⁷ a price theory model,⁴⁸ a signaling model,⁴⁹ and an identity model.⁵⁰ Their data were most consistent with the identity model, whereby giving a child a distinctively “Black” name parents increase their own (and their child’s) identification with the black community.⁵¹ In the equilibrium of this model, there are no net costs to imparting a distinctively Black name on a child, since only authentically identified blacks pursue this strategy. Economics Nobel Laureate George Akerlof and his collaborator Rachel Kranton lay the foundation for this model in their model of identity associated with “prescriptions,” which dictate utility-maximizing actions. “When an individual takes actions in line with these prescriptions (e.g., a ‘black’ type choosing a distinctively Black name, or a ‘white’ type choosing a White name), there is a utility benefit.”⁵² We can similarly take two types of corporations (or two types of owners of corporations), one type with a strong affinity or connection to black communities and a second type with no affinity or connection to these communities. In this framework, the former type will experience a benefit by explicitly adopting a black racial identity, while the latter type would suffer a loss if it racially identified itself as black. This result holds even where both types of corporations are black-owned. Black-owned corporations that are authentically race-neutral in their aspirations and behaviors will endure net costs when they take actions consistent with the prescriptions for black-community-affined corporations, and vice versa. It is therefore profit maximizing for *some* black-owned businesses to organ-

47. Fryer and Levitt raise and dismiss the possibility of “ignorance on the part of Black parents who unwittingly stigmatize their children with such names.” Fryer & Levitt, *supra* note 45, at 770–71.

48. In this model, parents choose names to maximize their children’s expected utility, where Black names are assumed to generate more utility in black communities. *Id.* at 788.

49. In their signaling model, Black names serve as a measure of one’s affinity to the black community, but names are not in and of themselves productive (i.e., not valuable). There are two types of people—those with a strong affinity to the black community and those with none. Everyone knows their own type, but not the types of others in the community. Fryer and Levitt further assume that “[r]egardless of one’s actual type, social interactions in the black community yield higher utility if others believe that one has an affinity for the black community.” *Id.* at 789. So both types prefer to be viewed as having a strong affinity since this perception yields a higher return. “One way in which an individual signals his or her type is by the names that they choose for their children.” *Id.* Unlike the price theory model, where parents give their children distinctively Black names to increase their children’s utility, in the signaling model, parents impose otherwise costly names on their children to signal the parent’s authentic affinity to the black community and therefore increase the parents’ utility. It is important that the giving of a distinctively Black name be “costly” to the parents (even if only indirectly through their children) for the community members “to regard Black names as a [credible] signal of community loyalty.” *Id.*

50. The identity model is similar to the signaling model (in that distinctively Black names continue to be costly for those without a true affinity to the black community) and different from the signaling model (in that distinctively Black names are now a benefit—not a cost—for those with authentic affinity to the black community).

51. Fryer & Levitt, *supra* note 45, at 792.

52. *Id.* at 791.

ize their transactions under the veil of a black corporate personality, while others would find it optimal to clothe their transactions with a deliberate measure of racial ambiguity or anonymity.

B. *Investments and Commitments*

Beyond viewing identity through the lens of “prescriptions,” my principal orientation is to view identity as a form of “commitment.” This understanding points to another efficiency purpose served by private adoption of corporate racial identity: investment efficiency. To see this point, consider again the parent debating whether to give her child a distinctively Black name despite the perceived market penalties. Parents who strongly identify with the black community and who derive utility from its advancement might naturally wish to impart these preferences to their children; they may also reasonably want the community to support and invest in their children’s development and growth. By choosing distinctively Black names, these parents may further these aims not only through an expressive channel, but also through an explicitly economic one. Ironically, the economic rationale is supported by the perceived penalties for distinctively Black names. That is, a distinctively Black name increases a child’s commitment to the black community by limiting his outside options. The community, in turn, will have more incentive to invest in the child, knowing that he is less likely to walk away and appropriate the returns of the community’s contribution to him.⁵³

Suggesting such calculation on the part of parents will undoubtedly strike some readers as crass, but we ought not fool ourselves. Parents utilize many devices to bind their children to cared-for communities—religious, racial, and others—and these devices are often supported by broad social customs and laws. The common law of trusts, for example, permits the enforcement of trusts that vest only if a child marries within the faith or that divest if he marries “a person of a certain race.”⁵⁴ One might interpret *Wisconsin v. Yoder*, where an Amish community sought and received an exemption from the state’s mandatory education requirement,⁵⁵ as an instance where the Court supported parental desires

53. See the holdup theory of the firm, Oliver Hart, *Firms, Contracts, and Financial Structure* 27–28 (1995) [hereinafter Hart, *Firms*]; Oliver E. Williamson, *The Economic Institutions of Capitalism* 15–26 (1985); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J.L. & Econ.* 297, 324–35 (1978).

54. See Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in *Death, Taxes and Family Property* 119, 127 (Edward C. Halbach ed., 1977); cf. John H. Langbein, *Mandatory Rules in the Laws of Trusts*, 98 *Nw. U. L. Rev.* 1105, 1109–10 (2004) (“The cases (and indeed the Restatements) have divided about whether to sustain such a term.” (footnotes omitted)).

55. 406 U.S. 205, 234 (1972) (“[T]he First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”).

to restrict children to an insular community by limiting their options.⁵⁶ Of course, these matters cannot be reduced to a purely utilitarian calculus, but neither are these parental decisions to identify their children with certain communities entirely nonconsequentialist.⁵⁷

C. *Efficient Identities*

By explicitly identifying a corporation with a racial or ethnic group, corporate promoters (parents, of sorts) can increase investment from that group, ultimately advancing both the corporation's and the group's interests. I am not here calling for a stakeholder approach to corporate practice, nor am I arguing against such an approach.⁵⁸ My commitment model is agnostic on the issue of whether corporate managers owe, or should owe, any fiduciary obligations to nonshareholder interests. Rather than underscoring potential conflicts between shareholder and nonshareholder interests, this model pays heed to intertemporal conflicts within shareholders. Corporate racial adoption can efficiently respond to time-inconsistent shareholder preferences. Adding race to the corporate personality may allow managers a way to better commit to long-run, profit-maximizing strategies.

The efficiency of personifying the corporation in this manner may be most easily observed within the "nexus of contracts" model of the corporation. Interestingly enough, the scholars credited with developing this model, Michael Jensen and William Meckling, argued exactly the opposite point in their foundational piece.⁵⁹ In their view, the nexus of

56. This is an admittedly pessimistic interpretation, and the opinion clearly suggests that the parents in that case were motivated by genuine concern for their children's emotional and spiritual welfare. *Id.* at 209. Still, the opinion also revealed that the parents were concerned about "the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today." *Id.*

57. Appiah raises important nonconsequentialist concerns about the desirability of such "internal restriction, inasmuch as it constrains the opportunities of the younger generations, impedes their right of exit, and so infringes on the autonomy of their future selves." Appiah, *Identity*, *supra* note 36, at 78–80.

58. See generally R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (1984) (arguing that management strategies must take account of different stakeholders in organization); Cheryl Carleton Asher et al., *Towards a Property Rights Foundation for a Stakeholder Theory of the Firm*, 9 *J. Mgmt. & Governance* 5 (2005) (advocating new perspective on stakeholder theory of the firm); Margaret M. Blair, *Closing the Theory Gap: How the Economic Theory of Property Rights Can Help Bring "Stakeholders" Back into Theories of the Firm*, 9 *J. Mgmt. & Governance* 33 (2005) (commenting on and lauding article by Asher et al.). Many of the modern arguments on both sides were identified long ago by E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 *Harv. L. Rev.* 1145 *passim* (1932) and A.A. Berle, Jr., *Note, For Whom Corporate Managers Are Trustees: A Note*, 45 *Harv. L. Rev.* 1365 *passim* (1932).

59. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305, 311 (1976) ("*The firm is not an individual*. It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals . . . are brought into equilibrium within a framework of contractual relations.>").

contracts model of the corporation makes “clear that the personalization of the firm . . . is seriously misleading.”⁶⁰ But they claimed too much here. There is no necessary inconsistency between the nexus of contracts fiction and corporate personality.⁶¹ In fact, a personified corporation can be an efficient contractual commitment.

To see this, take the corporation to be a nexus of N contracts between the firm and various contracting parties, including shareholders, employees, suppliers, customers, and so on, indexed by $i = \{1, 2, 3, \dots, N\}$. Define the value that the firm derives from each contract as $v_i(e_i)$, where e_i is some measure of effort or investment that the firm’s contracting party, i , makes. Assume that investments positively affect the firm’s value of the contract, but they are noncontractible—which is to say the parties cannot write an enforceable contract that specifies the investment level that i ought to take because investments are unobservable, unverifiable, indescribable, or otherwise prohibitively costly to enforce.⁶² For instance, the firm may want an employee to make some unobservable relationship-specific investment (e.g., human capital development specific to the firm) or it may desire that a supplier make some noncontractible asset-specific investment.⁶³ Suppose the contract is jointly more valuable if the employee or the supplier makes some high level of investment. The problem, however, is that after the employee or supplier makes the investment, they are subject to being held up by the firm through some implicit or explicit renegotiation of the original noncon-

60. *Id.*

61. Jensen and Meckling preferred to see the corporation as operating like a market rather than a person. Yet, whether the firm is more like “a market,” or like “a machine,” or like “a team,” or like some other creature or thing familiar to us, as opposed to being like “a person,” is really a contest of metaphors. For the team metaphor, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *Am. Econ. Rev.* 777 *passim* (1977). For the machine metaphor, see Meir Dan-Cohen, *Rights, Persons, and Organizations* 46–51 (1986). Frank Kirkpatrick applies the machine metaphor to associations broadly, identifying it in the liberal philosophies of Thomas Hobbes, Jeremy Bentham, and Jean-Jacques Rousseau. Frank G. Kirkpatrick, *Community: A Trinity of Models* 16, 18, 29, 33 (1986). In some contexts the market analogy is apt (as long ago suggested by Ronald Coase in his 1937 classic article *The Nature of the Firm*. R.H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937)). In other contexts, the person and machine fictions are more useful. But there is no ultimate truth or “cognitive necessity” with regard to any of these fictions. These fictions are deployed simply to persuade, an aim that motivates and animates both legal and economic argument. See Donald N. McCloskey, *The Rhetoric of Economics passim* (1985); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 20–22 (1913). The corporation as “a person,” “a team,” “a market,” “a machine,” and as “a creature of the state,” are all metaphors invoked to advance particular arguments.

62. See Eric Maskin & Jean Tirole, *Two Remarks on the Property-Rights Literature*, 66 *Rev. Econ. Stud.* 139, 146 (1999).

63. For example, “the firm may wish to persuade a worker to engage in a lengthy apprenticeship at a low wage in return for the promise of a higher wage later if the worker becomes skilled.” Oliver Hart, *An Economist’s View of Fiduciary Duty*, 43 *U. Toronto L.J.* 299, 306 (1993) [hereinafter Hart, *Economist’s View*].

tractible agreement. Even if the firm's management does not wish to do so, a single shareholder may compel the corporation to engage in some activity consistent with shareholder primacy but inconsistent with the optimum *ex ante* prescribed behavior of the parties. Fearing the possibility of being held up, employees and suppliers will have reduced incentives to invest, lowering the value of the contracts with the firm: the "holdup problem."⁶⁴ If, however, the firm could credibly commit to not renegotiate, then incentives to invest optimally may be maintained and the holdup problem avoided.⁶⁵

Parties' *ex ante* desires are often subverted by their ability to renegotiate arrangements *ex post*.⁶⁶ Whether they can credibly commit to "no renegotiation" and what form that commitment might take are substantial questions. Game theorists Eric Maskin and Jean Tirole suggest that contracting parties could include irrevocable clauses in their contracts, prohibiting renegotiation and stipulating large legally enforceable penalties (i.e., liquidated damage clauses) if renegotiation occurs.⁶⁷ Of course, these clauses may themselves be renegotiated by the parties. Maskin and Tirole respond to this challenge by pointing out that "[the] parties could in principle register their contract [clauses] publicly and play out the mechanism before an arbitrator."⁶⁸ American courts, however, have shown great reluctance to enforce large liquidated damage clauses.⁶⁹ Yet despite this institutional constraint, it is certainly true that parties can credibly commit to "no renegotiation" in varying forms and degrees.⁷⁰

Taking on an identity is one way a corporation may, to a nontrivial degree, increase its commitment to various contracting partners, such as customers, employees, and suppliers. The corporation may, for instance, stipulate in its articles of incorporation that the entity's legal personality

64. See Bernard Salanie, *The Economics of Contracts* 175–88 (1997); Patrick W. Schmitz, *The Hold-Up Problem and Incomplete Contracts: A Survey of Recent Topics in Contract Theory*, 53 *Bull. Econ. Res.* 1, 4 (2001).

65. "It would be better for the firm if shareholders could commit themselves not to claim back money from workers and suppliers *ex post*. One way to do this is to broaden the scope of fiduciary duty to include workers and suppliers." Hart, *Firms*, *supra* note 53, at 306. For example, the 1994 reorganization of United Airlines resulted in a charter that gave nonshareholder employees and other constituents the right to nominate directors, to give them some control, and perhaps to afford them some fiduciary obligations from the board. See Henry Hansmann, *The Ownership of Enterprise* 117–18 (1996).

66. The tale of Ulysses and the sirens represents the classic instance of this phenomenon. See John Elster, *Ulysses and the Sirens: Studies in Rationality* 65–68 (1979).

67. Eric Maskin & Jean Tirole, *Unforeseen Contingencies and Incomplete Contracts*, 66 *Rev. Econ. Stud.* 83, 99 (1999).

68. *Id.* (footnotes omitted).

69. See Arron S. Edlin & Alan Schwartz, *Optimal Penalties in Contracts*, 78 *Chi.-Kent L. Rev.* 33, 36 (2003).

70. See Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 *Rev. Econ. Stud.* 115, 116 (1999) ("[T]he degree of commitment is something about which reasonable people can disagree: both cases—where there is and where there is not commitment—are worthy of study.").

shall hereafter be associated with some chosen social identity. By using the charter for this purpose, the corporation's commitment to that identity and associated others is publicly registered (as suggested by Maskin and Tirole). Promoters generally have strong incentives to choose efficient identities (i.e., ones that maximize returns over the nexus of contracts) for inclusion in the corporate charter, including no explicit identity or a proshareholder identity.⁷¹ All of this, of course, is nothing new. Businesses that pursue not-for-profit incorporation, and those that advertise themselves as socially responsible, and even those that display allegiance to shareholder primacy are all making public commitments to certain practices and communities of individuals.

By explicitly adopting an identity (racial, religious, or other), a corporation may commit to strategies that maximize perceived long-run firm value even when challenged by more myopic impulses. For example, the large Netherlands IT company, Baan, founded by the so-called brothers Baan, quite explicitly associated a religious identity with the corporate entity.⁷² And though “[i]n the end, the brothers couldn’t have it both ways,” as the “enterprise could not be both commercial and religious,”⁷³ it is worth noting that as the company struggled, the employees (many of whom shared the religious identity associated with the entity) rewarded the firm for its commitment by praying for its success and remaining with the firm for a longer period than they may have otherwise.⁷⁴ Furthermore, even the act of categorizing the corporate entity into specified racial, religious, or other groups (by the entity’s fiduciaries) may increase the commitment of those fiduciaries to the group. Psychologists in the subfields of social identity theory and categorization theory have empirically identified a connection between the process of categorizing others (and self) and group commitment—though the precise psychological

71. Oliver Hart has explained this phenomenon:

The reason is that as long as the founders sell their claims (equity, debt, etc.) in a competitive market, the total amount they receive reflects the present value of returns on all claims taken together. An exception occurs if some claimholder (or stakeholder) cannot be charged for its future return up front.

Hart, *Economist’s View*, *supra* note 63, at 309 n.25. On the founder’s creation of identity (and culture) in a firm, see Edgar H. Schein, *The Role of the Founder in Creating Organizational Culture*, *Org. Dynamics*, Summer 1983, at 13, 13 (“An organization’s founder . . . by force of his or her personality, begins to shape the group’s culture.”).

72. See Stephen Baker, *The Fall of Baan: How the Effort to Create a Silicon Valley Star in the Old World Failed*, *Bus. Wk.*, Aug. 28, 2000, at 247, 247–48 (noting that Baan brothers, both members of conservative Dutch Reform Church, caused their company to suffer “a fatal split, one represented by the hrothers and their dual fascinations: God and *geld*”).

73. *Id.* at 248.

74. See Naomi Ellemers et al., *Self and Social Identity*, 53 *Ann. Rev. Psychol.* 161, 164 (2002) (“[W]hen profits plummeted, instead of leaving for a more financially sound company, employees started daily prayers in the hope that the firm might yet be saved from bankruptcy.”).

mechanisms through which commitment to the group emerges are not well understood.⁷⁵

Judges too have affirmed the legal salience of adopted corporate identity and its implications for commitment to nonshareholder interests. In *Paramount Communications, Inc. v. Time Inc. (In re Time Inc. Shareholder Litigation)*,⁷⁶ the court rationalized Time's use of defensive tactics, at a significant loss to immediate shareholder returns, based on Time's "identity and culture."⁷⁷ Time argued that its identity and culture implied a commitment to its customers and employees (for journalistic integrity) that should take priority over its commitment to maximizing short-run shareholder returns. Of course, by weakening its commitment to its shareholders, Time has more discretion to hold them up, which may lead to reduced shareholder investment. On the other hand, there may be increased value and greater expected returns to shareholders from a firm's commitment to other parties, which can offset the expected hold-up costs of weakened shareholder commitment. A firm in this case ultimately faces tradeoffs between increasing shareholder investment and investments from other parties. What is the best strategy? That is unclear. The answer will depend on the circumstances and objectives of the particular firm. However, what is clear is that the firm, if it is a nexus of contracts, should seek to optimize value across the sum of its contracts—not just shareholder contracts. This optimization may imply a noncontractual commitment to nonshareholders—for example, adoption of corporate racial identity—which can leave both the firm and its shareholders better off.

Given the economic potential from racializing corporations, it is a little surprising that it did not happen sooner; why did we not see, for instance, parties organizing businesses as legally "white" persons during the Jim Crow period? In fact, some legislatures—both domestic and foreign—in the past did seek to restrict stock ownership by race and to determine the racial content of incorporated entities, but courts have resisted these practices. The next two Parts show that there were a number of reasons for this judicial restraint, based significantly on the political and economic context in which relevant transactions arose.

III. THE JIM CROW POLITICAL ECONOMY OF RACED PERSONS

A number of intriguing possibilities are revealed in the overlapping history of racial and corporate formation. The inquiry here, however, is limited. This Part will neither review nor revive stale debates over the "real" versus "social" bases of race or of corporate personhood. Much has

75. See *id.* at 180 ("This question [of how group commitment emerges] has not been a high priority in social psychological research in which commitment [has] often been treated as an independent variable.").

76. 571 A.2d 1140 (Del. 1990).

77. *Id.* at 1149.

been written on each of these fictions, and in isolation, I have little new to add. However, taken together and focusing on their intersection, prominent facets of each are revealed. For instance, the vital role of the corporate veil (a related fiction) in separating liabilities and obligations of shareholders from the corporation takes on new salience in the join of these constructs. From there, one can also clearly observe the fluidity of race. Immutability is difficult to maintain when race is connected to (or, indeed, defined by) ownership interests that are predicated on ease of transferability.⁷⁸ Racial identity in strictly legal persons not only makes the social construction of race plainly observable (absent the distractions of biology and deceptions of appearances), but it also reveals the practical and political instability of the construct in a dramatic fashion.

A. *Civil Rights and Creditors' Rights*

It is from such a practical and political perspective that one must view the refusal of courts to attribute race to corporations during Jim Crow. This was a momentous decision, “and it can well be believed that the Courts which had to consider it had no desire to let any mere technicality suppress the obvious demands of” the state’s segregationist policy.⁷⁹ But why would a Southern court allow a former slave to use a corporate shell to purchase land that he could not have acquired in his own capacity? Why did the courts refuse to pierce the corporate veil or to attribute race to the entity, when so much else was raced?⁸⁰ The answers to these questions are to be found in the political settlement between the North and the South over equality rights following the Civil War.

Equality rights in the wake of the Civil War were understood along three distinct lines: civil, political, and social. Civil equality and political equality were differentiated, though both were ultimately subject to de jure enforcement;⁸¹ social equality was another matter entirely—a matter

78. On the fluidity of race across jurisdictions, see Donald Braman’s treatment of *Plessy v. Ferguson*. Donald Braman, *Of Race and Immutability*, 46 *UCLA L. Rev.* 1375, 1393–400 (1999). On the fluidity of race within persons, see Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1716–18 (1993).

79. Hallis, *supra* note 6, at xlviii. The passage is borrowed from Frederick Hallis’s discussion of a similar refusal by English courts to treat a corporation held and controlled by Germans as an enemy of the state during World War I. For further discussion of Hallis’s views on the potential for the legal form of the corporation to obscure underlying social realities, see *infra* note 212.

80. This is not meant to suggest that piercing the veil and attributing race to the entity are equivalent. Veil piercing primarily operates to protect creditors by attributing corporate liabilities to individual shareholders, while “racing” corporations protects shareholders by attributing their characteristics to the entity.

81. Political equality, which implied equal rights to vote, hold political office, and sit on juries, was not the same as civil equality, which implied, *inter alia*, equal rights to make and enforce contracts or to hold and transfer property. “The distinction between civil and political equality was important to the framers of the Fourteenth Amendment because many of them did not want blacks to have the right to vote, to say nothing of women.” Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, Mimeo 7 (2005) (unpublished

largely thought beyond the enforcement powers of courts and legislatures.⁸² The conventional understanding held that the social hierarchy was determined by nature and, if anything, the state should intervene only to preserve that natural order—not to level it.⁸³ This view authorized one hundred years of state regulation of interracial association through the establishment of black hospitals, railcars, schools, and so forth. But why not black corporations?

Had the People's Pleasure Park Company been a partnership or some other unincorporated business, the racially restrictive covenant would not have been defeated as it was.⁸⁴ Importantly, corporations were not then, nor now, viewed as associations of coventurers, as partnerships, for instance, were.⁸⁵ Under the existing segregation mandate, the state

manuscript, on file with the *Columbia Law Review*). This distinction, prominent in congressional debates at the time, was “why the Fifteenth Amendment, giving black men the right to vote, was thought necessary.” *Id.*; see also Akhil Reed Amar, *The Bill of Rights, Creation and Reconstruction* 216–18, 258–61, 271–74 (1998) (discussing “legal distinction between civil and political rights”).

82. Social equality was viewed as beyond the state's power to effectuate. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“If the two races are to meet upon terms of social equality, it must be the result of natural affinities Legislation is powerless to eradicate racial instincts”); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1127 (1997) (“Thus, considered in retrospect, the distinction between civil and political, on the one hand, and social rights on the other, helps explain juridical differences in the rule structure of racial status regulation enacted in the decades following the Civil War.”); Balkin, *supra* note 81, at 7 (“Social equality and social inequality were not the business of the state.”). Not all commentators agree that the distinctions were so clear. See Amar, *supra* note 81, at 216–18, 258–61 (discussing recharacterization during Reconstruction of right to bear arms as civil, rather than political, right); Richard A. Primus, *The American Language of Rights* 154–57 (1999) (“[M]any rights were not clearly fixed in one category or another.”); Balkin, *supra* note 81, at 6 (“What fell into each category was always somewhat contested” (footnote omitted)).

83. Balkin references antimiscegenation laws as an example of state intervention to maintain the social hierarchy. Mixed race children would blur racial distinctions and thus “affect the status of other members of [a] social group without their consent. Hence the state's intervention [was] not only not seen as futile, [but] as necessary to preserve racial identity and racial status.” Balkin, *supra* note 81, at 8. This view of miscegenation as threatening group status allowed states to “continue to prohibit interracial sex or interracial marriage consistent with the Fourteenth Amendment.” *Id.* at 7–8.

84. The People's Pleasure Park controversy preceded the Uniform Partnership Act (U.P.A.) by almost a decade, but one might still look to section 8(3) of the Act, which explicitly recognizes that real estate may be acquired in the partnership name, to argue that a partnership may have also served as a suitable vehicle for African American purchasers. U.P.A. § 8(3) (1914) (amended 1997), 6 U.L.A. pt. 1, at 532 (2001). However, the partnership would have been treated as a group of “colored” persons by the association theory of partnership. See *id.* § 6 (“A partnership is an association of two or more persons to carry on as co-owners a business for profit.”). Thus, the partnership form would not have circumvented the covenant because the race of individual partners would have been relevant.

85. There was a period in American corporate law when challengers of the corporate person fiction had some success in their efforts to have the common law conceptualize and regulate corporations as partnerships. Morton J. Horwitz, *Santa Clara Revisited: The*

may have felt some authority to regulate an interracial association of coventurers (though even this, I think, would have been unlikely),⁸⁶ but shareholders are not in association with each other. They are atomistic rights claimants over the corporation. They hold contractual and property rights—as residual claimants—on the corporation; and these are *civil* rights clearly subject to court enforcement.⁸⁷ These protected rights would have been compromised if the state racialized the corporation.⁸⁸

Beyond the civil rights of shareholders, the rights of corporate creditors were also at stake in the decision over whether to racialize corporations. Corporate creditors extend credit knowing that assets owned by a corporation are not available to satisfy creditors of the individual shareholders. In other words, a corporation is not responsible for its shareholders' personal liabilities. This directive is the functional counterpart to shareholder limited liability (i.e., the shareholder is not personally liable for the corporation's obligations). Together these reciprocal restraints create a tidy partition of the assets and liabilities of shareholders.⁸⁹ Without this partition, corporate investors would invest less and incur higher monitoring costs. Reduced investment and higher costs would result because if coinvestors had significant personal debt, which creditors could collect from the corporation, then other shareholders would end up contributing to the bill. Indeed, the bill would ultimately

Development of Corporate Theory, 88 W. Va. L. Rev. 173, 182 (1985); see also William W. Bratton, Jr., The "Nexus of Contracts" Corporation: A Critical Appraisal, 74 Cornell L. Rev. 407, 424 (1989) (describing nineteenth century "consensus picture" of corporations, that "[t]he corporate entity represented a state-created juridical structure only—a 'legal fiction' that was conceptually different from actual conduct of corporate business, which, 'like that conducted by individuals and partnerships, was a contractual aggregate'); discussion *infra* notes 221–222. However, Anglo-American common law has not for the most part embraced an associational view of the corporation. See *infra* notes 203–207 and accompanying text.

86. Even though partnerships were conceived of as associations of individuals, they were also contracts and therefore subject to protection under the 1866 Civil Rights Act. Still, the contractual rights of prospective interracial marital partners and train passengers were often defeated by the state's interests in regulating interracial association. See Siegel, *supra* note 82, at 1122–25.

87. "[C]itizens . . . of every race . . . shall have the same right[s] . . . to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . ." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (current version at 42 U.S.C. § 1982 (2000)).

88. Just as states could not zone a neighborhood by race following *Buchanan v. Warley*, 245 U.S. 60, 82 (1917), neither could they "race" a corporation. In this sense, one might look at the nonracializing of corporations as a precedent to *Buchanan*. In *Buchanan*, the Court felt that the legislation was less about "social rights" than "fundamental rights in property" or civil rights, that is, "the civil right of a white man to dispose of his property . . . to a person of color and of a colored person to make such disposition to a white person." *Id.* at 79–81.

89. These restraints also create a partition of the assets and liabilities of shareholders and the corporation, but presently I wish to emphasize the separation among shareholders.

be paid by not just other shareholders, but corporate creditors generally, like commercial lenders, employees, suppliers, and other trade creditors.

All these parties would be exposed to greater financial liability if corporations were raced at this time. Had the court in *People's Pleasure Park* ruled the corporation black, asset partitioning would have been defeated by attributing a liability (disability) of the owners of the corporate stock to the corporation itself. Permitting this to be done even in this one context would increase the information costs of dealing with corporate assets in all contexts, since creditors (broadly defined) would have to worry about whether a corporation will be treated as though it has a disadvantageous racial identity (because of the race of its owners) and hence be subject to additional liabilities (disabilities) relative to white-owned or un-raced corporations.⁹⁰ This would not have been a trivial concern for investors and creditors in the world of Jim Crow.

The court's refusal to "race" corporations one hundred years ago becomes somewhat more comprehensible in light of these legal (civil rights) and practical (creditors' rights) concerns. Yet these concerns are still with us, as contemporary courts attribute race to these legal persons without much hand wringing. What has changed is that we no longer live in a world that enforces racial covenants and the like.⁹¹ This fact underscores the broadest reason why courts previously did not attribute race to strictly legal persons. Doing so would have revealed the unadorned legal construction of race and undermined the political and social regime of that period. Therefore, to fully appreciate the ruling in *People's Pleasure Park* one must situate it within the then extant social and political context.

B. People's Pleasure Park

Where is the Jim Crow section
 On this merry-go-round,
 Mister, cause I want to ride?
 Down South where I come from
 White and colored
 Can't sit side by side.
 Down South on the train
 There's a Jim Crow car.
 On the bus we're put in the back—
 But there ain't no back
 To a merry-go-round!

90. To take a simple example, note that the seller of property covered by racially restrictive covenants might have to verify the racial identity of corporate buyers up to the point of the sale in order to avoid liability and consequent damages or divestitures.

91. Racially restrictive covenants still resonate, however. See, e.g., Julian Walker, *Woman Seeks \$100,000 in Damages in Housing Bias Suit*, *Richmond Times-Dispatch*, Dec. 8, 2005, at B2 (describing recent case in which black prospective buyer sued white homeowner who allegedly refused to sell to blacks on basis of racially restrictive covenant).

Where's the horse
For a kid that's black?⁹²

The controversy over the racial identity of the People's Pleasure Park Company began at the turn of the twentieth century, when the last children born into slavery were just approaching middle age, and white idealization of the Old South and the Civil War soared, particularly in Richmond, Virginia, the seat of the Confederacy.⁹³ "Socially, Richmond was two cities—one white, one black. . . . By the late [1880s] official segregation in Richmond had reached the point that white and black children were walking to and from school on separate sides of the street."⁹⁴ White and black prostitutes also walked on separate streets, and "[i]f taken to court, [they] would likely have found the spectators racially separated, and perhaps, like the procedure in Savannah's mayor's court in 1876, they would have sworn on a Bible set aside for their particular race."⁹⁵

Law and custom mandated segregation of not only physical spaces,⁹⁶ but also activities—especially social activities.⁹⁷ Motivated in large part by the rhetoric of protecting white women from black men,⁹⁸ interracial

92. Langston Hughes, *Merry-Go-Round: Colored Child at Carnival*, in *The Panther and the Lash* 92, 92 (1974).

93. Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* 185 (1998) ("Between 1890 and World War I, white Southerners went to extraordinary lengths to mythologize the past, to fantasize an Old South, a Civil War, a Reconstruction, and a Negro that conformed to the images they preferred to cherish.")

94. Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* 150 (1983) [hereinafter *Fink, Workingmen's Democracy*] (discussing segregation in Richmond in late 1880s).

95. Howard N. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865–1890*, 63 *J. Am. Hist.* 325, 337 (1976). "[I]n the courtroom of the Radical circuit court judge in Richmond, whites sat on the west side and blacks on the east." *Id.* at 332. See also Litwack, *supra* note 93, at 246, for his description of the Jim Crow Bible in a North Carolina courtroom.

96. Prisons, for example, were required to be segregated, but overcrowding often prevented full segregation. At one point, Alabama prison authorities dealt with this problem by placing "white women convicted of adultery with blacks [in] the same cells as Negro women." Rabinowitz, *supra* note 95, at 340. Not only were schools and libraries segregated, but a North Carolina law also prohibited the exchanging of books between black and white schools. See *N.C. Gen. Stat. § 115-294* (1944) (repealed 1955), reprinted in *States' Laws on Race and Color* 331 (Pauli Murray ed., 1997). Murray offers a comprehensive list of laws relating to segregation in graveyards, hospitals, insane asylums, restaurants, inns, hotels, and so on. See *States' Laws on Race and Color*, *supra*.

97. The South was more concerned with policing the interracial social environment than the physical one. See 2 Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 606–21 (Transaction Publishers 1996) (1944).

98. After the passage of the Civil Rights Act of 1875, the *Raleigh Sentinel* expressed a common sentiment among many Southern whites: "[T]he negro will be forced upon . . . [the white man's] wife, and his daughter, on the cars, . . . in theatres and other places of amusement." Rabinowitz, *supra* note 95, at 333 (quoting *Raleigh Sentinel*, Aug. 2, 1875). This sentiment was also observable in the *People's Pleasure Park* trial transcript, which in significant part focused on "a drunken negro, [who came] down from Richmond on the car on a Sunday morning and insulted a white lady," and the behavior of "suspenderless" and "shirtless" negro men. Transcript of Record at 220–22, *People's Pleasure Park Co. v.*

dancing, dating, and intimacy were severely punished,⁹⁹ as were interracial fishing, boxing, and other sports, as well as pool halls, race tracks, theaters, parks, beaches, circuses, and other “tent shows.”¹⁰⁰ White Southerners did not take incursions across the color line lightly. For instance, when the Knights of Labor held their 1886 General Assembly in Richmond,¹⁰¹ Frank Ferrell, a black Knight from New York, attended a performance of *Hamlet*¹⁰² at the city’s most exclusive theater.¹⁰³ “This breach of racial mores created a furor” throughout the city, with the “police, forty deputies, and a hastily organized ‘Law and Order League’” taking posts outside the elite theater the following evening to prevent any further violations.¹⁰⁴ Matters were no less controlled at the other end of the social hierarchy. Indeed, a key point of contention in the *People’s Pleasure Park* litigation was whether, and to what extent, blacks and whites were seen eating at the same table in the local dive near the company’s property. It also did not help the company’s case that the property at issue was located on hallowed Confederate grounds.

Rohleder, 61 S.E. 794 (Va. 1908) (No. 135) (on file with the *Columbia Law Review*) [hereinafter *People’s Pleasure Park Record*] (deposition of J.W. Camp); id. at 110 (deposition of R.A. Rohleder); see also id. at 155 (deposition of A.F. Craddock); id. at 158–59 (deposition of F.P. Watson); id. at 169 (deposition of Mrs. C.E. Dawson); id. at 175–76 (deposition of J.D. Clark); id. at 219 (deposition of W.C. Vincient).

99. See Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* 216–23 (2003); Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 18–28 (2001).

100. See *States’ Laws on Race and Color*, supra note 96, at 17; Rabinowitz, supra note 95, at 327–28, 331–32.

101. Major Joseph B. Johnson was an influential member of the Knights and likely had something to do with the choice of Richmond for their General Assembly. He was the official organizer of Richmond’s Knights of Labor District Assembly 92, “composed entirely of Negro members . . . with . . . membership of 1,285.” Sidney H. Kessler, *The Organization of Negroes in the Knights of Labor*, 37 *J. Negro Hist.* 248, 258 (1952) (citation omitted); see Rachleff, supra note 1, at 127. “Black workers were best organized in Richmond.” Kenneth Kann, *The Knights of Labor and the Southern Black Worker*, 18 *Lab. Hist.* 49, 54 (1977). And the Knights were “a powerful local force” there. Fink, *Workingmen’s Democracy*, supra note 94, at 155.

102. Michael Ayres Trotti, *When Coney Island Arrived in Richmond*, 51 *Va. Cavalcade* 168, 171 (2002).

103. Kann, supra note 101, at 60–61. Ferrell’s attendance may have been intended to challenge the heightened discrimination to which he was exposed in Richmond. He likely stayed at the St. Charles Hotel. “[T]he St. Charles [was] the only Richmond hotel to accept a black delegate to the 1886 Knights of Labor convention [and] gave him second-class quarters and seated him at a table in the dining room farthest from the door and behind a screen.” Rabinowitz, supra note 95, at 336. It is important to emphasize that it was not Major Johnson, nor the other black members of District Assembly 92, who crossed the color line. They knew better. “[T]he Negro in Richmond, Virginia, regardless of his legal rights, knew ‘how far he may go, and where he must stop.’” Id. at 349. “Breaking the color line . . . was even more difficult for Southern Knights than achieving harmony in economic struggles.” Kann, supra note 101, at 59.

104. Trotti, supra note 102, at 171. “Amidst this swirl of controversy, Knights leaders cautiously retreated [and] immediately assured white Richmond the visiting Knights would not challenge the color line again.” Kann, supra note 101, at 62.

The land in question, located just outside of Richmond, witnessed some of the bloodiest battles of the Civil War.¹⁰⁵ It was sold by the heirs of Samuel Mosby to Bliss and Blanche Black of Boston on January 19, 1900.¹⁰⁶ The Blacks platted the roughly 125 acre site into 1,330 lots under the name “Fulton Park” with the intention of establishing a settlement for “white persons.”¹⁰⁷ In many ways an ideal site for a suburban settlement, Fulton Park was located across the street from the Fair Oaks Station at the intersection of two rail lines: the Southern Railway and the electric streetcar running from Richmond. The streetcar trolley from Richmond stopped directly across from the amusement park built by the Blacks to attract home buyers.¹⁰⁸

Unfortunately for the Blacks, several Richmond streetcar companies had already developed “suburban parks at the ends of their lines.”¹⁰⁹ These suburban trolley parks and numerous amusement alternatives in Richmond left little demand for the Blacks’ white-only amusement park. The Blacks were also flustered by competition in residential development along the trolley line. Local developer Edmond Read started selling lots close to Fair Oaks Station in 1892, the year “the owners of the railroad applied for permission to electrify it and run streetcars instead of trains.”¹¹⁰ Major Sol Cutchins also platted “Shelton Park” the same year as, and directly adjacent to, Fulton Park.¹¹¹ For these and other reasons,¹¹² the Fulton Park settlement failed, selling only thirty out of the thirteen hundred lots to twelve purchasers. Three of those lots were ultimately transferred to Florence E. Rohleder, the named plaintiff in *Rohleder v. People’s Pleasure Park Co.*, who used the property as a residence for herself and her husband, Richard, also known as Dick.¹¹³

105. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 471 (1988). “Immediately following the war, in 1866, [the battleground] was selected as the site for a national cemetery.” Carlton Norris McKenney, *Rails in Richmond* 107 (1986).

106. Deed of Purchase (Dec. 18, 1877) (on file with the *Columbia Law Review*) (recording sale of plot of land by A.B. Apperson to Samuel Mosby in Henrico County, Virginia); *People’s Pleasure Park Record*, supra note 98, at 148–49 (petitioner’s facts).

107. *People’s Pleasure Park Record*, supra note 98, at 1–2 (petitioner’s facts); Petition for Rehearing, supra note 4, at 1–2.

108. The Blacks were familiar with the amusement business as owners of the Revere Beach Country Fair and Musical Railway Company. See *People’s Pleasure Park Record*, supra note 98, at 2 (petitioner’s facts).

109. The streetcar companies did this to profit from the amusement sales and to “fill the trolleys during off-peak hours.” Trotti, supra note 102, at 172; see also Rabinowitz, supra note 95, at 337–39 (discussing segregation and integration in parks built at ends of streetcar lines).

110. McKenney, supra note 105, at 107.

111. There was a strip of land forming part of Fulton Park that ran between Shelton Park and Nine Mile Road. See *People’s Pleasure Park Record*, supra note 98, at 143 (deposition of J.W. Powers); Shelton Park Map, Figure 1, infra text accompanying note 138.

112. See infra notes 132–134 and accompanying text.

113. Richard Rohleder, acting as an agent for Florence, purchased Lots 93, 94, 95, and Block F on the corner of Powell Street and Virginia Avenue from John W. Powers and

Dick Rohleder did not care for African Americans. He once said that he “personally suffered nearly every indignity and all the odium that the presence of large numbers of idle and depraved negroes could put on any man of refinement.”¹¹⁴ On April Fool’s Day, 1906, after overhearing that Fulton Park was under contract “to colored persons” he raced to Bliss Black’s managing agent, David G. Fulton, to disconfirm the rumor.¹¹⁵ Unsatisfied with Fulton’s assurances that he would “refuse any offer” from “these negroes,” Dick encouraged his wife, Florence, to file a preliminary injunction to stop the sale.¹¹⁶ The injunction was granted on April 10, 1906.¹¹⁷ The Rohleders, however, were unable to meet a subsequent bond posting requirement, despite significant financial contributions from the Henrico County Improvement Association.¹¹⁸ People’s Pleasure Park Company purchased the land on May 3, 1906 and started operations a few days later, causing Dick Rohleder more than a little annoyance.¹¹⁹

Rohleder must have found the “incessant” “hurrahing and whoops” of the black park patrons maddening.¹²⁰ He was also deeply bothered by their presence on streetcars.¹²¹ This was no small matter in the South.¹²² Perhaps because railways are natural monopolies—where efficiency favors fewer lines and, to an extent, fewer cars, thereby discouraging race-specific rail transport—integrated railways were carefully managed and highly contested.¹²³ Streetcars were especially contentious and perilous

Harriet J. Powers on October 5, 1904 for \$750 and other consideration. See *People’s Pleasure Park Record*, supra note 98, at 100–01, 106 (deposition of R.A. Rohleder).

114. *Id.* at 102. Richard Rohleder was a local title examiner. *Id.* at 99.

115. *Id.* at 103.

116. *Id.* at 14–24 (plaintiff’s bill for injunctive relief).

117. See *id.* at 31 (Injunction Order, Apr. 10, 1906).

118. See *id.* at 31 (Injunction Enlargement Order, Apr. 20, 1906); *id.* at 31–32 (Injunction Order, June 1, 1906).

119. See *id.* at 21 (plaintiff’s bill for injunctive relief). On Dick Rohleder’s annoyance regarding the streetcars, see *id.* at 101 (deposition of R.A. Rohleder).

120. See *id.* at 104 (deposition of R.A. Rohleder).

121. See *id.* (“Oft times on Sunday it was necessary to stop the cars in order to collect fares, and to throw these negroes who got on at Fulton Park, off the cars in order that white persons could have a seat or get a foothold.”)

122. See Rabinowitz, supra note 95, at 342 (“[B]lacks are forced into the smoking cars where they are subjected not only to all the annoyance of smoke and dirt, but often to the additional hardship of association with the roughest and most quarrelsome class of whites.” (quoting *Nashville Am.*, July 30, 1885)).

123. Many municipalities simply excluded blacks from the streetcars when they were first introduced. In Richmond, blacks were required to ride on the outside of the cars while whites rode on the inside. In other places, trolley companies were required to run multiple cars, each designated for a particular race. There are accounts of cars fitted with white balls on their roofs to identify them for the sole use of “white women and their escorts.” Rabinowitz, supra note 95, at 330–31. Black entrepreneurs tried, with varying success, to establish black rail and trolley lines. Juliet E.K. Walker, *The History of Black Business in America: Capitalism, Race, Entrepreneurship 193–96* (1998); August Meier & Elliott Rudwick, *The Boycott Movement Against Jim Crow Streetcars in the South, 1900–1906*, 55 *J. Am. Hist.* 756, 765 (1969). Efforts to maintain separate racial rail lines

places for blacks.¹²⁴ Major Johnson experienced this firsthand when Private Elijah Turner, of the Virginia Sixth Negro Regiment under his command, was shot dead by a streetcar conductor for refusing to move from a seat reserved for whites.¹²⁵

Customers of People's Pleasure Park also experienced streetcar violence firsthand. Dick Rohleder recalled one occasion where, "fully disgusted and sufficiently amused," he watched "negroes thrown off the car[s]" to make room for whites: "[T]hey pushed them off, they pulled them off, they knocked them off, and they threw them off, and doubtless, had there been any other means of getting them off the officials of the railroad would have resorted to that also."¹²⁶ Yet despite these perils, riders by the thousands flocked to the black-owned park, rendering huge profits for the company.¹²⁷ The profits, it is reasonable to assume, were at the root of the lawsuit—notwithstanding Dick Rohleder's personal indignation—as the principal actor against People's Pleasure Park, Dick's brother Joe Rohleder, undoubtedly desired such profits from his own amusement business and "colored colony."¹²⁸

and cars broke down as trolley companies complained that "separate cars would not pay." Rabinowitz, *supra* note 95, at 345 (citing *Richmond Planet*, Dec. 27, 1890). The costs and inefficiencies associated with segregated streetcars turned trolley companies into unexpected allies of Southern blacks (to some extent). Initially "[s]treetcar companies either ignored [local streetcar segregation laws] or blatantly refused to enforce [them]," but later they "seemed to have responded to the call for separate sections as an alternative to running entirely separate cars." Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 *J. Econ. Hist.* 893, 916 (1986).

124. Even more so than on railcars, blacks feared "physical maltreatment at the hands of 'poor white trash'—[streetcar] conductors and motormen." Meier & Rudwick, *supra* note 123, at 761. When conductors were given police powers the threat to blacks increased substantially. John Mitchell, editor of the black newspaper the *Richmond Planet*, warned his readers to avoid conflict with conductors during the black streetcar boycott of 1905: "[Y]ou will see their guns, their Winchesters." *Id.* at 771 (quoting *Richmond Times-Dispatch*, Apr. 20, 1905). Fifty years before the bus boycotts of the Civil Rights movement, there were streetcar boycotts throughout much of the South. There were even "successful protests against Jim Crow horsecars during Reconstruction in Richmond, New Orleans, Charleston, and Louisville." *Id.* at 758.

125. Gatewood, *supra* note 1, at 207.

126. *People's Pleasure Park Record*, *supra* note 98, at 111 (deposition of R.A. Rohleder).

127. *Id.* at 33 (affidavit of John A. King) (predicting profits of \$1500 per month between May and October). Rohleder claimed that "enormous crowds of negroes sometimes amounting to eight or ten thousand were . . . turned loose in that neighborhood to the terror and great [sic] danger of the white people in that community." Brief for Appellee at 5, *People's Pleasure Park Co. v. Rohleder*, 61 S.E. 794 (Va. 1908) (No. 135). The Brief noted that the "negro crowds were noisy, rowdy, objectionable, indecent, . . . and were a constant danger and a source of anxiety and annoyance to the white people in that community, and especially was this so after a white woman was insulted." *Id.*

128. Joe Rohleder owned the ahutting Shelton Park, where "there [were] 9 houses on that property occupied by colored people" and none "by white people." *People's Pleasure Park Record*, *supra* note 98, at 63 (deposition of J.W. Gillman); see also *id.* at 143 (deposition of J.W. Powers). Joe Rohleder also owned "a small store just across the Southern Railway from [] 'Fulton Park.'" *Id.* at 44 (demurrer and answers of People's

“A man of violent and vindictive temper,”¹²⁹ Joe Rohleder had the “whole management” of People’s Pleasure Park arrested on its opening night.¹³⁰ Only the week before, he was running his own amusement fair—selling tobacco and candles, and operating a toboggan slide—at Fulton Park.¹³¹ He also owned and managed Shelton Park, a twenty-acre residential plot abutting Fulton Park that at the time only accommodated blacks.¹³² This, of course, strained relations with Bliss and Blanche Black, who were marketing the Fulton Park area as an exclusive white community.¹³³ Fulton Park manager David G. Fulton testified that once Shelton Park opened up to blacks, it became impractical to establish a “white colony” or to operate an amusement park for whites.¹³⁴ Still, David Fulton continued to market lots for several more years while he and Joe Rohleder maintained a tense working relationship.¹³⁵ But when rumors

Pleasure Park Co.). J.L. Rohleder was identified as the principal instigator. See *id.* at 156 (deposition of A.F. Craddock); *id.* at 160 (deposition of F.P. Watson); *id.* at 171 (deposition of C.E. Dawson); *id.* at 177 (deposition of J.D. Clark). J.L. Rohleder also contributed more to the litigation and bond than anyone else.

Florence seemed an uninterested or even unwilling plaintiff. By several accounts, she was indifferent to the rumored transaction. See *id.* at 156 (deposition of A.F. Craddock); *id.* at 169–70 (deposition of C.E. Dawson). J.W. Camp also testified “that at the time” Joe and Florence Rohleder “did not speak.” *Id.* at 225 (deposition of J.W. Camp).

129. *Id.* at 44 (demurrer and answers of People’s Pleasure Park Co.).

130. Local papers suggested that the arrest warrants were sworn out by A.H. Rohleder. See *Fulton Park Managers Arrested*, *Times-Dispatch* (Richmond), May 5, 1906, at 8; *Fulton Park Is Tied Up*, *News Leader* (Richmond), May 9, 1906, at 5; *Fulton Park Case Exciting Interest*, *Times-Dispatch* (Richmond), May 10, 1906, at 12. The deposition of Richard Rohleder, however, indicates that Joseph Rohleder was behind the criminal arrest warrants. *People’s Pleasure Park Record*, *supra* note 98, at 112–13 (deposition of R.A. Rohleder). According to a local paper, A.H. Rohleder claimed “that he had a verbal contract with the former owners of Fulton Park, by which he was to manage the place for the coming season [and that he] was looking forward to the position of manager of the park for this season.” *Fulton Park Managers Arrested*, *supra*.

131. He was subsequently arrested for selling tobacco and operating a toboggan slide at Fulton Park without a license. *County Court Order Constables Removed*, *News Leader* (Richmond), July 17, 1906, at 1; *Henrico Citizens Are Enthusiastic*, *Times-Dispatch* (Richmond), June 4, 1906, at 8; *Magistrate Is Accused*, *News Leader* (Richmond), June 14, 1906, at 1; *News of the Suburbs: Highland Springs*, *Times-Dispatch* (Richmond), May 6, 1906, at D5; *Non-License Case in Henrico Continued*, *News Leader* (Richmond), June 2, 1906, at 4; *Squire Angle Is Indignant*, *News Leader* (Richmond), June 15, 1906, at 4.

132. David Fulton unsuccessfully attempted to buy the abutting twenty-acre site shortly after he purchased Fulton Park. *People’s Pleasure Park Record*, *supra* note 98, at 217 (deposition of D.G. Fulton). The property was instead acquired by Sol Cutchins, who named it “Shelton Park.” Cutchins conveyed Shelton Park to Joe Rohleder on September 18, 1901. *Id.* at 150 (Agreed Statement of Facts).

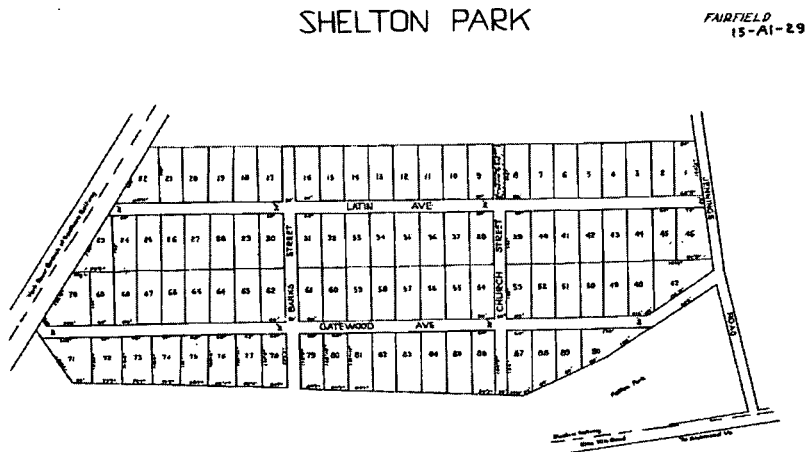
133. Relations were strained to the point where Cutchins was alleged to have threatened to “start a negro town” in response to David Fulton’s recalcitrance. *Id.* at 206–07 (deposition of D.G. Fulton).

134. See *id.* at 208 (“[A]fter Shelton Park was opened up to the sale of colored people . . . it damaged us. . . . We lost money.”). Fulton also answered that it was impracticable to establish a white colony at Fulton Park. *Id.*

135. Joe Rohleder developed hard feelings when Fulton rejected his request for an easement across Fulton Park to 9 Mile Road. See *id.* at 143–44 (deposition of J.W.

of the sale to the colored corporation surfaced,¹³⁶ the simmering conflict between them reached “blood heat.”¹³⁷

FIGURE 1: SHELTON PARK MAP



That summer, the sale of Fulton Park to People’s Pleasure Park Company consumed Joe Rohleder and other members of the Henrico County Improvement Association, which was formed in response to the transaction.¹³⁸ Dr. G.T. Collins, the association’s president, divulged: “We ate it, drank it, and slept it.”¹³⁹ They also placed ads “calling on citizens . . . to take action,” and they instigated trouble for Major Johnson when and

Powers). Yet despite the difficulties between them, J.L. Rohleder apparently either worked (or was promised employment) at the amusement park at Fulton Park. See *id.* at 215 (deposition of D.G. Fulton).

136. It was rumored that there were “colored persons who propose[d] to [create a] place of amusement for negroes.” *Id.* at 20 (complaint of appellant).

137. *Henrico Citizens Banded Together*, *Times-Dispatch* (Richmond), May 8, 1906, at 3 (“The people are on the warpath . . . and they intend to make things hum for purchaser and seller in the transaction, which stuck a short pole at less than arm’s length into the unsuspected hornet’s nest.”); see also *Danger of Clash at Fulton Park*, *News Leader* (Richmond), June 2, 1906, at 9 (predicting “further trouble between the white and black factions at Fulton Park”); *Henrico Pleasure Park Case Argued in Court*, *Times-Dispatch* (Richmond), Mar. 10, 1907, at 6 (“The residents and property-owners of the Fair Oaks neighborhood were aligned with the Rohleders in their battle against the negro pleasure park, and at one time a serious disturbance, involving a clash between the whites and blacks, seemed imminent.”); *White People Aroused*, *Times-Dispatch* (Richmond), May 4, 1906, at 6 (describing community as “thoroughly aroused” and “ready to fight the matter out to the bitter end”).

138. See *People’s Pleasure Park Record*, *supra* note 98, at 4 (complaint for appellant) (“[A] number of persons . . . living on the line of Seven Pines electric road . . . organized the ‘Henrico County Improvement Association’ for the purpose of trying to defeat your corporate petitioner in its effort to establish a pleasure park for colored people on the property in question.”).

139. *Id.* at 117 (deposition of R.A. Rohleder).

where they could.¹⁴⁰ Several “clashes between the Rohleder men and the negroes” were reported in the press.¹⁴¹ And as tensions rose so did the membership of the association,¹⁴² which would subsequently be represented (Dr. Collins announced at a packed meeting in the East Richmond Sunday School) by the exiting governor of the state of Virginia.¹⁴³

The departing governor, Andrew Jackson Montague, had five years earlier based his gubernatorial campaign on a platform of white supremacy and disfranchisement of Virginia’s blacks.¹⁴⁴ He made good on his campaign promises. Following his inauguration, at the 1902 constitutional convention, he helped fashion a state constitution designed to limit black political participation through poll taxes and literacy tests.¹⁴⁵ In response to concerns that the new constitution would also limit white voting power, Montague wrote that he and his party’s representatives at the convention were “slowly, but surely, framing a law that will so effectually exclude the idle, shiftless and illiterate of the negro race from the suffrage that the gates of republican wrath cannot prevail against it.”¹⁴⁶ “[W]e will accomplish this,” he assured his constituency, “and keep the pledge that no white man will be disfranchised.”¹⁴⁷ Of course, the subsequent disfranchisement of blacks in Virginia and the South generally is well documented.¹⁴⁸ And though Governor Montague would ultimately fail in his effort to convince the court that People’s Pleasure Park was black, his disfranchisement policies were successful and lasting. A century after their implementation, municipalities throughout Virginia are still wrestling with their lingering effects. In the 1970s and 1980s, the City of Richmond attempted to undermine some of the harmful consequences of political disfranchisement by encouraging black participation in government contracting.¹⁴⁹ Ironically, it has been suggested that the Supreme Court first recognized (white) corporate racial identity in a

140. *Id.* at 45, 198.

141. Danger of Clash at Fulton Park, *supra* note 137. Insurance companies too refused to insure People’s Pleasure Park, given “the great hostility of the white people along the Seven Pines Electric Railway . . . and the fear [that] hostile persons might willfully set fire [to the property].” *People’s Pleasure Park Record*, *supra* note 98, at 33–34 (affidavit of James W. Gordon).

142. Henrico Citizens Bitterly Opposing, *Times-Dispatch* (Richmond), May 25, 1906, at 5 (“Seventy-five new names were added to the list of members of the association as a result of the good work of last night.”).

143. *Id.*; cf. William Larsen, *Montague of Virginia: The Making of a Southern Progressive* 248 (1965) [hereinafter *Larsen, Montague of Virginia*].

144. William Larsen, *Andrew Jackson Montague: Virginia’s First Progressive*, in *The Governors of Virginia: 1860–1978*, at 159, 162 (Edward Younger & James T. Moore eds., 1982). He also fought for the elimination of “Negro suffrage” as Attorney General of Virginia. *Id.* at 161–62.

145. *Id.* at 163.

146. *Larsen, Montague of Virginia*, *supra* note 143, at 111 (quoting *No White Man to Lose His Vote in Virginia, 1901 Election Broadside*).

147. *Id.*

148. See, e.g., Litwack, *supra* note 93, at 218–29.

149. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–79, 502 n.3 (1989).

challenge to one of these programs.¹⁵⁰ Before turning to this claim, however, let us briefly consider the court's ruling in *People's Pleasure Park*.

C. *Regarding and Disregarding (Raceless) Corporate Persons*

The Fulton Park lots in question specifically restricted transfer of title to "persons of African descent" or "colored person or persons."¹⁵¹ Judge R. Carter Scott of the Circuit Court of Henrico County found this title restriction repugnant. He voided it as "an unreasonable restraint on alienation [and] contrary to public policy."¹⁵² However, he enjoined People's Pleasure Park's operations on the land until the "[c]ompany or some one for it [paid Florence Rohleder] the market value of her property."¹⁵³ The company appealed.

Judge Scott ordered the payment because he felt Florence Rohleder was misled and "imposed upon in the purchase of her [lot]."¹⁵⁴ At trial, her counsel argued that the expectation that "colored people" would be excluded from Fulton Park "was a material inducement to" his client;¹⁵⁵ and this expectation was reasonable given the numerous newspaper ads, pamphlets, and personal assurances from Bliss Black and his associates.¹⁵⁶ On appeal, however, the Supreme Court of Appeals of Virginia refused to engraft this parol evidence "on the deed,"¹⁵⁷ and focused its attention instead on the title restriction. Without ruling on the repugnancy of the restriction, the appeals court reversed Judge Scott, sustaining the demurrer filed by People's Pleasure Park claiming that the

150. See *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1058 (9th Cir. 2004) (noting that Supreme Court has "implicitly recognized that corporations can have racial characteristics by allowing white owned corporations to challenge contractor set asides on reverse discrimination grounds" (citing *J.A. Croson Co.*, 488 U.S. 469); see discussion *infra* notes 259–273 and accompanying text.

151. Bliss Black conveyed the lots on Fulton Park to various associates, including Revere Beach Company, before getting to People's Pleasure Park. The deeds in relevant part stated, "[t]he title to this land never to vest in a person or persons of African descent" and "[t]he title to this land never to vest in a colored person or persons." *People's Pleasure Park Co. v. Rohleder*, 61 S.E. 794, 794 (Va. 1908) (internal quotation marks omitted).

152. See *id.* at 795; *People's Pleasure Park Record*, *supra* note 98, at 237 (Final Decree of Oct. 4th, 1907).

153. See *People's Pleasure Park Record*, *supra* note 98, at 237 (Final Decree of Oct. 4th, 1907).

154. *Id.*

155. *Id.* at 27 (Exhibit B (trial brief for F.E. Rohleder)).

156. The Blacks aggressively advertised Fulton Park in the Richmond papers. See *id.* at 125 (deposition of J. St. George Bryan, Secretary and Treasurer of the Times-Dispatch (Richmond)); *id.* at 144–46 (Exhibit ADV. 1 to Exhibit ADV. 6); *id.* at 146 (Exhibit ADV. 6) ("Fulton Park on Seven Pines Electric, near Fair Oaks, is slowly but surely forging ahead. Its owners are Boston men who are here to stay, and propose to make it a select suburb [and] therefore *will not sell to colored people.*" (emphasis added)).

157. *People's Pleasure Park*, 61 S.E. at 796.

title was not transferred to colored persons.¹⁵⁸ “The court said, in effect, that the corporation was not colored, because it ‘is a person which exists in contemplation of law only, and not physically.’”¹⁵⁹

Professor Maurice Wormser admonished the appeals court for its “slavish adherence”¹⁶⁰ to *persona ficta*—converting, he argued, a fiction of convenience into a “fetish” in much the same way “savages worship a red cow or an ornamental totem pole as a supposed incarnation of a sacred spirit.”¹⁶¹ Of course, Wormser was not advocating that the court ought to have assigned a race to the corporation, thereby expanding the fiction. He rather believed that the court should have disregarded the fiction of a veil separating the corporate entity from its owners.¹⁶² It was he, after all, who popularized the expression “piercing the veil,” and he embraced a liberal standard of holding shareholders liable for corporate misconduct.¹⁶³

The difference between piercing the corporate veil (i.e., assigning corporate liability or status to shareholders) and assigning shareholder status or characteristics to the corporate entity is worth emphasizing. It is one thing to disregard the (raceless) corporate person “and hold a shareholder responsible for the corporation’s action as if it were the shareholder’s own.”¹⁶⁴ It is entirely another matter to attribute shareholders’ ascriptive features as if they were the corporation’s own. Without concluding that the corporation possessed a racial identity (or not), the *People’s Pleasure Park* court in either event could have pierced. It was just not an obvious case for piercing,¹⁶⁵ and much of Wormser’s outrage over the court’s denial of corporate racial identity seems simply misplaced.

158. *Id.* at 797. The court reached this conclusion after quoting various sources in support of the distinct legal personality of the corporation, including Justice Marshall’s oft-cited *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

159. Wormser, *Disregard*, *supra* note 5, at 27 (quoting *People’s Pleasure Park*, 61 S.E. at 796).

160. *Id.* at 2.

161. *Id.* at 24.

162. “The decision entirely overlooks that the sole purpose of organization of the corporation was obviously to evade and circumvent the title restriction forbidding negroes from taking the land. *The fiction should not have been applied.*” *Id.* at 27 (emphasis added).

163. Stephen B. Presser, *Piercing the Corporate Veil* §1:5, at 1-26 to 1-30 (1991). While recognizing the logical mandate preserving the fiction of “distinction between the corporation, as a legal unit, and its members,” Wormser argued that courts should “shake[] aside fiction . . . in order to do justice.” Wormser, *Disregard*, *supra* note 5, at 91, 26; see also I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 *Colum. L. Rev.* 496, 514 (1912) [hereinafter *Wormser, Piercing*] (urging that corporate entity theory be ignored in stockholders’ suits for mismanagement).

164. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *Cornell L. Rev.* 1036, 1036 (1991).

165. Wormser was simply wrong in claiming that the court overlooked the fact “that the sole purpose of organization of the corporation was obviously to evade and circumvent the title restriction forbidding negroes from taking the land.” Wormser, *Disregard*, *supra* note 5, at 27. The court record reveals a clear awareness that *People’s Pleasure Park Company* “was organized for the purpose of acquiring the Fulton Park tract as a place of

The asserted impossibility of a racially identified corporation was, however, a curious basis on which to resolve the matter. The covenants could have been invalidated on a number of conventional grounds. In addition to being an unreasonable restraint on alienation and against public policy, the covenants were susceptible to challenge under the changed circumstances doctrine.¹⁶⁶ Despite original intentions, the area had hardly developed into an exclusively white community. Beyond the black settlement at neighboring Shelton Park, there was “a public county school for colored children” on Fulton Park property, a “colored church” across the street, and various nearby “colored parks.”¹⁶⁷ The appellate court neglected all of these issues, instead choosing to focus on the alleged race of the corporation. This choice was quite deliberate, as can be seen by reference to the extant jurisprudence of race and corporate existence, to which we now turn.

D. *The Race Arbitrage Problem*

Conceding that corporations possessed racial identities would have, in a variety of ways, threatened the South’s segregationist regime. Pre-apartheid South Africa faced and averted a similar threat in *Dadoo, Ltd. & Others v. Krugersdorp Municipal Council*.¹⁶⁸ The case involved Mahomed Mamoojee Dadoo, who held 149 shares of Dadoo, Ltd., with the remaining share owned by A.E. Dindar.¹⁶⁹ Both Dadoo and Dindar were legally defined as British Indians (“Asiatics”) and “coloured.” The company, Dadoo, Ltd., purchased two stands within Krugersdorp Municipality in 1915. One stand was used as a grocery and the other was occupied by Dadoo and his family when he was in South Africa and by his manager when he was away.¹⁷⁰ Krugersdorp Municipality contended that though

amusement for colored people.” *People’s Pleasure Park Record*, supra note 98, at 3 (petitioner’s facts). As for Virginia’s veil piercing doctrine, the earliest case I found was *Commonwealth v. Southeastern Iron Corp.*, 128 S.E. 528 (Va. 1925), which involved disregarding the separateness of two corporations. Epperson and Canny describe Virginia’s piercing doctrine as “more fluid” and reliant on the “totality of the circumstances.” G. Michael Epperson & Joan M. Canny, *The Capital Shareholder’s Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in the District of Columbia, Maryland, and Virginia*, 37 *Cath. U. L. Rev.* 605, 626 (1988). Stephen Presser observed that “Virginia is a fairly mainstream veil-piercing jurisdiction, which follows the usual two-part analysis, and demands (1) proof of ‘alter ego’ or ‘instrumentality,’ and (2) proof of wrongful use of the corporate form such as fraud or crime.” Presser, supra note 163, §2:51, at 2-606 to 2-607. Assuming there was a unity of interests among the shareholders and *People’s Pleasure Park Company*, evidence of fraud or crime appeared lacking.

166. See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841 (1994).

167. See *People’s Pleasure Park Record*, supra note 98, at 63–64 (deposition of J.W. Gilham) (school and church); *id.* at 58 (parks); see also *id.* at 206–07 (deposition of D.G. Fulton).

168. 1919 (1920) A.D. 530 (A) (S. Afr.).

169. *Id.* at 539.

170. *Id.* at 540.

the stands at issue were registered in the name of Dadoo, Ltd., they were virtually owned by Mahomed Dadoo in contravention of laws prohibiting “coloured” and “Asiatic” persons from owning fixed property.¹⁷¹

In an opinion strikingly similar to *People’s Pleasure Park*, the appellate court held that “[a] registered company [such as Dadoo, Ltd.] is a legal persona distinct from the members who compose it;”¹⁷² and “[as] a mere legal person” the corporation “has neither body, parts nor passions”¹⁷³ and could “in no sense be described as an Asiatic.”¹⁷⁴ Thus, even though “Dadoo Ltd., was manifestly formed to acquire what Dadoo personally could not hold,”¹⁷⁵ the validity of the transaction “follow[ed] from the separate legal existence with which such corporations are by statute endowed.”¹⁷⁶ As the court observed, “had Dadoo and Dindar been partners, they could not legally have become owners of these stands; but as shareholders in a company which owns them, they remain . . . outside the legal prohibition.”¹⁷⁷

In holding for Dadoo, Ltd., the court protected the integrity of corporate transactions as well as the fiction that the license to establish race—as opposed to simply identifying it—was ultra vires of the court’s domain. The court’s decision, however, opened up an extraordinary arbitrage opportunity for corporate and “coloured” persons. By organizing their activities and transactions through corporate entities, “coloured” persons could defeat state-mandated racial segregation in a number of situations. The court was well aware that “[s]uch situations might easily

171. *Id.* at 531. The relevant statutes were Law No. 3 of 1885 s. 2 (preventing “Asiatics” from owning immovable or fixed property “except only in such streets, wards or locations as the Government for purposes of sanitation shall assign them to live in”) and Gold Law of 1908 s. 130 (similarly prohibiting “coloured” persons from acquiring certain properties). See *Dadoo*, 1919 (1920) A.D. at 541.

As Asiatics [Dadoo and Dindar] are hit by sec. 2(b) of Law No. 3, 1885, as amended by Volksraadbesluit of 12th August, 1886, and are not capable of being owners of immovable property in the Transvaal. As coloured persons within the meaning of sec. 130(1) of Act 35 of 1908 they may not acquire any rights under that Act, nor may the holder of any right acquired under any of the previous Gold Laws transfer or sublet any portion of such right to either of them, nor permit either of them to reside on or occupy ground held under such right, with the single exception [of] . . . bona fide servants.

Id. at 563 (De Villiers, J., dissenting). The court was quite candid in its understanding of the policy behind these statutes: “No doubt these enactments were passed in furtherance of a policy of social, political and economic inequality as between white and coloured inhabitants of the Republic.” *Id.* at 549 (majority opinion). “That policy, it is said, was that the people would not recognize the equality of the white and coloured inhabitants either in Church or State.” *Id.* at 555 (Solomon, J., concurring).

172. *Id.* at 550 (majority opinion).

173. *Id.* at 552.

174. *Id.* at 557 (Solomon, J., concurring).

175. *Id.* at 542 (majority opinion).

176. *Id.* at 550.

177. *Id.* at 552.

arise and would present difficulty.”¹⁷⁸ The difficulty was largely avoided with the passage of a law, which “specially declared that from and after May 1st, 1919, [the racially restrictive statutes] shall be construed as prohibiting the ownership of fixed property by any company in which Asiatics possess a controlling interest.”¹⁷⁹

Compared to South Africa, laws mandating racial residential separation in the United States played a relatively limited role (at least temporarily) in effecting segregation. As such, a rule of statutory interpretation could not be used to restrain the arbitrage opportunities created by the *People’s Pleasure Park* decision. The “difficulty” here was avoided by expanding the scope of private race-based covenants to include “use” and “occupancy” restrictions. Recall that Rohleder argued such restrictions were implied in her deed, but the court would not admit parol evidence supporting her claim. These restrictions had to be placed directly into the covenants and—as the following case illustrates—when properly integrated they effectively discouraged the arbitrage described above.¹⁸⁰

Twenty years after *People’s Pleasure Park*, in 1926, the property owners of a Columbus, Ohio neighborhood agreed (through equitable servitudes) that their lots shall not “be leased, rented, sold or conveyed to any person or persons of any race other than Caucasian, nor shall any such [persons] be permitted to occupy the same . . . except as a servant.”¹⁸¹ On or around June 6, 1945, one of these lots (lot no. 6 at 93 North Ohio Avenue) was conveyed to the Monroe Avenue Church of Christ, an Ohio corporation. The church planned to use the single residence property as a parsonage for its minister, Reverend Lloyd L. Dickerson.¹⁸² However, because the church had a racially mixed congregation and because Reverend Dickerson was “part Negro,” plaintiffs, Fred Perkins et al., sought to enjoin the sale and to restrict Dickerson’s occupancy.¹⁸³

At trial the plaintiffs prevailed on both the sale and occupancy challenges. The Court of Appeals reversed the lower court’s holding regarding the first challenge, however, stating that “[i]t ought to be clear that a corporation as a legal entity can have no racial identity.”¹⁸⁴ The sale re-

178. *Id.* at 549.

179. *Id.* at 549–50.

180. The arbitrage transactions were discouraged because blacks could buy properties covered by racially restrictive covenants using their corporate intermediary, but they could not use or occupy the properties. In addition to discouraging the arbitrage opportunities, the use and occupancy restrictions were, in some jurisdictions, a useful response to the challenge of unreasonable restraint on alienation.

181. *Perkins v. Trs. of Monroe Ave. Church of Christ*, 70 N.E.2d 487, 489 (Ohio Ct. App. 1946).

182. See Brief for the Defendants-Appellants at 48 app. A, *Perkins*, 70 N.E.2d 487 (No. 30931).

183. *Id.* at 48–49 app. A.

184. *Perkins*, 70 N.E.2d at 490. The court stated that although the church “has a mixed congregation[,] [i]t was not a non-Caucasian or a Negro, within contemplation of law.” *Id.*

striction therefore did not apply against the incorporated church, but the occupancy restriction against Dickerson was affirmed.¹⁸⁵ On appeal to the Ohio Supreme Court, Dickerson cleverly argued that as a servant-agent of the incorporated entity, his occupancy was allowed under the servant exception of the covenant.¹⁸⁶ Distinguishing between household servants and corporate servants, the state supreme court dismissed Dickerson's appeal in a per curiam opinion,¹⁸⁷ but the matter was subsequently resolved in his favor under the then recently handed down ruling in *Shelley v. Kraemer*.¹⁸⁸

Arbitrage between corporate and natural persons was (and still is) a provocative notion,¹⁸⁹ but it is worth noting that in the racially partitioned and stratified Jim Crow South, incorporated persons did not always face fewer constraints. Consider, for example, *Berea College v. Kentucky*,¹⁹⁰ decided just two years after *Rohleder*. Berea College, founded in 1855, was a racially integrated private college incorporated in Kentucky.¹⁹¹ A half century after the college's founding, the Kentucky legislature passed a segregation law aimed specifically at the college—the so-called Day Law—which disallowed “any [public or private] college, school or institution where persons of the white and negro races are both received as pupils.”¹⁹² The Supreme Court denied Berea's claimed right

185. *Id.* at 492–93.

186. See Restatement of Agency § 2 (1933) (distinguishing independent contractors from servants).

187. See *Perkins v. Trs. of Monroe Ave. Church of Christ*, 72 N.E.2d 97, 97 (Ohio 1947) (per curiam), rev'd per curiam, 334 U.S. 813 (1948).

188. 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants violates Equal Protection Clause); see also Order of the Supreme Court of Ohio Dated June 18, 1948 at *1–*2, *Perkins*, 72 N.E.2d 97 (No. 30931) (on file with the *Columbia Law Review*).

189. Scholars were once intrigued by the implications of gender arbitrage. See Dewey, *supra* note 6, at 657 (“[S]uppose that a number of married women, who, under common law suffered from disability to contract, had formed a corporation.”); Machen, *supra* note 6, at 256 (noting discussion of whether corporation could marry). This would seem a fair use of the corporate form, as business entities were often used to impose upon married women. For instance, “[t]he common law rules [concerning dower], which before their abolition in 1930 were intended for competent sustenance of the widow . . . were often circumvented by the creation of one-man companies to hold real property belonging to the husband.” Wolff, *supra* note 6, at 517 (emphasis added). Gender and race arbitrage involving government benefits for women-owned and minority-owned corporations suggests present day examples, as do nationality-based arbitrage opportunities that might arise in the context of wartime restraints, trade sanctions, or embargoes.

190. 211 U.S. 45 (1908).

191. Scott Blakeman, *Night Comes to Berea College: The Day Law and the African-American Reaction*, 70 *Filson Club Hist. Q.* 3, 4 (1996) (describing Berea's early history).

192. 1904 Ky. Acts 181 § 1. The Act was named after Kentucky State Representative Carl Day, who introduced the bill that would later become the Act. For a discussion of Jim Crow era Kentucky, Berea, and the Day Law, see Jennifer Roback, *Rules v. Discretion: Berea College v. Kentucky*, 20 *Int'l J. Group Tensions* 47, 51 (1990). Berea College, importantly, was incorporated under a general incorporation Act that “merely required

to continue its integrationist policy by noting that the state's reserved discretion in granting corporate charters allowed for amendments, such as that brought about through the Day Law.¹⁹³

The Court suggested that it might have reached a different conclusion if Berea College had not been incorporated,¹⁹⁴ but it limited its inquiry to "the power of a State over its own corporate creatures."¹⁹⁵ Had the college unincorporated itself and continued its business, the natural persons associated with it would have had a stronger constitutional claim to voluntary interracial association. Of course, Kentucky prevented voluntary association through its antimiscegenation laws, and the state would certainly have argued that application of the Day Law to natural persons "was a reasonable exercise of its police power . . . to prevent miscegenation."¹⁹⁶ While we can never know how the Court would have ruled if faced with an unincorporated Berea College, observe that it "rejected exactly [this miscegenation] rationale for interfering with property rights in *Buchanan v. Warely*."¹⁹⁷ Post-*Buchanan*, in *Richmond v. Deans*, it affirmed a Fourth Circuit decision explicitly invalidating a miscegenation-based ordinance that prohibited the purchase of property in a neighborhood by anyone who could not marry someone of the majority race in that neighborhood.¹⁹⁸

Consideration of race arbitrage suggests a puzzle. If treating corporations as raceless created an arbitrage problem, then how are we to understand the prior judicial refusal to radicalize corporate entities and avoid this problem in the first place? The answer to this puzzle is simply that acknowledging race in legal persons presented more problems for the regime than denying it. Based on many years of race management, the Court understood the need for a balanced approach.

the signatures of ten Kentucky citizens and the filing of papers with a county clerk." David E. Bernstein, *Plessy v. Lochner: The Berea College Case 4* (George Mason Univ. Sch. of Law, Law & Econ. Paper Series, Paper No. 00-13, 1999), available at <http://www.law.gmu.edu/faculty/papers/wpDetail.php?wpID=61> (on file with the *Columbia Law Review*) (citations omitted). Lacking a specific charter to operate a racially integrated school, Berea College could not claim any vested right to do so despite the passage of the Day Law. *Id.* at 19.

193. *Berea Coll.*, 211 U.S. at 54, 57.

194. *Id.* at 54; see also *id.* at 58 (stressing that Court need only concern itself with whether Act could be upheld under power of state over its corporations); *id.* at 66-68 (Harlan, J., dissenting) (criticizing majority for going beyond that discussion). The statute did, in fact, prohibit persons and associations of persons (in addition to corporations) from operating integrated educational institutions. However, the Court did not directly address the constitutionality of the constraint on voluntary association by natural persons, relying exclusively on the narrower reserved discretion argument.

195. *Id.* at 58 (majority opinion).

196. Bernstein, *supra* note 192, at 27.

197. *Id.*

198. 281 U.S. 704 (1930) (mem., per curiam), *aff'd* per curiam 87 F.2d 712 (4th Cir. 1930).

Virginia courts, from their colonial beginnings to the present, have struggled with categorizing and identifying race;¹⁹⁹ and while often relying on anatomical or physiological patterns,²⁰⁰ these courts were hardly ensnared by a view of race as biologically determined. Race was never solely contingent on scientific verification or clinical examination; it was identifiable by common knowledge and through performances.²⁰¹ Throughout the post-Reconstruction South, in particular, court-identified race was well understood among many as a fiction.²⁰² This broad understanding ironically came about because the implementation of de jure segregation at the turn of the twentieth century required an articulation of race that revealed its social basis. The *People's Pleasure Park* court was undoubtedly aware of this. Yet, despite this awareness—or maybe because of it—the court was disinclined to attribute race to artificial persons. To do otherwise would undermine creditors' rights and the civil rights of natural persons (as suggested earlier). But there was also another threat, one that could undermine the fragile stability of race in the

199. See Gross, *supra* note 35, at 165 (noting Virginia Supreme Court's determination of race of trial witness); A. Leon Higginbotham Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *Geo. L.J.* 1967, 1975–88 (1989) (discussing changes in Virginia's statutory definition of race); Gilbert T. Stephenson, *Race Distinctions in American Law*, 43 *Am. L. Rev.* 29, 40 (1909) (discussing Virginia statute's definition of whiteness).

200. Fatimah L.C. Jackson, *Anthropological Measurement: The Mismeasure of African Americans*, 568 *Annals Am. Acad. Pol. & Soc. Sci.* 154, 159–60 (2000) (discussing anthropological measurement as template for racial identification laws). Influenced by physical scientific research approaches, advocates sought to identify anatomical and physiological patterns (e.g., cranial size, hair texture, and nose width) in early racial categorizations. *Id.*; see also James E. Bowman, *Anthropology: From Bones to the Human Genome*, 568 *Annals Am. Acad. Pol. & Soc. Sci.* 140, 143–44 (2000) (discussing research into purported link between intelligence, cranial size, and race).

201. See Braman, *supra* note 78, at 1381 (arguing that Supreme Court has never understood race in biological terms); Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 *Law & Soc. Inquiry* 611, 633 (1999) (discussing Supreme Court cases that classified Native Americans by their lifestyle); Gross, *supra* note 35, at 114–15 (discussing complexity of legal construction of race); Haney Lopez, *White by Law*, *supra* note 35, at 115–16 (arguing that legal construction of race is complex and multidimensional); Harris, *supra* note 78, at 1714 (discussing relation between whiteness and property); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 *Yale L.J.* 1473, 1476 (2003) (arguing that historically many legal actors conceived of race as social construction).

202. From both extremes—white supremacists on one end and black social critics on the other—and in between, the sociolegal construction of race in the late 1800s and early 1900s was widely, if not always explicitly, acknowledged. Sharfstein makes this point by highlighting, *inter alia*: (i) complaints among white supremacists who felt that law was watering down whiteness by not excluding individuals with a drop (or more) of black blood; and (ii) complaints from the other side that “[i]t is only a social fiction, indeed, which makes of a person seven-eighths white a Negro.” Sharfstein, *supra* note 201, at 1476–77, 1489 (quoting Charles W. Chesnut, *The Future American: A Complete Race-Amalgamation Likely to Occur*, *Boston Evening Transcript*, Sept. 1, 1900, reprinted in Charles W. Chesnut: *Essays and Speeches* 131, 134 (Joseph R. McElrath, Jr. et al. eds., 1999)).

South by completely dissociating it from persons. Part IV develops this claim.

IV. RACE BEYOND PERSONS

Many pages have been devoted to “the tempting but profitless discussion—more metaphysical than legal—as to the true anatomy of the corporate concept.”²⁰³ For present purposes, a full review of this literature is unnecessary.²⁰⁴ For while scholars have advanced competing views of corporate existence (among them, corporations as simple aggregations of shareholders,²⁰⁵ and as “real persons”), the fiction theory, i.e., *persona ficta*, remains unrivaled in common law courts.²⁰⁶ American courts, at least since *Trustees of Dartmouth College v. Woodward*, have regarded corporations as artificial persons, mere legal fictions created and expanded for and at the convenience of law.²⁰⁷

A. Legal and Extralegal Objects

Quite apart from legal fictions, people speak naturally of corporations “as though they are persons.”²⁰⁸ Language allows corporations to engage in cognition and other mental states—fictions, to be sure, yet ones that are not at odds with everyday usage. But when lay persons make physiological allusions to corporations, their comments often require metaphoric or metonymic interpretations to make sense.²⁰⁹ Judges

203. Wormser, *Piercing*, supra note 163, at 496. Recollections of this discussion undoubtedly informed H.L.A. Hart’s plea for legal scholars to abandon their “ever-baffling” inquiries into the nature of organized associations. H.L.A. Hart, *Definitions and Theory in Jurisprudence*, 70 *Law Q. Rev.* 37, 56 (1954).

204. For an outstanding review of writings up to 1930, see generally Hallis, supra note 6 (commenting on ideas of, inter alia, F.C. von Savigny, A.V. Dicey, Rudolf Stammler, H. Kelsen, Bernard Bosanquet, Leon Duguit, Otto von Gierke, Rudolf von Ihering, N.M. Korkunov, Georg Jellink, and H. Krabbe); cf. id. at 247–50 (bibliography).

205. Under the aggregation framework, a corporation, C_1 , is defined by its shareholders, perhaps uniquely: $C_1 \equiv [s_1, s_2, s_3, \dots, s_n]$ (such that the corporation may no longer exist if a shareholder, say s_1 , transfers her interest to another, say to s_{n+1} , or otherwise ceases to be associated with C_1 , i.e., $C_1 \neq [s_2, s_3, s_4, \dots, s_{n+1}]$ and $C_{n+1} \neq [s_2, s_3, s_4, \dots, s_n]$).

206. See Machen, supra note 6, at 253–55, 257 (noting that debate was richer in continental Europe than in common law countries). Here shareholders give rise to—and are members or elements of—a corporation ($s_1, s_2, s_3, \dots, s_n \in C_1$), but they do not define it, $[s_1, s_2, s_3, \dots, s_n] \neq C_1$, and their individual characteristics are independent of the corporation’s.

207. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) (Story, J., concurring) (describing corporation as “an artificial person, existing in contemplation of law, and endowed with certain powers and franchises . . . subsisting in the corporation itself, as distinctly as if it were a real personage” (emphasis added)).

208. Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 *Tul. L. Rev.* 564, 595 (1987) (“The law did not invent the linguistic imagery of the corporation as a person.”).

209. See id. at 607 (“So far as language is concerned, institutions do not have bodies—they indeed are incorporeal and intangible—but they certainly do have minds.”).

too, while articulating complex, if not absurd, mental states of corporations,²¹⁰ have been reluctant to employ the fiction of constructive physical presence.²¹¹ And though a few jurists have been willing to imbue the corporation with physical characteristics, most have resisted this impulse.²¹² And as for expanding the corporate person fiction to include race, that has been, until very recently it seems, inconvenient for law.

The nature of this inconvenience is not obvious. Given that corporations are acknowledged “persons,” and that persons possess racial character, the notion, for instance, of a “black corporation” should be fairly accessible. Much of the difficulty arises not because of the traps of analogical reasoning, but because of the ambiguity of terms like “persons” and “black.” When these terms are unambiguated, otherwise bizarre declarations often become clear.²¹³ Thus at one time in this country it was perfectly sensible to say that men and women born of African ancestry were not (legal) persons, while artificial corporate entities were (legal) persons.²¹⁴ Today, it may be no more odd to say that natural persons born of African ancestry are not black, but corporate entities are (legally) black.

210. For example, some courts employ the intracorporate conspiracy doctrine to shield corporations from conspiracy charges based on the theory that the corporation as a single person cannot satisfy the plurality requirement of conspiracy (even though multiple agents of the corporation may clearly engage in conspiratorial acts on behalf of the entity). See *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (describing intracorporate conspiracy doctrine and citing various cases that have employed it).

211. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 812 (1935) (“The jurisdiction taken of foreign corporations . . . does not rest upon a fiction of constructive presence”(quoting *Bank of Am. v. Whitney Cent. Nat’l Bank*, 261 U.S. 171, 173 (1923))).

212. See Wolff’s discussion regarding John of Salisbury’s theory of the corporate state, which Wolff characterized as “grotesque” and without real meaning. Wolff, *supra* note 6, at 498. Salisbury “designated the prince as the head, the senate as the heart, . . . judges as the ears, eyes and tongue, . . . the Treasury and the tax collectors . . . [as] intestines and belly,” and so on. *Id.* Similarly, Lord Denning’s remark in an oft-cited comment that “[a] company may in many ways be likened to a human body. It has a brain and a nerve centre . . . , hands which holds the tools . . . , mind and will” *H.L. Bolton (Eng’g) Co. v. T.J. Graham & Sons Ltd.*, (1957) 1 *Q.B.* 159, 172 (C.A.), quoted in Hallis, *supra* note 6, at iii–iv. The state, noted Frederick Hallis, is the “powerful creator of such persons. But . . . , if the state is not bound by any legal restrictions, it is necessarily bound by the inherent limitations of the artificial beings which it creates.” Hallis, *supra* note 6, at 80. Hallis cautioned that when the state goes too far in imbuing into its creations those qualities enjoyed by natural persons, “it errs in theory and invites practical absurdities.” *Id.*

213. See Max Radin, *The Endless Problem of Corporate Personality*, 32 *Colum. L. Rev.* 643, 651 (1932) (discussing “wholly incalculable” number of interrelationships between legal powers and physical powers and arguing that confusion can be avoided by “taking into account the concrete individual persons who are related”).

214. Blacks were denied the right to be considered persons capable of possessing citizenship for diversity jurisdiction and other constitutional privileges. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). Many of these were precisely the privileges that corporations gained upon achieving “personhood.”

Within law, race and personhood operate principally as legal constructs, separate and distinct from their meanings outside of law. Extralegal meanings, while often sharing similar or overlapping origins with legal characterizations, and while frequently drawn upon to support legal reasoning, are neither isomorphic with nor necessarily constitutive of legal definitions.²¹⁵ It is interesting to observe, but it ought not be surprising, that as extralegal understandings of racial and corporate formation depart from their shared origins with law, legal understandings of these notions can appear stubbornly fixed. Though they may increasingly take on the quality of being absurd fictions, they need not be abandoned because they were never intended to be consonant with notions outside of law or subject to their external validation.²¹⁶ Hence, to a lawyer it should be uncontroversial that a corporation can be legally a “black person,” even though economists have forcefully denied the existence of a corporate personhood²¹⁷—maintaining instead that the corporation is simply a nexus of contractual relationships—and anthropologists, geneticists, and other physical scientists have rejected the existence of natural racial groupings.²¹⁸

In some cases, we seem able to simultaneously hold distinct biological, cultural, social, and legal understandings of particular constructs. Take the notion of adulthood. One is biologically an adult when able to sexually reproduce, which does not necessarily coincide with various cultural criteria (as exemplified in rites of passages such as the Bar Mitzvah) or broad social understandings of adulthood (e.g., mature independent living). And none of these prior meanings need coincide with the legal definition of adulthood. Legal adulthood is simply what law says it is—and nothing more. It does not, of necessity, change one’s adult status biologically, culturally, or socially; nor does the attainment of adulthood according to any of those other criteria by itself change one’s legal adult status. Furthermore, it does not matter that one state has a legal age of

215. See Hohfeld, *supra* note 61, at 20 (asserting importance of “differentiating purely legal relations from the physical and mental facts that call such relations into being”).

216. “Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable to only physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional.” *Id.* at 24 (footnote omitted); see also Dewey, *supra* note 6, at 657 (“[M]uch of the difficulty attending the recent discussion of the real personality of corporate bodies is due to going outside the strictly legal sphere, until legal issues have got complicated with other theories . . .”).

217. See Jensen & Meckling, *supra* note 59, at 311 (emphasizing “the essential contractual nature of the firms” and describing “the personalization of the firm” as “seriously misleading”).

218. For a broad survey on the existence of race as a biological construct within the anthropological and scientific communities, see generally Braman, *supra* note 78, at 1411–18, 1423–36 (describing influence of anthropologist Franz Boas during first half of twentieth century as well as more recent developments).

adulthood that is different from another state. Law's explicit independent operation is fairly transparent when it comes to adulthood.

Race is another matter. Race exhibits a greater tolerance for ambiguity. The sources of race are less subject to being isolated—or perhaps the difference is that with race we demand greater coherence across domains (biological, cultural, social, and legal), as well as greater coherence within law, making it difficult to observe law's independent force. This demand for coherence is driven by strong suspicions concerning legal racial classifications. Because of these suspicions, extralegal notions of race are constantly and fluidly enlisted by lawmakers as part of their justificatory rhetoric. Legal “adulthood” requires less by way of justification, because as John Hart Ely has observed, “the [fact] that all of us once were young . . . should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws (enacted by predominantly middle-aged legislatures) that comparatively advantage . . . those who are younger.”²¹⁹ Racial determinations and laws disadvantaging members of specified races can hardly be afforded such deference given our history.

Centuries of *de jure* subjugation of minority races required support beyond law. This was particularly important in the Jim Crow South because highlighting law's independent production of racial character would undermine the segregationist imperative of that place and time. It is much harder to maintain that blacks are naturally inferior to whites, and therefore subject to white control, if blacks are not naturally black, but instead made so by law. The justificatory prerequisite for law to regulate and subordinate classes of persons—black persons, corporate persons, other persons—is predicated on a conception and characterization of their prelegal personhood allowing for, or even requiring, heightened regulation. The imagined natural inferiority of blacks authorized their subordination,²²⁰ just as the image of lifeless enterprises being granted existence through legislative charters justified the state's regulation of corporate persons.²²¹ Revealingly, beginning in the late 1800s, as law's explicit role in producing “colored” and corporate persons became more

219. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 160 (1980).

220. As Chief Justice Taney maintained, while arguing that blacks were not entitled to the privileges of citizenship under the U.S. Constitution:

[Blacks] had for more than a century before [the framing of the Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857). Therefore, blacks were subject to continued subjugation because of their inferior prelegal (preconstitutional) nature as viewed from the perspective of the Framers, if not from the perspective of the opinion's author.

221. This idea is commonly referred to as the “grant” or “concession” theory, “which treated the act of incorporation as a special privilege conferred by the state.” Horwitz, *supra* note 85, at 181. From this act a number of legal doctrines were derived “in order to enforce the state's interest in limiting and confining corporate power.” *Id.*; see also Bratton, *supra* note 85, at 433.

formal and explicit, it had the effect of delegitimizing the extant justifications of their subordination.²²² Racial definitions in law may thus not only tolerate ambiguity, they might actually require it.²²³

B. *The Trouble with Race*

Scholars have long recognized and discussed the confounded nature of race. Though current academic discourse largely acknowledges race as a social product,²²⁴ not all researchers are willing to abandon more tradi-

222. The post-Reconstruction South sought to formalize what had long been customary and informal. Thus, even more so than in the context of slavery, segregation required clear legal classifications of the races. As Gilbert T. Stephenson observed, “[i]f race distinctions are to be recognized in the law, it is essential that the races be distinguished from one another.” Stephenson, *supra* note 199, at 37. The institutional change (from slavery to segregation) that called for formalist attempts at classifying race resulted in many inconsistencies and contradictions (both between and within jurisdictions), which fueled challenges to the regulation of “colored” persons. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Taney’s opinion in *Dred Scott* revealed how his conception of black personhood led to a denial of the constitutional privileges of citizenship to blacks. *Dred Scott*, 60 U.S. (19 How.) at 404–05. Similarly, Justice Taney’s opinion in *Bank of Augusta v. Earle* shows how his conception of corporate personhood informed the view that corporations were also not entitled to the privileges of citizens. 38 U.S. (13 Pet.) 519, 586 (1839). The opinion makes clear that “[h]e could not yet even imagine that the fictional entity itself could plausibly claim constitutional privileges.” Horwitz, *supra* note 85, at 185. The justification of corporate regulation would shortly thereafter suffer a meaningful blow because of formalist changes in the treatment of these persons. General (or “free”) incorporation statutes, reducing corporate formation to mere formalities, reinforced the notion that the constitutive aspect of this business form was largely premised on private agreements among private individuals. “[F]ree incorporation undermined the grant theory.” *Id.* at 181. It did so “[b]y rendering the corporate form normal and regular.” *Id.* at 183. With this, the genesis of corporations was increasingly viewed as being in the hands of these private individuals and not the state. As such, arguments justifying state regulation of these entities were weakened, and for a time, corporations were to a significant extent regulated like partnerships. *Id.* at 182.

223. “[T]he contradictions deep within the articulation of race actually make it a stronger concept.” Elliott, *supra* note 201, at 633.

224. See K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in *Color Conscious* 30, 41 (K. Anthony Appiah & Amy Gutmann eds., 1996) [hereinafter Appiah, *Misunderstood*] (noting that throughout nineteenth century, race developed social meaning underpinned by its perceived basis as scientific term); Luigi Luca Cavalli-Sforza, *Race Differences: Genetic Evidence*, in *Plain Talk About the Human Genome Project* 51, 53 (1997) (discussing how variations in genes are so numerous as to suggest that it is nearly impossible to define races in scientific way); Haney Lopez, *White by Law*, *supra* note 35, at 111 (“Races are social products.”); see also Braman, *supra* note 78, at 1381 (arguing that Supreme Court has treated race as product of social and political institutions); Elliott, *supra* note 201, at 613–15 (arguing that nineteenth century ideas of race were continually reinvented); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 *Stan. L. Rev.* 1, 4 (1991) (describing one idea of race being formal racial categories that are socially constructed); Gross, *supra* note 35, at 114–15 (claiming that meaning of race is “historically contingent, dependent on political and social circumstances”); Harris, *supra* note 78, at 1713 (claiming that whiteness provides valuable social benefits such that American property law recognizes property interest in whiteness); cf. Vincent Sarich & Frank Miele, *Race: The Reality of Human Differences* 2–3 (2004)

tional views;²²⁵ nor is the general public. We are all intimate with the human body, a fact that allows anachronistic views, once connected to the

(noting desire of people in social sciences to downgrade race from biological concept to mere social construction); Joanna L. Mountain & Neil Risch, Assessing Genetic Contributions to Phenotypic Differences Among 'Racial' and 'Ethnic' Groups, 36 *Nature Genetics* S48, S48 (2004) (analyzing race and ethnicity as social categories, despite some biological inclusion criteria).

225. On the one hand, many researchers are increasingly concluding that race (biological or not) has limited analytical value, compared to, for instance, ethnicity, place of birth, and culture. Editors of some scientific journals have recently rejected racial categorizations in terms of black and white; “[f]or example, a category of ‘a black Chicago population’ would be” too imprecise to allow replication of the study for the purposes of scientific validity. Bowman, *supra* note 200, at 141. The American Anthropological Association has declared the concept of race distortionary and has recommended that “the term be dropped from the census and scholarly writings.” Jennifer Hochschild, *From Nominal to Ordinal: Reconceiving Racial and Ethnic Hierarchy in the United States* 31 (2004) (unpublished manuscript, on file with the *Columbia Law Review*) (citing Am. Anthropological Ass’n 1996, 2000). The International Committee of Medical Journal Editors similarly holds in its editorial policy statement that “‘authors should avoid terms such as ‘race,’ which lack precise biological meaning, and use alternative descriptors such as ‘ethnicity’ or ‘ethnic group’ instead.’” *Id.* at 31–32 (citing Int’l Comm. of Med. Journal Editors 2001). On the other hand, the American Sociological Association’s policy statement on race maintains that “although racial categories do not necessarily reflect biological or genetic categories” a decision to “end the collection of data using racial categories [would be] ill advised.” Am. Sociological Ass’n, *The Importance of Collecting Data and Doing Social Scientific Research on Race* (2003), at http://www2.asanet.org/media/asa_race_statement.pdf (on file with the *Columbia Law Review*). Many social scientists are concerned that real inequalities that correlate with existing racial categories would become unobservable if entities like the U.S. government did not collect statistics on race. Bowman, *supra* note 200, at 143 (arguing that government collection of data on race enhances literature and statistics on voting patterns and incidence of disease). Similar debate rages within the epidemiological and medical communities regarding the collection and use of racial data. See Esteban González Burchard et al., *The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 *New Eng. J. Med.* 1170, 1174 (2003) (“Ignoring racial and ethnic differences in medicine and biomedical research will not make them disappear. Rather than ignoring these differences, scientists should continue to use them as starting points for further research.”); Richard S. Cooper et al., *Race and Genomics*, 348 *New Eng. J. Med.* 1166, 1167 (2003) (“One view holds that the ability to categorize persons according to continental ‘race’ validates the clinical and epidemiologic use of self-reported racial ancestry We disagree.”); S.O.Y. Keita et al., *Conceptualizing Human Variation*, 36 *Nature Genetics* S17, S19 (2004) (“‘Race’ is a legitimate taxonomic concept that works for chimpanzees but does not apply to humans (at this time).”); Mountain & Risch, *supra* note 224, at S52 (“Racial or ethnic categorization will continue to be useful as long as such categorization ‘explains’ variation unexplained by other factors.”); Charles N. Rotimi, *Are Medical and Nonmedical Uses of Large-Scale Genomic Markers Conflating Genetics and ‘Race’?*, 36 *Nature Genetics* S43, S46 (2004) (“Unfortunately, instant notoriety can be attained by reporting genetic explanations for ‘racial’ differences in disease”); Robert S. Schwartz, *Racial Profiling in Medical Research*, 344 *New Eng. J. Med.* 1392, 1392 (2001) (“I maintain that attributing differences in a biologic end point to race is not only imprecise but also of no proven value in treating an individual patient.”).

body, to retain a familiar and natural persistence.²²⁶ Hence, though the Court long ago rejected evidence of pigmentation as a proxy for race,²²⁷ the Justices *still* talk of race in terms of skin color and blood,²²⁸ even scholars who argue that race is socially constructed tend to present evidence of construction at the margins of race, leaving untouched the notion that, at its core, race is essentially nonsocial.

The intrigue of corporate racial identity is that it strikes the traditional notion of race at its core. To see this, let us first consider Judith Butler's provocative challenge to sex as a presocial biological phenomenon.²²⁹ In her boldest moments, Butler appears to contest the very materiality of sexed bodies,²³⁰ though she ultimately settles on the more modest (but nonetheless controversial) claim that social practice outlines the materialization of sex. Butler shifts, as Kenji Yoshino observes, "from an ontological claim ('There is no biological sex') to an epistemological one ('There may be a biological sex, but we can never be confident that what we are pointing to is biological sex')." ²³¹ Not knowing where sex ends and gender begins, any line drawing between biological sex and sociality-determined gender must be arbitrary, which reveals both the social con-

226. See Braman, *supra* note 78, at 1458 n.358 ("Many of our strongest institutions are grounded in analogies to . . . the body . . . , effectively putting them beyond daily critical inquiry.").

227. See *Ozawa v. United States*, 260 U.S. 178, 197 (1922) ("Manifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race . . .").

228. Cases as recent as *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003), explicitly equate skin color with race. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), Scalia's comments focused on blood—that is, biological lines of descent—in oral argument. *Gotanda*, *supra* note 224, at 32. Some emphasize the courts' approach to race as biologically informed. *Id.* at 29; Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Saliency of Race to LatCrit Theory*, 85 Cal. L. Rev. 1143, 1162 (1997). Others emphasize that courts have not embraced a purely biological notion of race in the twentieth and twenty-first centuries. Elliott, *supra* note 201, at 615 ("[S]ome in the 19th century recognized this process as surely as we do today."); *Gotanda*, *supra* note 224, at 29–30 (discussing *Saint Francis College v. Khazraji*, 481 U.S. 604, 610 n.4, 613 (1987)).

229. See Butler, *Trouble*, *supra* note 35, at 10 ("[T]he sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders.").

230. Butler writes:

And what is "sex" anyway? Is it natural, anatomical, chromosomal, or hormonal, and how is a feminist critic to assess the scientific discourses which purport to establish such "facts" for us? . . . If the immutable character of sex is contested, perhaps this construct called "sex" is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.

Id. at 10–11.

231. Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 870–71 (2002).

struction of sex at the margins²³² and society's endogenous influence over the materialized biology of sex.²³³

Butler's epistemological and endogeneity challenges to biological sex can also be asserted against biological conceptions of race. Observers have long noticed the construction of race at the borderline—the so-called color line—between white and nonwhite (“colored”).²³⁴ Not knowing where whiteness ends and color begins, the establishment of a color line reveals the social construction of race at the margins. Moreover, the color line exerts an endogenous effect on “natural” racial features, which further contributes to the materialized biology of race as popularly understood. The biological realizations (such as skin color, hair texture, and facial features) all too often associated with race are themselves determined by racial definitions, but again mainly at the margins.²³⁵

C. *From the Margin to the Core*

Notice that both the epistemological and endogeneity challenges, however, preserve an essentialist understanding of race: We simply cannot identify it, and through our ignorance, we distort it. Nonetheless, *it*

232. In *Bodies That Matter*, Judith Butler writes:

The moderate critic might concede that some part of “sex” is constructed, but some other is certainly not, and . . . find . . . herself not only under some obligation to draw the line between what is and is not constructed, but to explain how . . . “sex” comes in parts whose differentiation is not a . . . construction.

Judith Butler, *Bodies That Matter* 11 (1993) [hereinafter Butler, *Bodies*].

233. See id. (“But as that line of demarcation between ostensible parts gets drawn, the ‘unconstructed’ becomes bounded once again through a signifying practice, and the very boundary which is meant to protect some part of sex from the taint of constructivism is now defined by the anti-constructivist’s own construction.”).

234. See sources cited supra notes 224–225. Appiah cites an 1876 essay by Ralph Waldo Emerson: “The individuals at the extremes of divergence in one race of men are as unlike as the wolf and the lapdog. Yet each variety shades down imperceptibly into the next, and you cannot draw the line where a race begins or ends.” Appiah, *Misunderstood*, supra note 224, at 68. As W.E.B. Du Bois famously stated, “[t]he problem of the twentieth century is the problem of the color-line.” W.E.B. Du Bois, *The Souls of Black Folk* 16 (First Vintage Books 1990) (1903).

235. Many racial constructivists tend to overlook how race affects the materiality of bodies because for them race has no biological antecedents. Still, race as popularly conceived does have biological associations, which are influenced by racial demarcations. Generations of blacks attempting to lighten their skins and straighten their hair with chemicals or careful mating will attest to this fact. For instance, K. Anthony Appiah, in support of his argument for the social construction of race, points to the social, behavioral, and psychological effects of racial labels, but stops short of mentioning physiological effects. Nonetheless, Appiah’s thoughtful analysis is fully consistent with this simple extension of Butler’s claims. To further support his analysis, Appiah enlists Ian Hacking’s notion of dynamic nominalism, which argues that “‘numerous kinds of human beings and human acts come into being hand in hand with our invention of the categories labeling them.’” Appiah, *Misunderstood*, supra note 224, at 78 (quoting Ian Hacking, *Making Up People*, in *Forms of Desires: Sexual Orientation and the Social Constructivist Controversy* 87 (Edward Stein ed., 1990)).

remains essentially presocial and is always present. But while one may have to concede a material essence to sex,²³⁶ it is not clear that a similar concession must be made with regard to race. Corporate racial identity resists this concession, allowing one to assert the stronger ontological claim that there is no biological race, that race is socially constructed at its core.²³⁷ This follows from the fact that corporate persons are artificial persons, and if there are races among corporations, then those races must also be artificial. This much is clear. A corporation can be black or possess some other race only if its race is a social product.

Without a conception of race as fully socially determined, no court could conceive of such a thing as a “colored corporation.” A critic, of course, might argue that a court—for example, the court in *Thinket*—may find race in corporations, but only as derived from the racial essence of affiliated natural persons, like shareholders, agents, or customers. So while race in a corporation may be as artificial as the corporate person itself, the attribution of race to the entity merely extends the bounds of race beyond natural persons; it does not create it from whole cloth. Though it is not an inconsequential contribution to show that corporate racial identity extends the boundaries of race beyond bodies, courts have actually done more. In *Bains*, the court attributed race to the corporate entity based on the conduct of third parties, not their racial essence. The conduct itself was based on manifestations of attributes associated with certain ethnicities, religions, and nationalities. There was no necessary racial essence driving the court’s finding of race in the entity. The court’s judgment relied on how race was signaled and received in the interaction between the plaintiff and the defendant, and not on whether the entity or any other person possessed some essential racial content.

But when courts condition their attribution of race to a corporate person on their own judgment (or the state’s judgment) of the race of the corporation’s shareholders, they again veer down the dead end path of searching for racial essence. The alleged racial discrimination against *Thinket* by Sun Microsystems did not result from any essential racial characteristic residing in these legal persons, or even in their shareholders and agents. *Thinket*’s agents simply manifested certain attributes commonly associated with race, to which Sun’s agents improperly responded against the corporation. Hence the corporation suffered race-based discrimination. But in this discriminatory interaction there was no essential racial attribute, no singularly defining essence of race, only manifestations that signal racial identity. These signals matter legally not because law has any independent interest in defining or identifying race, but only

236. Butler, *Bodies*, supra note 232, at 10 (“To ‘concede’ the undeniability of ‘sex’ or its ‘materiality’ is always to concede some version of ‘sex’ . . . and, yes, that concession invariably does occur. . .”).

237. Friedrich Nietzsche, *On the Genealogy of Morals* 45 (Walter Kaufmann trans., Vintage Books 1989) (1887) (“[T]here is no ‘being’ behind doing, effecting, becoming; ‘the doer’ is merely a fiction added to the deed—the deed is everything.”).

because the signals are associated with actions that confer gains and penalties. When these gains and penalties are distributed unjustly or in contravention of the law, then and only then are they legally relevant.

Legal recognition of racial discrimination against corporations has the marvelous potential of helping us to see race as it truly is: existing within an interaction between a signifier and a recipient at a particular time, in a particular place. This was the ultimate point of the discussion in Part II. Legal identification of race in corporations need only refer to how race is signaled and received in an interaction, not to whether a corporation or any other person *has* a race. By stressing that their judgments about race are judgments about interactions, about how someone (or something) was behaving (or being treated) and simultaneously being interpreted, courts can reflect race not as an essential characteristic of persons (or things), but as social characteristics of interactions in particular contexts.

V. LAW OF CORPORATE RACIAL IDENTITY

The U.S. Supreme Court has only twice addressed the possibility of corporate racial identity, denying it in both instances.²³⁸ In *Connecticut General Life Insurance Co. v. Johnson*, Justice Black made a passing reference—that “[c]orporations have neither race nor color”—in rejecting the applicability of the Fourteenth Amendment to strictly legal persons.²³⁹ The Court more explicitly dealt with corporate race in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁴⁰ Evaluating whether the Metropolitan Housing Development Corp. (MHDC) had standing to pursue the claim, Justice Powell stated that “[a]s a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners’ alleged discrimination.”²⁴¹ This is the clearest statement of “the Supreme Court’s view on the narrow issue of whether a corporation can itself be considered to have a racial character.”²⁴²

One year after the *Arlington Heights* decision, in the summer of 1978, Hudson Valley Freedom Theater, Inc. (HVFT) sought federal funding to

238. A recent missed opportunity to address the issue was presented in *Domino’s Pizza, Inc. v. McDonald*, 126 S. Ct. 1246 (2006). John McDonald, the sole (black) shareholder of JWM Investments, Inc. (JWM), brought a § 1981 claim against Domino’s Pizza, Inc. (Domino’s), alleging that Domino’s breached its contracts with JWM because of racial animus, causing harm to McDonald and his corporation, JWM. However, “[s]ince JWM settled its claims and [was] not involved in this case, [the Court found] no occasion to determine whether, as a corporation, it *could* have brought suit under § 1981.” *Id.* at 1248 n.1. Justice Scalia did note “that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims.” *Id.* (citing *Hudson Valley Freedom Theatre, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982), cert denied, 459 U.S. 857 (1982)).

239. 303 U.S. 77, 87 (1938) (Black, J., dissenting).

240. 429 U.S. 252 (1977).

241. *Id.* at 263.

242. *Heimbach*, 671 F.2d at 707 (Pierce, J., concurring) (footnote omitted).

promote theatrical and artistic productions in minority communities, but was denied by the local administering agency. HVFT sued in *Hudson Valley Freedom Theater, Inc. v. Heimbach*, alleging that “it ‘personally has suffered [injury] . . . as a result of the putatively illegal [racially motivated] conduct.’”²⁴³ Relying on Justice Powell’s comments in *Arlington Heights*, the lower court ruled “that ‘a corporation, as a faceless creature of the state, may not assert claims of racial discrimination under the Fourteenth Amendment on its own behalf.’”²⁴⁴ Reversing this judgment on appeal, Judge Friendly remarked that Justice Powell’s dicta concerning race of corporations “was of only academic importance” and that he did not believe “the Supreme Court would slavishly apply it so as to deny HVFT its day in court.”²⁴⁵

According to the Ninth Circuit opinion in *Thinket*, Judge Friendly’s belief was vindicated (“at least moderately”²⁴⁶) in *City of Richmond v. J.A. Croson Co.*,²⁴⁷ where “the Supreme Court . . . implicitly recognized that corporations can have racial characteristics by allowing white owned corporations to challenge contractor set asides on reverse discrimination grounds.”²⁴⁸ Given Justice Powell’s dicta in *Arlington Heights*, there was indeed surprisingly little discussion of race and standing with regard to the Croson Company, an Ohio corporation.²⁴⁹ Still, the absence of this discussion does not imply (as *Thinket* claims) that the Court acknowledged Croson as a white corporation. The Court has for some time recognized that “a distinctive physiognomy is not essential to qualify for § 1981 protection.”²⁵⁰

An alternative, and more plausible, interpretation of Croson’s standing is that of a representative: a reverse derivative action, of sorts, where the corporation sued on behalf of its (white) shareholders.²⁵¹ “The prin-

243. *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

244. *Id.* at 704 (majority opinion) (quoting *Arlington Heights*, 429 U.S. at 263).

245. *Id.*; see also *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (“[O]ne need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination.”).

246. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1058 (9th Cir. 2004) (citation omitted).

247. 488 U.S. 469 (1989).

248. *Thinket*, 368 F.3d at 1058 (citation omitted).

249. The only direct reference to Croson’s standing seems to have been limited to the amicus brief of the Washington Legal Foundation and the Lincoln Institute for Research and Education, which simply noted that “[e]ven though Croson is an Ohio Corporation, it is well-settled that a corporation is a ‘person’ under the Equal Protection Clause as well as the Due Process Clause of the Fourteenth Amendment.” 187 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1988 Term Supplement 469 n.1 (Philip B. Kurland & Gerhard Casper eds., 1990).

250. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

251. With regard to achieving standing through the ordinary derivative action: In general, shareholders lack standing to assert an individual § 1983 claim based on harm to the corporation in which they own shares. See *RK Ventures, Inc. v. City of Seattle*, 307 F.3d

ciple that a corporation may assert equal protection claims when it alleges discrimination because of the color of its stockholders derives implicit support from *Fullilove v. Klutznick*”²⁵² In fact, the Court has established a well-settled pattern of allowing racial discrimination representative suits (by individuals, associations, and corporations) when there exists an integral legal relationship,²⁵³ or when the harmed parties’ racial or ethnic identities are essentially linked to the representative.²⁵⁴ For example, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville* the Court held that the association had standing to bring an equal protection claim because its members were disadvantaged by Jacksonville’s racial classification plan for awarding city contracts.²⁵⁵ Corporations too have been privileged with associational (or organizational) standing based on shareholders’ race.²⁵⁶

Racial antidiscrimination “law prohibits discrimination on the basis of race—something that it can do without knowing what race is and in-

1045, 1057 (9th Cir. 2002); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969). Furthermore, unless the corporation’s board resists pursuing the discrimination claim itself, the shareholder faces significant hurdles based on basic corporate law principles.

252. *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982).

253. The relationship between a trustee and the trust beneficiary, for example, may provide “adequate ‘identification’ with the allegedly disfavored groups to support an equal protection claim.” *Lanna Overseas Shipping, Inc. v. City of Chi.*, No. 96 C 3373, 1997 WL 587662, at *7 (N.D. Ill. Sept. 18, 1997); see also *Barrows v. Jackson*, 346 U.S. 249, 255–58 (1953) (finding contractual agreement sufficient for standing).

254. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (allowing NAACP standing to litigate on behalf of its members’ First Amendment associational rights by noting that NAACP “and its members are in every practical sense identical”). Similarly, the Seventh Circuit allowed a plaintiff to maintain a § 1983 action in light of state actors’ anti-Semitic behavior based on its “identification with a particular (presumably historically disadvantaged) group.” *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe*, 37 F.3d 1216, 1220 (7th Cir. 1994).

255. 508 U.S. 656, 668–69 (1993); see also *United Food & Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) (“‘[R]epresentational standing,’ of which . . . ‘associational standing’ is only one strand, rests on the premise that in certain circumstances, particular relationships . . . are sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties.”).

256. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Supreme Court articulated the test for so-called associational standing and concluded that an association has standing when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” See also *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (discussing requirements of associational standing). Corporate organizational standing based on shareholders’ (members’) racial identity is distinct from standing arising “where ‘a functional nexus exists between the purpose or activity of the corporation and the identity of the members of that corporation,’” *Gersman v. Group Health Ass’n*, 931 F.2d 1565, 1567–68 (1991), vacated, 502 U.S. 1068 (1992), and standing where the corporation can demonstrate a concrete injury to its activities with incidental drain on organizational resources, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

deed without accepting that race is something that is knowable”²⁵⁷ and certainly without attributing race to legal fictions. I wish to be clear here. I am not claiming that courts cannot attribute race to corporations, nor am I arguing (at this moment) that they should not attribute race to corporations. I maintain here only that they need not do it in order to invoke antidiscrimination protection for corporations. “[W]hether a corporation has a racial identity is not determinative of whether that corporation has standing to bring a discrimination claim.”²⁵⁸

A. *Race Recognized*

If there remained any uncertainty over whether federal courts have implicitly recognized race in corporations, Judge Thomas left little room for such speculation in *Thinket*. Thinket Ink Information Resources, Inc. (Thinket), a minority-owned technology services contractor, entered into a series of contracts with Sun Microsystems, Inc. (Sun), which required Thinket to provide systems support services at Sun’s facilities.²⁵⁹ Over time the relationship between Thinket and Sun soured, leading Thinket to file a § 1981 claim against Sun, alleging that Sun deliberately refused to contract with the corporation based on its status as a minority-owned business.²⁶⁰ In discussing Thinket’s standing, the Ninth Circuit explicitly found that the corporation had acquired a racial identity based on the race of its shareholders.²⁶¹ The exact nature of this acquisition, however, and how the shareholders’ race bears on that of the corporation’s, were not spelled out.

Thinket relied significantly on the corporation’s government certification as a minority-owned business. As such, the court asserted,

257. Richard Thompson Ford, *Racial Culture: A Critique* 103 (2005) [hereinafter Ford, *Racial Critique*] (“To prohibit discrimination on the basis of race, we need only know that there is a set of ideas about race that many people accept and decide to prohibit them from acting on the basis of these ideas.”).

258. *Gersman*, 931 F.2d at 1568. On the other hand, the absence of consistent and clear standing rules in corporate racial discrimination cases does subject corporate plaintiffs to the discretion of the courts and third party petitioners, who may not have the same incentive to challenge the alleged discriminatory conduct. “[S]hareholders, for example, may not recover under the Civil Rights Acts for harm to the corporation they own.” Robert N. Strassfeld, Note, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 Va. L. Rev. 1153, 1154 (1983). These matters of judicial discretion in standing rulings, however, are not unique to corporate race-based discrimination cases. See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. Rev. 612, 614–15 (2004) (arguing that politics and personal preferences of judges play large role in standing decisions).

259. Thinket is certified by the Small Business Administration as a firm owned and operated by socially and economically disadvantaged individuals, and is thus eligible to receive federal contracts under the SBA’s section 8(a). Small Disadvantaged Business Development Program, 15 U.S.C. § 637 (2000) (relevant regulations at 13 C.F.R. § 124 (2006)).

260. 42 U.S.C. § 1981 (2000).

261. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004).

“Thinket was required to be certified as a corporation *with a racial identity*.”²⁶² This assertion is not quite correct. Government certification merely requires fifty-one percent or more minority ownership of control interests. Ownership and identity are obviously different, as are “racial identity” and “minority status.” Thinket could have received its minority-owned certification with only one percent African American ownership, so long as another fifty percent was owned by other qualifying minority interests. What racial identity would the court assign to the corporation in that case?²⁶³ The court’s conflation of minority status and racial identity may have been obscured by the fact that “all of [Thinket’s] shareholders were African-American.”²⁶⁴ Perhaps the court relied on this fact more than any other in concluding that the corporation possessed a racial identity. But, if so, then threshold questions remain: Was one hundred percent African American ownership of Thinket necessary or sufficient, or both, or neither?

Answers to these questions are far from obvious, but there are a number of salient considerations that ought to enter the inquiry. First, courts are not the sole, nor necessarily the best, authority to establish a corporation’s race. Legislators and other nonjudicial government officials, as well as private adjudicative and nonadjudicative bodies, may serve this purpose. Promoters of the corporation may ideally define its racial identity (recall the “efficient identities” discussion in Part II) using the corporate charter, which might subsequently be modified by the board of directors or the shareholders. In addition to charter-based definitions, statutes and regulations may be used to characterize the race of the corporation.

Furthermore, when characterizing the corporation’s race, the relevant decisionmaker may also look beyond the shareholders’ race. There are a number of plausible nonshareholder bases from which corporate racial identity may be derived. The relevant decisionmaker might look to the corporation’s customers, managers, employees, or other agents, in addition to where the business is located, the communities it serves, and its principal activities and purposes.²⁶⁵ In *Pourier v. South Dakota Depart-*

262. *Id.* (emphasis added).

263. The court may have considered “minority status” as a form of racial identity—a nonmajority (presumably nonwhite) racial category that privileges whiteness as unique and lumps everything else together. There is precedent for this broadly inclusive nonwhite/white racial categorization. Indeed the usage “colored” and “persons of color” was largely invoked as “a generic phrase including all who were not wholly Caucasian or Indian.” Stephenson, *supra* note 199, at 39. Following the Civil War “[t]his nomenclature was taken over from the antebellum statutes, and it is surprising to find how seldom the word ‘Negro’ is used in the statutes and court decisions.” *Id.*

264. *Thinket*, 368 F.3d at 1059.

265. For example, the court could look at those residing near the principal place of business of the corporation or the community that the corporation principally serves (by practice or as stated in its charter)—e.g., a business claiming to serve the “black community” might be treated as a black business even if its owners and agents are white.

ment of Revenue,²⁶⁶ the Supreme Court of South Dakota concluded that Muddy Creek Oil and Gas, Inc. possessed Sioux Indian identity based on various policy considerations²⁶⁷ and evidence that the corporation's "business is operated on the reservation, the vast majority of its customers are Indians residing on the reservation, and it is licensed by the Tribe to do business on the reservation."²⁶⁸

The decisionmaker might also look to the conduct of third parties in determining a corporation's identity, as the court did in *Bains LLC v. Arco Products Co.*²⁶⁹ *Bains* differs starkly from other corporate race cases insofar as the court employed a notion of corporate racial identity not determined by the state, or the preferences of shareholders, or agents of the corporation. In *Bains*, an East Indian owned trucking company (d/b/a Flying B), "alleged that it had been subject to racial discrimination while performing under the contract and that the contract had been terminated in violation of 42 U.S.C. § 1981."²⁷⁰ Based on the conduct of third parties, the Ninth Circuit found that "Flying B undoubtedly acquired an imputed racial identity."²⁷¹ The court considered Flying B's identity a matter of social fact—evidenced by the defendants' behavior toward the owners and employees of the entity. In this sense, one might say the court merely gave legal recognition to the existence of a social fact.

Judicial recognition of race exogenously imposed onto corporations was hypothesized two decades ago by Robert Strassfeld, noting that if people perceive a business as having a racial identity—regardless of whether it *actually* has one—then "law appropriately [should recognize] these per-

266. 2003 SD 21, 658 N.W.2d 395, vacated in part, 2004 SD 3, 674 N.W.2d 314. Loren Pourier, a member of the Oglala Sioux Tribe, owned and operated a gas station on a Sioux reservation in South Dakota. *Id.* ¶¶ 3–4. Invoking the U.S. Supreme Court's precedent in *Oklahoma Tax Commissioner v. Chickasaw Nation*, 515 U.S. 450 (1995), *Pourier* sought to recover \$940,000 in state taxes that he claimed were unjustly levied against his enterprise. *Pourier*, 2003 SD ¶ 5. In response, the South Dakota Department of Revenue alleged that it was authorized to tax *Pourier's* company under the Hayden-Cartwright Act, and more importantly for our purposes, that *Pourier's* company failed to meet *Chickasaw's* threshold requirement because as a business entity, it could not have an Indian racial identity. *Id.*

267. The court held that "[p]olicy considerations also weigh heavily in favor of treating Muddy Creek as a tribal member. . . . [Refusal to do this] could hinder economic development. This is particularly unwarranted in the instant case because the Pine Ridge Reservation is the poorest in the country." *Pourier*, 2003 SD ¶ 25.

268. *Id.* ¶ 22. The court also emphasized that "Congress has recognized the fact that there is such a thing as an 'Indian corporation.'" *Id.* Here too, however, the problem is that the regulations merely require "that corporations must be at least 51% owned by eligible Indians or Indian Tribes." *Id.* ¶ 24.

269. 405 F.3d 764, 770 (9th Cir. 2005).

270. *Bains LLC v. Arco Prods. Co.*, 220 F. Supp. 2d 1193, 1196 (W.D. Wash. 2002).

271. *Bains*, 405 F.3d at 770. The court noted that "the corporation is owned entirely by Sikh shareholders, and while not all of its drivers were Sikhs, even the non-Sikh drivers testified that they were treated poorly by Davis [ARCO's agent] based on their association with what Davis saw as a Sikh company." *Id.* "Davis asked both Patrick Dauer and A.C. Morgan, the only two Caucasian Flying B drivers, 'How did you get hooked up with these f——s?'" *Id.* at 767.

ceptions, for they inevitably influence social and economic behavior.”²⁷² This approach to corporate racial attribution may be placed under the “regarded as” conception of antidiscrimination law, recently advanced by Angela Onwuachi-Willig and Mario Barnes.²⁷³ Here the emphasis is on the realization of race, materializing—not principally through an individual’s choices and actions (i.e., her performance of her racial identity)—from the choice and actions of others (i.e., their performance of an individual’s racial identity). Thus, even though the owners of Flying B did not themselves affirmatively attempt to attribute East Indian identity to the business entity (nor did the government “certify” ex ante some identity in Flying B), it acquired a specific racial identity, according to the court, based on the conduct of others.²⁷⁴

B. Rules of Recognition

There are numerous ways in which race may be legally attributed to corporations. For instance, the Nuremberg Laws, enacted by Germany’s National Socialist (Nazi) Party, decreed that “[a] business enterprise qualifying as a juristic person is considered to be Jewish” if any of its “legal representatives” are Jews, or if any “members of its supervisory boards are Jews,” or if controlling interests over the company’s capital or voting shares are held by Jews.²⁷⁵ Adolf Hitler and the Nazi party were highly suspicious of corporations,²⁷⁶ particularly the anonymity associated with corporate shares, which would have made it difficult for the state to deter-

272. Strassfeld, *supra* note 258, at 1179. “So long as bigots discriminate against businesses managed or owned by blacks, other businesses will be less likely to hire black managers, and other black investors will find it more difficult to pool their capital.” *Id.*

273. See generally Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 *Wis. L. Rev.* 1283 (proposing framework for recognizing discrimination claims broadly based on perceptions of discriminator rather than traits (as determined by court) of victim of discrimination).

274. *Bains*, 405 F.3d at 770.

275. *Legislating the Holocaust 159* (Karl A. Schleunes ed. & trans., 2001) (internal quotation marks omitted) (providing translation of Nazi-era laws). Sole proprietorships and other unincorporated businesses, including general and limited partnerships, were also deemed Jewish (under Paragraphs 1 and 3) if any owners or partners were Jewish. *Id.* Paragraph 2 motioned that “a joint-stock company or a company with limited liability” was Jewish if any “Jews [sat] on its board of directors” or exercised “a decisive influence in its affairs either by way of capital investment or by virtue of voting power.” *Id.* (internal quotation marks omitted). Paragraph 6 imbued Jewish identity into “associations, foundations, institutions, and other organizations which are not business enterprises.” *Id.* at 160 (internal quotation marks omitted).

276. “Hitler himself expressed a pronounced animus against corporations in *Mein Kampf*.” Curtis Warren Bajak, *The Third Reich’s Corporation Law of 1937*, at 62 (Dec. 1986) (unpublished Ph.D. dissertation, Yale University) (on file with the *Columbia Law Review*). In an infamous 1933 speech to the Reichstag, Hitler made clear his view about the relationship of the state (as representative of the Volk) and business (as “embodied” through the corporation): “[T]he Volk does not exist for business . . . business [serves] the Volk.” *Id.* at 72 (internal quotation marks omitted).

mine the race of businesses.²⁷⁷ Anticipating this difficulty, the Reich Citizenship Law sought to establish an official registry for Jewish business enterprises and authorized the adoption of a Jewish trademark.²⁷⁸ Further Nazi proposals to curb corporate anonymity included limiting the transferability of bearer stocks or eliminating them altogether through the German Corporation Law of 1937.²⁷⁹ These proposals were ultimately rebuffed by academic and business interests, fully aware of the tradeoff between recognizing corporate racial identity (nonanonymity more broadly) and the financial returns of incorporation.²⁸⁰ That is, an implicit tradeoff exists between the verifiability of race and the fluidity of corporate interests, which, as discussed earlier, will undercut most efforts to racialize corporations based on the race of shareholders.

The race of shareholders, of course, need not limit the race of corporations. The combinations of assignors of, and criteria for, corporate racial identity are daunting. As suggested above, corporate agents, promoters, shareholders, courts, legislators, regulators, or other officials could serve as assignors of corporate racial identity based on such criteria as corporate customers, employees, officers, directors, shareholders, service community, or business purposes. But to maintain some focus, I will limit the scope of consideration to a single assignor (i.e., the court) and a single criterion (i.e., the race of the shareholders), which I assume to be known, observable, verifiable, and fixed. This is not an attempt to trivialize the problem. I rather hope to reveal the complexities faced by courts even under these admittedly restrictive circumstances.

By summarily denying the possibility of corporate racial identity, the U.S. Supreme Court has not availed itself of an opportunity to consider how the race of shareholders might bear on the racial character of corporations. However, a review of the Court's treatment of shareholders' citizenship and nationality as they relate to the corporation's status is instructive. In *Bank of the United States v. Deveaux*, an 1809 case concerning whether a corporation was a citizen for purposes of federal diversity jurisdiction, the Court held that corporations are not citizens in and of themselves.²⁸¹ The Court addressed the diversity issue by going beyond the corporate veil, assigning to the corporation the citizenship of its shareholders.²⁸² However, because *Strawbridge v. Curtiss*, decided just three years earlier, required a complete disjoin of plaintiff and defendant citi-

277. *Id.*

278. That is, "a special identifying mark for those Jewish enterprises which are to be recorded in the official directory." *Legislating the Holocaust*, *supra* note 275, at 160 (internal quotation marks omitted) (translating Nazi-era laws).

279. See *Bajak*, *supra* note 276, at 72–73.

280. *Id.* at 201–16. Though the Nazi proposals to curb corporate anonymity were undermined, their larger objective of subordinating the corporation "to society and the state" through the Corporation Law of 1937 was more successful. *Id.* at 204.

281. 9 U.S. (5 Cranch) 61, 88 (1809).

282. See, e.g., *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 528–29 (1839).

zanship for diversity (“complete diversity”),²⁸³ *Deveaux* implied that all shareholders of the corporation must hold the requisite characteristic of distinct state citizenship from the adversary for it to be imputed onto the corporation. If a single shareholder holding only one share of stock failed to meet this test, then diversity was defeated. Such a test may be labeled a one-share rule (an analog of the “one-drop rule” of racial determination among natural persons).²⁸⁴

In addition to state citizenship, the issue of corporate national citizenship as it relates to shareholders’ nationality has prompted the intriguing question of whether a corporation can be the enemy of a king, a state, or a nation. Clearly, legal entities (i.e., other states) can be alien enemies. Continuing along this path, since nationals of enemy states are generally themselves considered enemies, then a corporation (if a national of an enemy state) can itself be an enemy of another state. But is corporate nationality to be determined by the shareholders’ nationality? When this question arose in the context of the Trading with the Enemy Act during World War I, the answer from the U.S. Supreme Court was “no.”²⁸⁵ Though foreign corporations could be enemies, a Delaware corporation wholly owned by German citizens residing in Germany, for instance, could not have been an enemy of the United States during the first World War.²⁸⁶ This position was subsequently reversed in the World War II case of *Clark v. Uebersee Finanz Korporation, A.G.*, which allowed the nationality of controlling shareholders to determine the enemy character of a corporation,²⁸⁷ a position previously taken by the United Kingdom²⁸⁸ and adopted in the Treaty of

283. 7 U.S. (3 Cranch) 267, 267–68 (1806).

284. The Court reversed this one-share diversity jurisdiction rule through *Louisville, Cincinnati & Charleston Rail-Road Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844) and *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 328 (1853), employing the irrefutable presumption that shareholders are citizens of the state of incorporation. Today this is resolved by statute. See 28 U.S.C. § 1332(c)(1) (2000) (“[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”).

285. See, e.g., *Hamburg-Am. Line Terminal & Navigation Co. v. United States*, 277 U.S. 138, 140–41 (1928); *Behn, Meyer & Co. v. Miller*, 266 U.S. 457, 472–73 (1925).

286. *Hamburg-Am.*, 277 U.S. at 140. Section 2 of the Trading with the Enemy Act of 1917 provided that the enemy status of a corporation was determined by the place of incorporation and place of business. 50 U.S.C. app. § 2(a) (2000).

287. 332 U.S. 480, 488–89 (1947).

288. See the classic British case of *Continental Tyre & Rubber Co., Ltd. v. Daimler Co., Ltd.*, (1915) 1 K.B. 893 (A.C.), which involved a company that was incorporated in England, but whose shares were held almost exclusively by Germans residing in Germany during World War I (only two shares out of 25,000 outstanding were not held by Germans). After the English Parliament passed a law prohibiting contracting with enemy aliens, the Court of Appeal had to decide whether the entity at issue was an enemy of the British state. The court found that the enemy alien character of the corporation’s shareholders did not deprive it of its original British citizenship. The House of Lords subsequently reversed the Court of Appeal. *Daimler Co., Ltd. v. Continental Tyre & Rubber Co., Ltd.*, (1916) 2 A.C. 307, 316 (H.L.); see Hallis, *supra* note 6, at xlvi–xlix; see

Versailles.²⁸⁹ The controlling shareholder test is now commonly used to determine the nationality of corporations—in the United States and abroad. Such a test may be labeled a majority-share or dominant-share rule (an analog of the predominant blood rule, once adopted by an Ohio court, ruling that “where the white blood predominated in a person, he is to be considered white”²⁹⁰).

The citizenship cases reveal the difficulty of defining corporate traits based on heterogeneous shareholders. When corporations were largely held by local interests, all possessing the same state or national citizenship, the matter of transferring shareholder citizenship to the corporation was somewhat straightforward. However, as corporate shareholders themselves have become more diverse, identifying a unique corporate citizenship (or race, ethnicity, or gender) based on shareholders has become more challenging and problematic. Dual citizenship or a multiracial corporate identity could solve some of these problems, but will introduce other difficulties. Perhaps a majority-share rule is the answer, assuming that a majority of the shares are held by individuals of a particular race or ethnicity. There are numerous possible solutions, but none likely to work across the full domain of potentially assignable shareholder traits.

The possibilities for defining corporate racial identity based on shareholders are as rich as, if not richer than, the ways of defining an individual shareholder’s race. Still, compared to that of natural persons, the race of corporations is in some ways more manageable. As purely legally constructed persons, the character of corporations “signifies what law makes it signify.”²⁹¹ This means that law can craft race within corporations without much of the contradiction and confusion that attend the racial determination of natural persons. And today courts can achieve this without many of the complications faced by the *Rohleder* court under de jure segregation. Today courts can more easily assign race to corporations; whether they should is another question.

C. *Risks of Recognition*

Under a de jure segregation regime, the liabilities and obligations of a racially-identified corporation would have varied substantially based on the changing racial composition of its shareholders.²⁹² This would create

also *The Queen v. Arnaud*, (1846) 115 Eng. Rep. 1485 (Q.B.) (holding that British corporation with Mexican citizen shareholders could obtain British registry for corporation’s ship).

289. See Norman Fink, *That Pierced Veil—Friendly Stockholders and Enemy Corporations*, 51 Mich. L. Rev. 651, 657 (1953).

290. Stephenson, *supra* note 199, at 40.

291. Dewey, *supra* note 6, at 655.

292. “Difficulties would certainly arise if the corporation had been composed of white men at the date of acquisition of title and later so many negroes gradually became members that the whites lost all their influence or resigned from the corporation.” Wolff, *supra* note 6, at 514. Courts could fix corporate racial fluidity by constraining it to what

significant difficulties not only for the political regime as discussed previously, but also for the corporation. Consider the likely effect on the corporation's capital accumulation efforts. The corporation would find it difficult to raise capital if its liabilities and obligations changed with the introduction of a number of black shareholders. This is because investors would face greater risk when purchasing the corporate issues. The market would respond to this risk with a lower price for the securities.

Recognizing corporate racial identity under Jim Crow would not only dampen investor enthusiasm, but it would also undermine the willingness of other parties to transact with corporations. To see this, recall first that the law requires assets owned by a corporation to be available only to satisfy creditors of the corporation and not creditors of the individual shareholders. This is the key aspect of the so-called "asset partitioning" function of the corporation.²⁹³ When an asset is known to belong to a corporation, a signal is sent to the world, and this information is relevant to many kinds of persons who deal with the corporation, including potential employees, customers, lenders, suppliers, and so forth.²⁹⁴ The simple signaling device to the world about asset partitioning would be compromised if the corporation had a fluid racial identity or if the corporate form were disregarded and the corporation treated like a collection of (black or Jewish) individuals for purposes of enforcing, for example, a racial covenant. Here we need not speculate that the court in *People's Pleasure Park* was motivated by efficiency concerns in order to see some efficiency in its decision to deny the existence of corporate racial identity.

Still, had the *People's Pleasure Park* court recognized entity racial identity, corporate investors and promoters could have committed themselves to restrictive agreements prohibiting stock transfers to members of designated racial groups. This commitment, however, would have been difficult to maintain for the same reasons that undermined self-enforcement of racially restrictive covenants among homeowners.²⁹⁵ Moreover, state courts well into the 1900s expressed considerable hostility toward restric-

existed at a particular time. Alternatively, courts could create an irrefutable presumption of shareholders' race as a means of allowing corporate racial identity to become immutable. See, e.g., *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 325–29 (1853) (employing irrefutable presumption that corporate shareholders are citizens of states of incorporation).

293. See, e.g., Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *Yale L.J.* 387, 394 (2000) (describing corporate law default rule where "corporation's creditors have first claim on the corporation's assets"); see also Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the 19th Century*, 51 *UCLA L. Rev.* 387, 391–92 (2003) (discussing Hansmann and Kraakman's analysis of asset partitioning). On defensive asset partitioning, which protects shareholders' personal assets from creditors of the corporation (i.e., shareholder limited liability), see Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 40–62 (1991).

294. I am indebted to Tom Merrill for this suggestion.

295. See Richard R.W. Brooks, *Covenants and Conventions* 11–14 (2005) (unpublished manuscript, on file with the *Columbia Law Review*).

tions on stock alienation—in large part out of fear that minority shareholders would be taken advantage of by dominant or controlling interests.²⁹⁶ Additionally, in *Sullivan v. Little Hunting Park, Inc.*, the U.S. Supreme Court refused to enforce a restrictive share agreement that was used to restrain transfer to an African American.²⁹⁷ The Court there,

296. Corporate charters and by-laws that prohibited alienation of stock were historically held void and against public policy. “The stockholder has an entire and perfect ownership over his own stock, and may sell and transfer it to whomsoever he pleases” *Brightwell v. Mallory*, 18 Tenn. (10 Yer.) 196, 198 (1836); see also *Victor G. Bloede Co. v. Bloede*, 34 A. 1127, 1129–30 (Md. 1896) (holding invalid corporate by-law requiring shareholders both to provide written notice of intent to sell stock and to give right of first refusal to other shareholders); *Sargent v. Franklin Ins. Co.*, 25 Mass. (8 Pick.) 90, 99–101 (1829) (holding that corporate charter which requires transfers of stock to be done at corporation’s offices is against general laws of Commonwealth); *Moore v. Bank of Commerce*, 52 Mo. 377, 379 (1873) (“The right of alienation is an incident of property, and a by-law prohibiting this right or imposing any restrictions on its exercise would be in restraint of trade and against public policy and therefor [sic] void.”); *Chouteau Spring Co. v. Harris*, 20 Mo. 382, 388 (1855) (holding that corporations may not restrain transfer of stock or prescribe to whom transfers might be made); *Bloomington v. Bloomington*, 177 N.Y.S. 873, 881 (Sup. Ct. 1919) (rejecting absolute restrictions on alienation of stocks, but holding that corporations may require shareholders to give right of first refusal to other shareholders when selling stock); *Ireland v. Globe Milling Co.*, 41 A. 258, 259 (R.I. 1898) (holding that Maine law does not authorize corporate by-law requiring stockholders to offer their shares to corporation before selling their stock). These courts worried that minority shareholders would be subject to abuse by dominant and controlling shareholders if restrictions were imposed on the shareholder’s ability to exercise her self-help option of alienation. The turn of the century witnessed a change in this absolute policy, with courts enforcing restraints viewed as reasonable—such as rights of first refusal—but still refusing to enforce more substantial restrictions, such as requiring the consent of all shareholders or the board of directors. See *Douglas v. Aurora Daily News Co.*, 160 Ill. App. 506 (App. Ct. 1911) (upholding president of corporation’s right of first refusal to purchase stock); *White v. Ryan*, 15 Pa. C. 170 (Ct. Com. Pl. 1894); *Petre v. Bruce*, 7 S.W.2d 43, 45 (Tenn. 1928) (allowing directors option of prohibiting transfers of stock); *Herring v. Ruskin Co-Op. Ass’n*, 52 S.W. 327, 331 (Tenn. Ct. App. 1899) (holding that by-law prohibiting transfer of stock except to the corporation itself is void); *In re Klaus*, 29 N.W. 582, 585 (Wis. 1886) (holding “a by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all of the stockholders” void as against public policy). The current judicial stance on restrictive stock transfer agreements is significantly more permissive, but still informed by a policy against enforcement of agreements that “unreasonably restrain or prohibit transferability” of the stock. *Ling & Co. v. Trinity Sav. & Loan Ass’n*, 482 S.W.2d 841, 844 (Tex. 1972); see also *Wingfield v. Contech Constr. Prods., Inc.*, 115 S.W.3d 336, 341 (Ark. Ct. App. 2003) (upholding agreement that corporation could repurchase stock at issue price rather than market price if employee-shareholder is terminated); *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 447 (Ind. 2003) (upholding “restriction precluding transfer [of stock] without Board approval”). Delaware corporate law allows stock transfer restrictions based on “designated persons or classes of persons or groups of persons” so long as the restriction is not manifestly unreasonable. Del. Code Ann. tit. 8, § 202(c)(5) (2001). Since restrictions to maintain tax advantages are presumed reasonable, identity-based restrictions (based on “Indian” identity for instance) are supported under the statute. *Id.*

297. 396 U.S. 229 (1969). A Virginia corporation, *Little Hunting Park, Inc.*, allowed “all persons in the immediate family of the shareholder to use the corporation’s recreational facilities.” *Id.* at 234. The shareholder could also assign his interest, subject to

however, was significantly motivated by the effect of enforcement on the acquisition of real property associated with the corporate stock, and it may have ruled differently had realty not been at issue.²⁹⁸

Alternatively, states, as opposed to private individuals, might have imposed state-based racial stock transfer restrictions. In 1836, the Louisiana legislature made just such an imposition, the implications of which were challenged in *Boisdere & Goule v. Citizens' Bank*.²⁹⁹ The plaintiffs ("free persons of color") asserted "that the president and directors [of the bank] refuse[d] to consider them as stockholders," even though they had (three years prior) properly subscribed to, and acquired shares in, the corporation.³⁰⁰ The corporate defendant admitted the assertions of plaintiffs but, nonetheless, contended that they were required to divest the interest of colored shareholders as a consequence of an amendatory act by the legislature. The Act, inter alia, stipulated that "no person or persons, who are not free white citizens . . . shall be either directly or indirectly owners of any part of the capital stock of [the] company."³⁰¹ The court ruled against the bank because the amendatory Act failed to give notice to the plaintiffs. State-imposed restrictions on share transfers subsequently would have been contestable under the Fourteenth Amendment, as were state restrictions on the race of corporate employees.³⁰²

The likely ineffectiveness of private and state (race-based) restrictions on stock transfers would have made the court's determination that corporations possess race quite impactful. If the court acknowledged corporate racial identity, then corporations would have paid a hefty price

board approval. The case developed when Sullivan attempted to assign his interest to Freeman, but "[t]he board refused to approve the assignment because Freeman was a Negro." *Id.* at 235.

298. "What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in [*Shelley*]." *Id.* at 236. The Court went on: "Such a sanction would give impetus to the perpetuation of racial restrictions on [real] property." *Id.* at 237. Yet it seems unlikely that a restriction of this kind, without its real property implications, would have been void prior to *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), when the Court first recognized that § 1981 and § 1982 applied to private actors.

299. 9 La. 506 (1836).

300. *Id.* at 509.

301. *Id.* at 511.

302. See, e.g., *In re Parrott*, 1 F. 481 (C.C.D. Cal. 1880). In *Parrott* the court struck down "a provision of the California Constitution [Cal. Const. of 1879, art. XIX, § 2] that prohibited all corporations chartered under California law from 'employ[ing], directly or indirectly, in any capacity, any Chinese or Mongolians.'" Thomas W. Joo, New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence, 29 U.S.F. L. Rev. 353, 376 (1994) (citation omitted). There have apparently been no formal attempts to separate black-owned and white-owned businesses, though it was certainly contemplated. See, e.g., David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 Yale L.J. 591, 632 (2004) (book review) (citing 1912 effort in Winston-Salem to racially segregate businesses after city passed comparable housing segregation laws).

(principally reflected in their costs of capital and credit) and the South's segregationist imperative would have been significantly hindered. Thus the refusal to allow corporations to have racial identities can be seen as expedient (particularly in a world that enforces racial covenants and the like) because it reduces information costs to society of understanding the implications of corporate ownership and racial identity.

VI. A NEW POLITICAL ECONOMY OF RACED PERSONS

The world, of course, is different today, which is not to suggest that we live in a postracial society; that courts are now racializing corporations evidences just the opposite. There remain considerable economic, political, and social consequences in the recognition and denial of race within corporations (as well as within natural persons).³⁰³ Legally cognizable corporate racial identity (and for that matter corporate gender identity) will bear on the award of contracts to minority-owned and women-owned businesses—with billions of dollars at stake—as well as the tax treatment of these businesses. For example, “[b]y finding that incorporation under state law deprives a business of its Indian identity,” the *Pourier* court observed, “we would force economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law.”³⁰⁴ Though the court invoked federal Indian law to justify its “racing” of the corporation, it is precisely such laws that make the enterprise of court-recognized corporate racial identity most dubious.

A. *Individual and Community Development*

While racial character has been recognized in corporations not officially designated as minority-owned,³⁰⁵ in most cases the imprimatur of

303. Look, for instance, at the battles being waged over federal recognition of Native American persons and tribes. With hundreds of billions of dollars in the balance, powerful political and economic forces are being brought to bear. The allegations that notorious lobbyist Jack Abramoff improperly accepted eighty-two million dollars from Native American tribes, and the influx of outside financing for tribes attempting to gain recognition are good examples of this. David Fahrenthold, *Some Tribes Still Outside the Casino Looking In*, Wash. Post, Dec. 4, 2005, at A1.

304. *Pourier v. S.D. Dep't of Revenue*, 2003 SD 21, ¶ 25, 658 N.W.2d 395, 405, vacated in part, 2004 SD 3, 674 N.W.2d 314. For example, had the firm's activities been organized through a partnership, rather than a corporation, the earnings of the business would flow through to the Native American owner of the firm, who was exempted from state tax. Thus, if the court rejected the claim that corporations could possess Native American identity, developers might shun incorporation in favor of other organizational forms. Of course, an imposition of corporate racial or ethnic identity is not the only means of avoiding this organizational distortion. Through judicial interpretation or veil piercing, for instance, the court could have achieved the same result without assigning a race or ethnicity to the entity.

305. The courts in these cases relied substantially on the fact that the corporations were closely held by shareholders of a single race: “This is the clearest case for a ‘black’ corporation [namely,] 100% owned by blacks and a close corporation.” Howard Sec.

federal certification has featured prominently in the court's logic of corporate racial attribution. For example, in *Organization of Minority Vendors, Inc., v. Illinois Central Gulf Railroad*, the court, relying on minority-ownership certification,³⁰⁶ observed that the "language [in *Arlington Heights*] does not foreclose the possibility that some corporations, like the plaintiffs, which have been identified as minority business enterprises under federal regulations, *do have a 'racial identity.'*"³⁰⁷ The *Thinket* court, like the *Pourier* court, also hinged its attribution of corporate racial identity on federal certification of control-ownership by minorities.³⁰⁸ The relevant certification in *Pourier* was based on the Indian Business Development Program (IBDP),³⁰⁹ and related regulations issued by the Bureau of Indian Affairs (BIA),³¹⁰ while *Thinket Inc.* was certified under the Small Business Administration's (SBA) procedures for designating minority-owned enterprises.³¹¹ The IBDP and SBA programs have similar requirements of at least fifty-one percent ownership of, and active management participation in, the corporation by specified individuals.³¹² But there is one important difference between these programs: SBA certification imposes no community restrictions, while the IBDP is limited to enterprises that serve the tribal community.³¹³

Servs. Inc. v. Johns Hopkins Hosp., 516 F. Supp. 508, 513 n.11 (D. Md. 1981); see also *T & S Serv. Assoc. Inc. v. Crenson*, 505 F. Supp. 938, 943 (D.R.I. 1981). The record in *Crenson* does not reveal that the corporation was certified as a minority business enterprise, and the opinion does not give weight to such consideration. Similarly, the court in *Rosales v. AT&T Information Systems, Inc.*, 702 F. Supp. 1489, 1494-97 (D. Colo. 1988), emphasized the possibility that corporations *could* possess a "minority racial identity" without relying on federal certification—though ultimately not deciding on whether the corporation in question had a racial identity. In the case of sole ownership, courts seem particularly inclined to use an alter ego approach. For example, in *Howard* the court held that "Howard [Security Services Inc.] is a close corporation, apparently wholly owned by Blenheim and operated by him as owner. To deal with Howard is, practically speaking, to deal with Blenheim." 516 F. Supp. at 513.

306. 579 F. Supp. 574, 588 (N.D. Ill. 1983) ("The individual corporate plaintiffs qualified as minority business enterprises under Department of Transportation regulations, 49 CFR § 265.5(j).").

307. *Id.* at 588 (emphasis added).

308. See *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059-60 (9th Cir. 2004); *Pourier*, 2003 SD ¶ 24.

309. 25 U.S.C. § 1521 (2000).

310. 25 C.F.R. § 286 (2006).

311. 13 C.F.R. § 124 (2006).

312. 13 C.F.R. § 124.105 (explaining that to be eligible for SBA program, corporation must be "*unconditionally and directly owned* by one or more socially and economically disadvantaged individuals" (emphasis added)); 25 C.F.R. § 286.3 ("[Eligible entities] shall be at least *fifty-one percent owned* by eligible Indians or an eligible Indian tribe. This Indian ownership must *actively participate* in the management and operation of the economic enterprise by representation on the board of directors of a corporation" (emphasis added)).

313. 25 C.F.R. § 286.7 ("To be eligible for a grant an economic enterprise must be located on an Indian reservation or located where it makes or will make an economic contribution to a nearby reservation").

By tethering Indian corporations to reservations, the federal Indian business assistance program restricts corporate growth in potentially profound ways given the limited resources on many reservations. To be sure, supporting infrastructure and development on Native American reservations is an appropriate undertaking for the federal government. But if the ultimate aim of the business assistance program is to develop Native American communities, then why restrict the inducements to only Indian-owned businesses? Certainly, these communities could benefit from more competition. Imagine the number of businesses that would serve reservations if they too could avoid state taxes.³¹⁴ On the other hand, if the assistance program is intended to promote Indian-owned businesses, then why constrain these businesses to communities with limited ability to support their growth? The problem, plainly, is that the program seeks to serve two distinct ends with a single tool—a strategy that invites failure on both counts.

Still more disconcerting is that the IBDP sends the clear message that the proper place for Indian businesses is on the reservation. There is much to be concerned about here, where federal agencies endorse distinctive choices and actions as appropriate to particular persons, legal or natural. This concern is compounded when courts enter the fray, defining which indicia of behaviors and choices (e.g., seeking federal certification) make a corporate person, for instance, legally black or Indian. This practice was suspect in the racial determination cases of natural persons in the nineteenth and early twentieth centuries. It is not less so today in the cases involving legal persons.

B. *The Identity Commons*

Moreover, it is not clear that the courts' current practice fulfills any necessary legal purposes. Literal possession of a specified racial identity is not essential for standing in race-based discrimination suits, and the benefits accruing to minority-owned businesses flow from the owners' racial identity, not the businesses'.³¹⁵ What, therefore, is gained by the

314. The Court chipped away at this possibility in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980), where it recognized that states may tax nonmembers even when their efforts are significantly connected to the tribes' economic and political interests.

315. There is, of course, a potential for abuse and fraud here, as suggested by the court in *Organization of Minority Vendors, Inc. v. Illinois Central Gulf Railroad*, 579 F. Supp. 574, 583 (N.D. Ill. 1983) (pointing to pervasive practice of "white male owners transferring stock to their wives," a practice that had become so widespread that "'women-owned firms account for the vast majority of MBE procurement' by the defendant railroads" (citation omitted)). But this potential exists whether corporations are deemed to possess race or not. The strongest case for the necessity of recognizing corporate racial identity has been made in disputes involving whether a corporate entity may claim state tax immunity based on Indian identity. This was the issue raised in *Pourier v. South Dakota Department of Revenue*, 2003 SD 21, ¶ 4, 658 N.W.2d 395, 397–98, vacated in part, 2004 SD 3, 674 N.W.2d 314, and *Baraga Products Inc. v. Commissioner of Revenue*, 971 F. Supp.

courts' policing of corporate racial identity? The question does not go to the more abstract issue of whether corporate persons do or should have racial identities. My concern here is much narrower.³¹⁶ What, if anything, would be lost if corporations adopted any racial identity they wished? A skeptic of this suggestion might insist that unrestrained adoption of a race by legal persons—who bear no necessary resemblance or connection to their nominal natural person counterparts—would devalue the identity, particularly for those natural persons who suffer real costs associated with that identity. Bearing none of these costs while appropriating benefits, one might argue that corporations should be expected to engage in racial adoption to an extent and manner commensurate with their extraordinary capacity to commodify. They would, in simple economic terms, engage in overproduction and generate negative externalities—identity externalities—if allowed to adopt race without restraint.³¹⁷ Therefore, the skeptic might conclude, the state should protect the “identity commons” from overuse and misuse.³¹⁸

294, 294–95 (W.D. Mich. 1997). Though these two cases come out oppositely on the issue, they both implicitly agree that the corporation itself must be deemed an “enrolled tribal member” of a federally recognized tribe to avoid being taxed by the state. *Baraga*, 971 F. Supp. at 296–97; *Pourier*, 2003 SD ¶¶ 21–28. Disregarding the corporate veil or recognizing the corporate entity as the alter ego of the single shareholder (as in *Howard Security Services, Inc. v. Johns Hopkins Hospital*, 516 F. Supp. 508, 513 (D. Md. 1981)), is rejected. The *Baraga* court in particular was hostile to the notion of a selective disregard: “[P]laintiff is asking the Court to recognize it as a corporation for all purposes except taxation. Yet plaintiff can not have its cake and eat it too.” 971 F. Supp. at 298. Revealingly, the *Baraga* court seemed trapped by its strict concession view of corporations. *Id.* at 296–98 (“[The] plaintiff cannot plausibly turn around and ask this Court to declare it immune from taxes levied by the very state which created it. . . . [T]he corporation is a creature of state law, created and existing only by virtue of state law.”). Neither court was willing to interpret the tax code in order to grant immunity to Indian-owned corporations. If veil piercing and interpretation of the tax code remain off the table (and it is not obvious why they should) going forward, such conflicts can be avoided through a regulatory or legislative adjustment by relevant tax authorities or by Indian businesses choosing alternative organizational forms—such as limited liability companies (LLCs)—that offer many of the benefits of incorporation while allowing for flow-through tax treatment. These alternatives to “racing” Indian-owned businesses for tax purposes are not without costs, but as I will discuss subsequently, they may be less costly than the implied rule in *Pourier* and *Baraga*.

316. See Ford, *Racial Critique*, *supra* note 257, at 16 (“[O]ne should be worried about a rights regime that would give judges sweeping authority to determine and enforce ideas of ‘correct’ or authentic group culture.”).

317. Akerlof & Kranton, *supra* note 15, at 717 (“A dress is a symbol of femininity. If a man wears a dress, this may threaten the identity of other men. There is an externality, and further externalities result if these men make some response.”).

318. The skeptic might also claim that the state has a right to craft race in corporate persons, in a manner it does not in natural persons, because corporations owe their very existence to the state. Indeed, as suggested earlier, it was this very view that empowered the *Baraga* court to define the boundaries of race in business forms—recognizing, for instance, that a sole proprietorship may have racial character for tax purposes, but a single-shareholder-owned corporation cannot because the state did not privilege corporate entities with such character. See *Baraga*, 971 F. Supp. at 297.

The problem with this conclusion, however, is that it presupposes a false sense of command and competence in the state's ability to regulate identity. The state cannot command the performance of race by others, whose motivations, prejudices, and preferences are often beyond their own conscious self-regulation, much less being subject to the government's clumsy tools of control. If one proclaims herself (or her corporation) black and others treat her (or her corporation) as black—whatever that means—then her black (corporate) identity is significantly performed, with the possible exception of the role reserved for the state. But the state alone cannot deny her black identity, no more than it alone can affirm it.

Beyond the state's limited command, there is also ample reason to question its competence in identifying and restricting racial identity. The Indian Arts and Crafts Act (IACA), for instance, restricts use of the brand "Indian" (with threat of imprisonment and fines) to federally certified "Indians" only.³¹⁹ Thus, as Richard Ford points out, the IACA "reifies a Native-American identity that was imposed by the federal government, in many cases over the fierce objection of Native-Americans."³²⁰ Worse yet, for those Native American artists lacking proper federal certification, the IACA questions not just the authenticity of their work, but the authenticity of their identity as Indian artists.³²¹ The state cannot manage the identity commons, nor should it attempt to do so.

C. *Production and Recognition*

Yet just because the state can neither fully control nor perfectly identify "race" does not mean it must ignore race—pretending, for instance, to be colorblind—in the face of racial injustice.³²² The state's duty to respond to injustice is compelled by law and morality, and fulfilling this

319. Indian Arts and Crafts Act, 15 U.S.C. §§ 305–305f (2000).

320. Ford, *Racial Critique*, *supra* note 257, at 89.

321. In some cases, individuals chose not to obtain federal certification because "[i]n their minds, their identity as Native-Americans arguably depends on their *independence* from formally recognized tribes." *Id.* In many other cases, the choice was made by others. Ford recounts the story of Bert Seabourn, an artist of Cherokee descent: "His work hangs in the Vatican. Like many Cherokees in eastern Oklahoma . . . his forebears didn't register with the Dawes Commission at the turn of the century. . . . Now Mr. Seabourn can't call himself an Indian artist because his ancestors aren't on the list." *Id.* at 89–90 (quoting Editorial, *Rubber Tomahawks*, *Wall St. J.*, Nov. 4, 1992, at A14).

322. Class-based affirmative action, for instance, is often proposed as one means through which the state may correct for racial disparities in higher education while not being explicitly cognizant of race. The implication of this proposition is that class is a sufficient proxy for race. However, the correspondence between class and race is not quite as strong as suggested by class-based affirmative action proponents, which implies likely inefficiencies (with resultant delays) associated with this means of correcting racial disparities. See Richard R.W. Brooks, *Efficient Affirmative Action* (Yale Law Sch., SELA Working Paper, 2005) (on file with the *Columbia Law Review*); Roland G. Fryer, Jr., Glenn C. Loury & Tolga Yuret, *Color-Blind Affirmative Action* (2003) (unpublished manuscript, on file with the *Columbia Law Review*).

duty will often oblige the state to recognize race, if only to grasp the nature of the underlying harm or injustice which is to be addressed. But the line between recognizing race and producing race is hard to draw and impossible to see. For many this is a significant concern. When well-intentioned courts resolve legal questions by recognizing race *in* corporations, they run the risk of producing race (with all its intended and unintended effects). While I am sympathetic to this concern, I do not feel that production of race is the real problem here. The problem is an understanding of race as based on the presence of some identifiable essence or characteristic existing *in* persons. The senseless search for racial essence is the real concern, as I see it, and racial production is merely an unfortunate consequence.

I have few serious qualms with racial or cultural production *per se*. Individuals should be able to produce and consume whatever they desire within the bounds of law and within the bounds established by respect of others. I take this proposition to be generally true, whether the production or consumption involves candy, rice, culture, or race. Though, admittedly, it is sometimes unpleasant to watch someone ungraciously gobbling up candy and rice, or culture and race, yet these are the goods we produce and consume. Indeed, if we extend the analogy of a market for race, then some of my concerns may be expressed in terms of excessive state production and overly intrusive state regulation of the market. The state exhibits limited competence and exerts undue influence when it participates too actively in racial production. Private actors instead should produce race and do so with minimal governmental intervention. On occasion, the state may be called upon to intervene, as it sometimes must even in well-functioning markets. Participants in such markets routinely call on courts to recognize, for instance, the existence of contracts; and just as courts exercise care not to impute or create the terms of an agreement when recognizing the existence of a contract, so too should courts be hesitant to impute or produce racial character when recognizing the existence of race or race-based phenomena.

But can there be court recognition of race without court production of race? Of course not; to see this consider again the contract analogy. In recognizing contracts the court is constructing the kinds of promises and agreements that are legally enforceable. Parties to a contract cannot write any old agreement they wish. Often it would simply be a written document without any legal force. For it to be a contract, the court must recognize it as such, and through that recognition the court is characterizing the broad determinants of contract (e.g., the presence of an offer, an acceptance, and consideration, or foreseeable detrimental reliance and such). In this sense, there cannot be judicial recognition without some construction. Importantly, the substantial force behind this construction by the court is largely due to the fact that contracts, like corporations, are legal constructs. A legally enforceable exchange of promises (a *contract*) is what the law says it is.

The court constructs what it means for agreements to be legally enforceable, which is to say that the court creates the categories into which promises may be organized as legally enforceable and not. But the court is not creating the terms of those agreements. The parties are. In making their promises and conforming to the parameters laid out by the court, the parties choose the terms of exchange. The court does not determine what, when, where, and how the exchanges should be made and by whom. The character of the contract is left to the parties to design. Similarly, the court may recognize race in persons (natural and legal) without defining the attributes that determine any person's race. In recognizing the phenomena of race the courts are in a very real sense engaged in constructing race broadly, but this does not imply that the court is determining the specific character of race in persons. Such thick construction of racial identity ought to be the domain of private individuals.

Legal judgments about race should recognize race as minimally as possible. Courts should avoid recognizing race when they can address unjust distributions of gains and penalties without imposing their own racial classification on persons (or interactions). To do otherwise risks constraining individual autonomy. The courts' recognition of the presence or absence of race in corporations should be avoided when legal questions can be resolved through conventional means. This claim applies to both *Thinket's* acknowledgement of corporate racial identity and to *People's Pleasure Park's* denial of corporate racial identity. In both cases, the courts had numerous alternatives to achieve the realized outcomes without defining the broader contours of race. Perhaps these courts had an interest in defining the contours of race, but that is not their business. The work of defining racial identity—the work of defining identity—is better left to private individual actors.

D. *Production and Identification*

If there is good reason to be concerned about excessive state production of race, might there not also be reason to worry about racial production by private corporations, which like the state wield tremendous influence over our society? Is there not a real risk that corporate racial identity, like corporate social responsibility, “will become just another commodity that businesses sell in the service of short-term shareholder wealth maximization?”³²³ Perhaps, but at the same time it is worth emphasizing that the marketing of social objects is not the same as identifying with those objects. This distinction can be seen in the market for multicultural objects.

323. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 *Tul. L. Rev.* 1227, 1239 (2002) (expressing “real concern that corporate social responsibility will become just another commodity . . . rather than the basis for any substantive change in the way business is done” (citation omitted)).

David Rieff has observed in this market an unanticipated concordance of interests between promoters of capitalism and multiculturalism. “[B]oth groups see the same racial and gender transformations in the demographic makeup of the United States,” and hence “business leaders have become multiculturalists out of these perceived necessities.”³²⁴ True enough, but it would be a mistake to equate the liberal capitalist’s commitment to multiculturalism with the commitments held by those for whom multiculturalism is part of their social identity.³²⁵ By this, I do not mean to suggest that one set of commitments is more or less instrumental than the other. The point is simply that producing and marketing cultural objects is different from identifying with those objects.

It is obvious, furthermore, that the commitments derived from cultural or racial identification are distinct from commitments to business plan and profit-seeking goals that motivate the marketing of culture and race. Indeed, what seems to bother people most about corporate cultural production is that corporations generally display no real commitment to the peoples and practices of the cultures they exploit. But, if desired, a corporation could manifest a genuine commitment by adopting a particular identity, which connects it to people and practices commonly associated with that identity. The claim here is not that corporate cultural production is unproblematic or that corporate racial identity offers a complete or even partial solution. It is rather simply a claim that the two are different.³²⁶

CONCLUSION

Judge Friendly once observed that questions about whether corporations do, can, or ought to possess race—or, for that matter, ethnicity, gender, religion, and so on—were “only [of] academic importance.”³²⁷ This certainly appeared to be the case at the time he made this observation. For even when it looked like courts were anthropomorphizing corporations, the common law tradition actually resisted assigning social identities to these entities. Relevant cases generally arose when some contractual clause or legal rule implicated characteristics normally residing in natural persons, but not in corporations, or at least not in the corporation in the case at hand.³²⁸ Courts typically resolved these cases

324. David Rieff, *Multiculturalism’s Silent Partner*, *Harper’s Mag.*, Aug. 1993, at 67, 70.

325. See *id.* (“Obviously, business leaders . . . are hardly motivated by the altruism or righteous anger that informs the views of the academic multiculturalists. But this does not make their commitment to multiculturalism any less complete.”).

326. They may, of course, overlap, as when corporations adopt racial identity as a marketing ploy.

327. *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 704 (2d Cir. 1982).

328. For example, legal documents reference qualities which only human beings are normally thought to have: “religion, race, nobility, [or] the quality of being the King’s enemy, etc.” Wolff, *supra* note 6, at 513.

by interpreting the clause or legal rule so as to produce the same outcome that would result if the corporation possessed the germane characteristic. But this is not an assignment of race to the corporation. It is pragmatic interpretation. If interpretation failed, courts might “glimpse” behind the corporate curtain and use the shareholders as a proxy for the corporate entity. This, too, is not an assignment—it is a disregard of the legal form (i.e., veil piercing). In the past, courts have pursued equitable outcomes without attributing race to corporations. There is currently a movement away from these prior practices and toward a more liberal recognition of race with respect to corporate persons. Whether this movement will turn out to be more than an academic curiosity is still to be seen. But, at the moment, it is worth observing the revealed legal treatment of race and persons at the turn of our new century.