Treading the Supreme Court’s Murky Immutability Waters

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I. INTRODUCTION

After spending several weeks analyzing the Supreme Court’s equal protection jurisprudence, my constitutional law professor asked the question that prompted this Comment. In his socratic fashion, he inquired, “What factors guide the Supreme Court in making its determination as to whether a group may be considered a suspect class?” The chosen student replied astutely, “One factor is immutability.”

The concept of immutability, as defined by the Supreme Court, encompasses traits not susceptible to change. Drawing upon this broad definition, the student noted sex and race are two characteristics that fall within the category of immutability and, accompanied by other factors, trigger heightened scrutiny analysis. The professor then posited several hypotheticals which required the student to analogize characteristics such as religion, national origin, and left-handedness, to race and sex.

Although the professor praised the student’s answers, I was troubled by the response. Perhaps, even more so, I was troubled by the professor’s approval of the response. This uneasiness was not due to the student’s method. Rather, it was a result of the Supreme Court’s unsuccessful attempt to define immutability by way of analogy.

While one may gain a superficial understanding of immutability by defining the term by analogy, a more probing inquiry into the term’s substantive definition would provide a much needed explanation as to what classifications the Supreme Court might be willing to accord heightened scrutiny. By analogizing other traits, such as religion or sexual orientation,

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2. See id. Exemplified by its Frontiero opinion, the Supreme Court has consistently used the concept of immutability to determine which legislative classifications should receive a heightened scrutiny analysis. The Supreme Court has adopted an exceedingly narrow definition of the term insofar as it has continually affixed the label to those characteristics which it feels are objectively unalterable, such as race and sex. See also infra note 4 and accompanying text.
4. See, e.g., Holland, 493 U.S. at 496. The Supreme Court has failed to provide a substantive definition of immutability; rather, the Court continually invokes the concept by way of analogy. Typically, as in Holland, the Court will state that a heightened scrutiny analysis should be afforded to legislative classifications disfavoring those with immutable characteristics, such as race or sex. This analysis reflects the degree to which the Court has paid attention to the immutability concept. Thus, immutability has been defined by comparing the nature of the characteristic in question to race or sex, rather than by a substantive discussion of the term immutable and how it applies to the proposed characteristic.
with race and sex, the Court’s analysis, perhaps strategically, circumvents the more important question as to why race is characterized as immutable.

The Court’s decision to align race (a socially constructed classification)\(^5\) with sex (a biologically-determined characteristic) leads one to believe that the Court espouses a biological justification for racial classification. This raises two questions: First, is race immutable? Second, if it is immutable, is the Court’s notion of immutability defined from a biological or sociological perspective?

These unresolved questions are the result of the Supreme Court’s unwillingness to adequately define immutability.\(^6\) Time and again, the Court’s opinions limit their evaluation of immutability to the analogizing of the proposed trait to characteristics previously classified as immutable.\(^7\) Thus, the Court has avoided a substantive, legal construction of the term.

The Supreme Court’s reluctance to define immutability in a satisfactory manner has mystified litigants. Recent efforts to elevate sexual orientation to a category of heightened scrutiny proceeded by characterizing sexual preference in biological terms.\(^8\) Although the Court itself,\(^9\) as well as legal scholars,\(^10\) contend the Court has parted from its former scientific approach to racial classification, a more careful reading of its opinions reflects the Court’s unwillingness to completely discard biological notions of race.\(^11\) In combining a failure to define immutability with an unwillingness to detach itself from scientific theories of race, the Supreme Court has led attorneys, legal scholars, and judges to believe racial classification may have biological roots.\(^12\) In turn, this confusion resulted in the development of an inconsistent jurisprudence within the lower courts, increased skepticism as to the credibility of the Supreme Court, and disappointment among those who believe the Court continued to advance, if only by implication, outdated and immoral theories.

5. See, e.g., IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 5-6 (1996). Lopez offers an engaging account as to how the law helped cultivate and perpetuate the notion of a white race.

6. See supra note 4 and accompanying text.

7. See supra note 4 and accompanying text.


9. See Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610-12 (1987). In this case, the Supreme Court highlighted the vast amount of research available regarding race’s social origins and the Court then appeared to agree that a biological construction of race was an untenable proposition. Id.


11. See, e.g., Al-Khazraji, 481 U.S. at 613.

If the Court continues to use this problematic concept, it should explicitly adopt the “effectively immutable” definition proposed by Judge William Norris in his concurrence in *Watkins v. United States Army*. However, given that the Court has recently expressed an interest in phasing out the immutability concept, instead favoring a “process analysis,” the complete retraction of this factor remains an attractive alternative. The appeal of such an approach is further enhanced by the fact that the immutability factor is only one of a host of factors used in the Court’s equal protection jurisprudence. In this regard, its elimination would pose no threat to heightened scrutiny for race.

Part II of this Comment provides an account of the sociological, historical, and anthropological basis for viewing race as a social, rather than biological, phenomenon. In doing so, this Part highlights more recent examples of race’s social origins, such as the changes in status of Jews, Italians, and the Irish. Part III discusses the origins of the Court’s equal protection jurisprudence and the development of the immutability concept. In doing so, it not only considers the caselaw through which the Equal Protection Clause was molded, but also alludes to a historical account of the racial and gender ideologies existing at the time. This contextual analysis relates social, economic, political, and historical perspectives that have contributed to the development of the Court’s equal protection jurisprudence. By drawing on Part II’s overview of the true social origins of racial classification in America, Part IV’s analysis traces this country’s evolving constructions of “black” and “white.” It begins with the construction of race as a means of justifying slavery and colonialism and ends with recent efforts to correlate intelligence with race.

Part V contends that the Court has not completely detached itself from a biological construction of race. The Court’s failure to provide a more substantive definition of immutability and its subsequent aligning of race (a social construction) with sex (a biological construction) has a negative impact on judicial consistency and credibility. Moreover, the combined effect of advancing scientific racialization is morally reprehensible. Given immutability’s problematic nature, the Court should explicitly adopt the “effective immutability” approach of Judge William Norris in *Watkins*. Doing so will avoid any misconception regarding our legal system’s perception of race and its application to the Court’s equal protection jurisprudence. If the

13. 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).
Court is unwilling to adopt this definition, then it should consider forfeiting the term altogether.

II. THE LEGAL SYSTEM'S FAILURE TO DISCREDIT PSEUDOSCIENCE

Modern scientists have discounted any plausible link between race and its perceived biological roots.15 Given the prominent role race plays in our society, many assume mainstream racial constructions are a natural phenomenon.16 Biologist Richard Lewontin, however, demonstrated the inaccuracy of this position in setting forth "the genetic case against race."17 After analyzing seventeen genetic markers in 168 populations, he concluded "there is more genetic difference within one race than there is between that race and another."18 Thus, if you were to "pick at random any two 'blacks' walking along the street, and analyze their 23 pairs of chromosomes, you [would frequently] find that their genes have less in common than do the genes of one of them with that of a random 'white' person."19 Despite such concrete scientific proof, scientists find it difficult to scourge mainstream America of inaccurate assumptions.

A. The Law Remained a Few Steps Behind Science

Not until the first half of the twentieth century did anthropologists begin to challenge the contention that race is biological.20 Embodying this shift, Franz Boas commented, "'We talk all the time glibly of races and nobody can give us a definite answer to the question what constitutes a race.'"21 Despite the scientific community's denial of a scientific basis for racial classification, legal scholars and institutions continued to hold strong to such inaccurate beliefs. Boas's cultural relativism questioned prior assumptions that rested at the foundation of many state classificatory schemes.22 He argued that an individual's perceived worth can be judged only by those of his or her own

16. Id.
17. See id.
18. See id.
19. See id.
20. See Braman, supra note 10, at 1418.
21. See id. at 1413 (quoting FRANZ BOAS, RACE, LANGUAGE AND CULTURE 309 (1940)).
22. See id. at 1411-12.
culture because the notion of a “cultured” individual is inherently relative. Armed with this proposition, Boas argued, “The development of various scientific schemes for the understanding and classification of humanity [was] one of the most creative and prolific participants in the project of modern anthropology, ow[ing] much to ‘the passions that were aroused by the practical and ethical aspects of the slavery question.’”

Boas was intent on exposing the overly broad generalizations inherent in categorizing according to race. He sought to question prior assumptions upon which racial classifications were drawn and encouraged a more exacting analysis of racial constructions. In this respect, he did not explicitly rebuke theories connecting race and physical variation. Instead, he simply called for more research.

When Gunnar Myrdal published his work, An American Dilemma, social scientists began to directly attack the previously unquestioned biological construction of race. In 1944, Myrdal inquired into the basis for using scientific terms while describing race. Eventually rejecting such a biological construction, he asserted that the concept of race has steadily declined in scientific circles, “‘being replaced by quantitative notions of the relative frequency of common ancestry and differentiating traits.’”

Evaluating the overlay in characteristics among perceived racial groups, Myrdal remarked that this overlap was so great that any theory positing a scientific construction of race was untenable. In concluding society created race, he stated, “‘[The Negro’s] African ancestry and physical characteristics are fixed to his person much more ineffaceably than the yellow star is fixed to the Jew during the Nazi regime in Germany.’”

Nonetheless, Myrdal understood the importance of race in addressing the problems of African-Americans. As a result, Myrdal wanted more than mere recognition of the social origins of racial classification. Determined to explore the subject more deeply, he contended scientific data was not to blame for

23. Id. at 1413.
25. See Braman, supra note 10, at 1414.
26. Id. at 1416.
27. See id. at 1416-18 (citing Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944)).
28. See id. at 1416.
29. Id. at 1417.
30. Id. at 1416-17.
31. See Jacobson, supra note 24, at 91. (quoting Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944)).
32. Braman, supra note 10, at 1416-17.
creating a hierarchy among the races. Rather, he ascertained racial ordering was a result "of the profound power and weight of the social institutions that created and maintained [racial classes]...."33 This reasoning had a profound impact on the future outlook of racial classification.34

Despite this apparent shift to social-science theory, the law continued to condone racialism, and thereby remained several steps behind science. As the industrial revolution spurred a thriving economy and an increasing number of immigrants arrived in the United States, one could begin to see the Court applying its traditional construction of race to a new class of individuals.

Much of the discussion in the new wave of immigration cases centered on naturalization law; deciphering who fell within the category of "free white persons" for purposes of citizenship.35 In 1922, while refusing to part from its scientific approach to racial constitutions, the Supreme Court denied citizenship to a Japanese immigrant, Takao Ozawa.36 After relying on common knowledge, as well as legal precedent, in denying Ozawa citizenship, Justice Sutherland appeared to have enough authority to support the Court's contention that Ozawa could not be considered white.37 However, Justice Sutherland pressed further. He stated that prior opinions relied on scientific authority for the proposition that the Japanese do not belong to the Caucasian race.38 In doing so, Sutherland remarked, "[prior federal and state court decisions] are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold."39 Thus, Justice Sutherland, writing for the Court, not only went out of his way to note scientific authority supported the decision, but also perceived this authority to be so credible that it was unnecessary for the Court to review these theories.

Although one might criticize the Court for relying on views linking race and science in the face of Boasian social-scientific theories, such criticism might be unwarranted because the Court may not have been familiar with Boasian instruction. In fact, George Stocking Jr. noted that Boas’s followers were a minority before the 1920s, but later became "social scientific orthodoxy."40 It might therefore be unfair to assume that the Court was acquainted with Boasian theories in 1922.

33. Id. at 1417.
34. Id. at 1416.
36. Id. at 198.
37. See id. at 196.
38. Id. at 198.
39. Id.
40. See Braman, supra note 10, at 1412 n.139.
By 1925, however, the United States judiciary was keenly aware of Boas’s research, but continued to base its decisions on outdated scientific evidence. In United States v. Cartozian, Professor Boas served as an expert witness in a federal case in which the District Court of Oregon relied on a biological construction of race in classifying Armenians as Caucasian. Although the court refused to rely solely on skin color or scientific evidence in construing race, it agreed that scientific research plays some role in making determinations. The opinion reflects this biological view by placing great emphasis on the belief that Armenians are of “Alpine stock.” The court cited in agreement language from United States v. Thind, which referred to “the dark-eyed, swarthy people of Alpine and Mediterranean stock.” Thus, the court implied that Armenians are of an Alpine stock, which has always been considered white. Although Boas’s presence at trial made the district court aware of his cultural relativism, the court continued to hold on to a biological view of race. This overview demonstrates that a biological approach to racialization dominated American racial discourse. Both the citizenry at large and the nation’s judiciary were affected by these incredible scientific assertions. Given that social scientists, such as Boas and Myrdal, had little impact until the middle of the twentieth century, the damage caused by pseudoscientists, such as Johann Blumenbach, had lingering effects on popular racial discourse as well as the judiciary’s evolving concept of race.

B. The Italians, Jews, and Irish: A More Contemporary Illustration of Race’s Social Construction

Although the American judiciary refused to detach itself from scientific racialism, during this same time period one of the more contemporary and compelling illustrations of race’s social origins emerged. Similar to the Japanese, at the turn of the century, the Irish, Italians, and Jews were perceived as distant, non-white “Others.” However, by the middle of the twentieth
century, "Immigration restriction, along with internal black migrations, altered the nation’s racial alchemy and redrew the dominant racial configuration along the strict, binary line of white and black, creating Caucasians where before had been so many Celts, Hebrews, Teutons, Mediterraneans, and Slavs." Thus, by tracing the changing categorization of these groups, theories linking science and race are inevitably undermined by the social and political justifications for the arbitrary racial splintering of humanity. Ultimately, this short term transition from "Other" to white demonstrates that one is not born white; rather, one is made so.

Similar to the scientific racialism used to subjugate African-Americans, many racial theorists asserted that the physiognomy of the Jews clearly distinguished them from other races. In *Sur l’Inegalite des Races Humaines*, Comte de Gobineau contended that the Jewish physique has largely remained the same over the centuries. He continued asserted that any changes those of the Jewish "race" have undergone are so trivial that the modern Jew is indistinguishable from those portrayed in Egyptian paintings some three thousand years ago. In light of such theories, Jacobson states, "the presumed immutability of the Jews became a staple of American science by [the] mid-[nineteenth] century."

These scientific accounts of Jewish racialism had a substantial impact on the mainstream racial ideology of the late nineteenth and twentieth centuries. Perhaps one of the more classic illustrations of the degree to which such racialism was embedded in the public's perception of the Jewish population is exemplified by the press coverage of the infamous Leo Frank case.

In 1913, Leo Frank was convicted of murdering a young female who worked at a factory owned by Frank. While some scholars assert that race played no role in his conviction, an analysis of the press coverage of the event leads one to a different conclusion. Having examined the proceedings, Jeffrey Melnick contended, "[Frank’s] Jewishness ‘came to light’ for public consumption via the press’s descriptions of the physical markers of his perversity." "Frank’s face looked the part to perfection." In an attempt to

50. *Id.*
51. See *id.*
52. See *id.*
53. *JACOBSON, supra* note 24, at 180.
54. *Id.*
55. *Id.*
56. *JACOBSON, supra* note 24, at 63.
57. *Id.* at 65 (quoting *JEFFREY MELNICK, ANCESTORS AND RELATIVES: THE UNCANNY RELATIONSHIP OF AFRICAN-AMERICANS AND JEWS* (1994) (Ph.D. dissertation., Harvard University)).
58. *Id.* (quoting *C. VANN WOODWARD, TOM WATSON, AGRARIAN REBEL, 65* (1938)).
single out the Jews as a lecherous race, the press seized upon his uniquely Jewish physical attributes. \(^{59}\) Members of the press noted Frank’s “high-bridged nose,” “bulging eyes,” and “thick lips.” \(^{60}\) In turn, “Such descriptions of Frank’s physicality conjoined nineteenth- and early-twentieth-century assumptions of lechery as a Jewish racial trait,” \(^{61}\) thereby biologically distinguishing the Jewish “race” as one of the perverse “Others.”

The Jews were not alone in this racialized, new world experience; for many Italians the promise of American opportunity was met by stereotypes of an inferior race. \(^{62}\) While Jews were characterized as lecherous, Italians were typified as mafioso and inherently corrupt. \(^{63}\) This perception of Italians as savages led New Orleans citizens to engage in anti-Italian mob violence after the trial of Italian immigrants for the murder of a Louisiana Police Chief. \(^{64}\) The popular literature published after this tragedy reflected not only a belief in the existence of an Italian race, but also a perception that this race was one of the most degenerate of all races. \(^{65}\) One such work stated, “the Sicilians have always been the most bloody-minded and revengeful of the Mediterranean races... These traits are probably owing to their Saracen origin, murder and intrigue being natural with them.” \(^{66}\) The prevailing racial discourse of the time was also reflected in a newspaper interview with a construction boss. When asked in the 1890s if Italians were white, the worker’s response was “No sir, an Italian is a dago.” \(^{67}\) Epithets, such as “dago,” a term understood at the time to mean “white niggers,” reflected the middle ground upon which Italians stood. \(^{68}\) Their supposed corrupt nature, combined with their darker complexion, led many to align Italians with African-Americans. \(^{69}\) However, unlike African-Americans, Italians were granted some legal rights, but they had
no social rights and in this respect were distinguishable from other Europeans.\footnote{See id.}

Lastly, the Irish were typified as a race whose brutish nature rendered them unfit for self-government. Similar to the Jews, theorists of the time postulated explanations as to how the demeaning traits of the Irish were linked to their observable physical characteristics.\footnote{JACOBSON, supra note 24, at 48.} This concept is illustrated in a piece published in Harper's Weekly, which “described the ‘Celtic physiognomy’ as ‘distinctly marked’ by, among other things, ‘the small and somewhat upturned nose [and] the black tint of the skin.’”\footnote{Id.} Such physical characteristics, it was argued, led to the perception that Irishmen were “‘low-browed,’ ‘brutish,’ and even ‘simian.’”\footnote{Id. at 70.} Similar to the Jews and Italians, scientists and scholars postulated a connection between the physical demeanor of the Irish and their perceived manners so as to justify their racial subjugation.\footnote{JACOBSON, supra note 24, at 70.}

Religion was also seen as a function of being Irish.\footnote{See id. at 70.} Many argued that the brute and passionate nature of the Irish Catholics rendered them “ill-suited” for Protestantism.\footnote{Id.} Since Protestants believed their tenets embodied all qualities necessary for self-government, they inferred Irish Catholicism could never lead to an autonomous state of being.\footnote{Id. at 70 (citing Romanism and the Irish Race, N. Am. Rev., Dec. 1879 at 523, 527-28).} They thereby concluded that no Protestant would ever mix with an Irish; thus, they would remain “separate in blood, separate in religion.”\footnote{See id. at 50.}

The extent to which this racial discourse was accepted is reflected by the fact that the Irish, at one point, considered themselves a unique race.\footnote{Id. at 49-50 (quoting Hugh Quigley, The Irish Race in California 61 (c.1865)).} In opposition to mainstream thought, they did not consider themselves inferior. Rather, Irish authors wrote with great racial pride: “Ireland, today, is the land where the world-renowned race is to be found in its purity and its ancient characteristics.”\footnote{See id. at 50.} Thus, the political and social dimensions of being labeled a distant “Other” led the Irish to embrace the stereotypes of their enemies so as to foster nationalism amongst themselves.

\footnotesize

70. See id.
71. JACOBSON, supra note 24, at 48.
72. Id.
73. Id.
74. See id.
75. Id. at 70.
76. JACOBSON, supra note 24, at 70.
77. See id.
78. Id. at 70 (citing Romanism and the Irish Race, N. Am. Rev., Dec. 1879 at 523, 527-28).
79. See id. at 50.
80. Id. at 49-50 (quoting Hugh Quigley, The Irish Race in California 61 (c.1865)).
In the face of the early eugenics movement, it appeared that the rest of the century would be marked by an expansion of scientific racialism. However, due in large part to the atrocities of World War II, by mid-century the Italians, Irish, and Jews were elevated to a state of "whiteness." Once the Nazi Party relied on the eugenics movement as authority for implementing racial cleansing, the academic community quickly called for "reevaluations of the race concept." Responding to this call, Julian Huxley provided a compelling argument for the eradication of racial classifications. In We Europeans, he wrote, "One of the greatest enemies of science is pseudo-science... A vast pseudo-science of 'racial biology' has been erected which serves to justify political ambitions, economic ends, social grudges, class prejudices."

In light of these devastating events, biological approaches to racial construction ultimately began to "[give] way to cultural and environmental explanations" for "the diversity of humanity." As Louis Adamic stated, "The word race should be used sparingly. There really is no Slavic, Italian, Jewish, or Scandinavian race. Such differences as exist among people are due, in the main, to different environment, history and experience." Despite a scholarly desire to pursue racial recategorization, it was evident that African-Americans, as being excluded from Adamic's list, were not one of the groups who would be realigned.

The differences between African-Americans and probationary races (meaning the Irish, Italians, and Jews) may have propelled those in power to synthesize these previously non-white races into the politically dominant Caucasian race. In this respect, these probationary races were invariably "whitened" by the presence of nonwhite "Others" in the cultural and political crucible of a given locale. However, not all racial groups disappeared. Rather, as reflected in a statement by Father John LaFargue, "minority racial groups" still existed, but were limited to "'Negro[es],' 'Mexican[s],' 'Oriental[s],' and 'American Indian[s].'"

The strikingly short transition period in which Italians, Jews, and Irish were recategorized is symptomatic of the problems in attempting to assert

81. See JACOBSON, supra note 24, at 95-96.
82. See id.
83. Id. at 99.
84. Id. at 99-100 (citing JULIAN HUXLEY, WE EUROPEANS (1935)).
85. Id. at 99.
86. JACOBSON, supra note 24, at 248 (citing LOUIS ADAMIC, FROM MANY LANDS (1939)).
87. See id. at 246-47.
88. See id.
89. See id. at 247-48.
scientific racialism. How can race exist in nature if, during the course of one century, three groups who were initially perceived as distant "Others" can become Caucasian? The most plausible conclusion is that race is not a stagnant concept. Rather, it is a product of politics, psychology, and environment. Race changes with time and geography. During the seventeenth century, Europeans demonized those of a darker complexion. This emphasis on skin color was just as powerful during the twentieth century. Therefore, when those in power faced post-World War II pressure to avoid over-racialization, they relied on the relatively lighter complexions of the Irish, Italians, and Jews in redefining the pre-existing racial categories. In this regard, the perceived superiority of lighter skin color led to the realigning and equating of these probationary groups with other, white Europeans.

The arbitrary nature of associating lighter skin with positive attributes is reflected in the social structure of Baku, an island in the Solomon Sea. On this island, the majority of the population is very dark skinned. Lighter skin is negatively viewed. Given this phenomenon, as well as the aforementioned recategorization of the Jews, Italians, and the Irish, it is apparent that the construction of race, specifically reliance on skin color, is social in nature. No scientific evidence nor biological propositions support the notion that an African-American has "black blood" or that an individual's bone structure can reveal whether he or she is African-American, Irish, Jewish, Italian, Armenian, or Caucasian. Relying on this evidence, most modern scientists unconditionally believe racial classifications stem from social, rather than biological, origins.

III. THE COURT'S PERSISTENT STRUGGLE IN DEVELOPING ITS EQUAL PROTECTION JURISPRUDENCE

Despite the growing shift towards an enlightened racial consciousness, the difficult task of educating the masses as to current scientific understandings of race is largely a result of a misinformed and inaccurate science that developed throughout the previous centuries. This junk science was largely spurned by

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91. See JACOBSON, supra note 24, at 247.
92. See Saulny, supra note 90.
93. Id.
94. See id.
95. See generally Race, Ethnicity, and Applied Bioanthropology, NAPA BULLETIN 13 (AM. ANTHROPOLOGICAL ASSOC. 1993).
96. See Begley, supra note 15.
97. See Steve Coll, The Body in Question; The Discovery of the Remains of a 9,000
those who financially benefitted from its acceptance.98 Thus, whites who
depended on African-American slaves as their most valuable source of labor
relied upon this pseudoscience in justifying their subjugation.99 As a result of
this enslavement, many African Americans were deprived of virtually all rights
afforded whites under the Constitution.

After the bloodiest war in American history, the Civil War Amendments
anticipated a greater entitlement of rights to former slaves who feared
emancipation was perhaps empty rhetoric.100 Despite these outward signs of
progress, the Supreme Court ardently reminded those of African decent that
their race was still seen as inferior. In Strauder v. West Virginia,101 Justice
Brown declared the purpose of the post-Civil War Amendments as "securing
to a race recently emancipated ... all the civil rights the superior race
enjoy."102 Given this reference to an Aristotelean Chain of Being,103 the
Fourteenth Amendment104 was interpreted against a backdrop of hierarchical
racial classification stemming from the notion of an inherent, biological
difference amongst the races – despite its token efforts to accord African-
Americans their previously denied rights.

99. See Coll, supra note 97, at W08.
100. U.S. Const. amend. XIII; U.S. Const. amend. XIV; U.S. Const. amend. XV. Collectively, the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution have become known as the Civil War Amendments. As the Slaughter-House Court noted, the Amendments repealed slavery, ensured equal protection of the laws for all individuals born or naturalized in the United States, and accorded African Americans the right of suffrage. Ultimately, they were meant to afford African-Americans all the rights previously given to white citizens. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).
101. 100 U.S. 303 (1879).
102. Id. at 306 (emphasis added).
103. See generally Aristotle, Nicomachean Ethics 16-17 (Martin Ostwald trans., The Liberal Arts Press, Inc. 1981). Aristotle posited that the good of the polis, i.e. community,
was served by individuals who understood and fulfilled their predestined roles to the best of
their ability. Id. at 17. Thus, he encouraged those who were born as slaves (who in ancient
Greece were predominantly white) to accept their role as slaves, but to work at being the best
possible slave so that he or she could serve the master who in turn could serve the community.
Id. In this respect, one should not assert any more authority than that into which he or she was born. Id.
104. U.S. Const. amend. XIV.
A. Early Development of the Fourteenth Amendment

In the *Slaughter-House Cases*, 105 the Supreme Court provided a very narrow interpretation of the Civil War Amendments. In effect, the decision limited the scope of the Amendments to "the freedom of the slave race, the security and firm establishment of that freedom, and protection [for former slaves] from ... those who had formerly exercised [full] dominion over [them]." 106 However, as the industrial revolution swept through the United States, the Court did little to advance "the freedom of the [former] slave race." 107 Instead, the Court immersed itself in a generation-long struggle over the constitutionality of state economic legislation. 108 During this time, which is commonly referred to as the Lochner Era, the Court, citing substantive due process concerns, consistently used the Fourteenth Amendment to strike down state laws seen as impinging on individual economic and property rights. 109 After this early wave of judicial interventionism, the 1930s saw a sharp retreat in which the Court exercised judicial deference and typically presumed the constitutionality of state economic and regulatory legislation. 110

As a result of its more reserved position, the Supreme Court’s evaluations of race-neutral, legislative classifications were marked by a rational basis standard of review. In *FCC v. Beach Communications, Inc.*, 111 Justice Thomas laid out this deferential standard, which serves as the paradigm for judicial restraint. Justice Thomas stated that, “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’ Moreover, because we never require a legislature to articulate the reasons for enacting a statute, it is entirely irrelevant ... whether the conceived reason ... actually motivated the legislature.” 112 Although the

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106. Id. at 71.
107. Id.
110. See, e.g., Nebbia v. New York, 291 U.S. 502 (1934). *Nebbia*, as well as *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), marked a turning point in the Court’s Fourteenth Amendment jurisprudence. During the early 20th century, the Court continually struck down regulatory legislation, arguing freedom of contract under a substantive due process analysis. However, in *Nebbia* and *West Coast Hotel*, the Court retreated from its prior contention that freedom of contract was implied through the Fourteenth Amendment’s Due Process Clause. From this point on, the Court began to exercise greater restraint, typically finding that states were validly exercising their police powers through various forms of legislation.
112. Id. at 315 (citing Lehnausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).
Court fluctuated by adding more or less bite, the aforementioned test, first set forth in *Williamson v. Lee Optical*, remains the one used by the Court when evaluating non-suspect classifications.  

B. Carolene Products's Footnote 4:

*The Supreme Court's Shift to "Protecting Discrete and Insular Minorities"*

Although the Lochner Era placed economic legislation at the legal forefront, the Supreme Court faced a number of equal protection challenges to state racial classification schemes. In *Strauder v. West Virginia*, an African-American male was convicted of murder by a jury from which all blacks were excluded. Under West Virginia law, the state extended jury duty solely to white males. While striking down the law on equal protection grounds, the Supreme Court highlighted the special role racial classifications play in its equal protection jurisprudence. Drawing on the historical and social context in which the Fourteenth Amendment was drafted, race and color were placed on a rational-basis pedestal with respect to scrutinizing state legislation that distinguished between races.  

While racial classifications were not widely focused on in the Lochner Era, during the Court's subsequent retreat, it began to show an increased interest in protecting those who were disenfranchised by the Black Codes that followed emancipation. This shift was foreshadowed by footnote four of *United States v. Carolene Products Co.*, in which the Court followed the Lochner Era dissents of Justices Holmes, Brandeis, and Cardozo, and shied

113. See id. at 315-16.  
114. See *Lochner*, 198 U.S. 45.  
116. See id. at 304.  
117. *Id.*  
118. See id. at 305-06.  
119. See id. at 307.  
120. As stated earlier, during the early twentieth century, the Court faced a host of cases challenging states' regulatory legislation on substantive due process grounds. Since *Lochner* has been viewed as the pivotal case in which a fundamental right to free contract was found in the due process clause, the period in which the Court participated in economic interventionism became known as the Lochner Era.  
121. 304 U.S. 144, 152 n.4 (1938).  
122. The dissent by Justice Holmes in *Lochner* reflects the prevailing arguments from opponents of the Court's Lochner Era jurisprudence. See 198 U.S. at 75-76. (Holmes, J., dissenting). Traditional dissenter, such as Holmes, Cardozo, and Stone argued that in finding a natural right to freedom of contract, the *Lochner* majority presumed the Constitution embodied a particular economic theory, namely laissez-faire capitalism. Conversely, these
away from substantive due process analysis. By effectively adopting these
dissents, Justice Stone expressed the Court’s growing concern that it was
engaging in an unauthorized broadening of the Civil War Amendments, and by
preoccupying itself with economic legislation, it had failed to acknowledge to
minority groups on whose behalf the Amendments were adopted. In response,
Justice Stone stated that the Court would not completely reject all forms of
interventionism. Most notably, the Court planned to take a more active role in
protecting discrete and insular minorities from undesirable legislation that
curtailed their political processes.\footnote{\cite{123}}

C. Creation of Suspect Classifications:  
Heighened and Strict Scrutiny

As exemplified in \textit{Strauder}, the Court once added special bite to its
rationality test when grappling with racial classifications.\footnote{\cite{124}} However, in
\textit{Korematsu v. United States},\footnote{\cite{125}} the Justices explicitly elevated racial
classifications to a standard requiring a more exacting scrutiny.\footnote{\cite{126}} In this
respect, the \textit{Korematsu} Court noted that all legal restrictions that invidiously
discriminate on the basis of race impede the rights of a racial group and are
therefore immediately suspect.\footnote{\cite{127}} Given its suspect nature, such legislation is
subject “to the most rigid scrutiny.”\footnote{\cite{128}} As later Courts clarified, where a
classification is subject to strict scrutiny, the legislation must pass a two prong
test.\footnote{\cite{129}} Such legislation must not only serve a compelling state interest, but the
classification “must be ‘necessary … to the accomplishment’” of its legitimate
purpose.\footnote{\cite{130}} Although the Court initially applied this standard solely to invidious
discrimination, in recent years it has expanded its application to include
remedial measures.\footnote{\cite{131}} As a result, strict scrutiny now applies to all race-based
legislation.\footnote{\cite{132}}

dissenters argued that the Constitution reflects no specific economic theory; rather, it was
carefully crafted so as to cater to the fundamentally differing views of the United States
citizenry.

\footnote{123. Carolene Prods. Co., 304 U.S. at 152 n.4.}  
\footnote{124. \textit{See Strauder}, 100 U.S. at 305.}  
\footnote{125. \textit{Korematsu v. United States}, 323 U.S. 214 (1944).}  
\footnote{126. \textit{Id.} at 216.}  
\footnote{127. \textit{Id.}}  
\footnote{128. \textit{Id.}}  
\footnote{129. \textit{See, e.g.}, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984).}  
\footnote{130. \textit{See e.g.}, \textit{id.}}  
\footnote{132. The Equal Protection Clause applies to the states via the explicit language of the
Fourteenth Amendment. U.S. CONST. amend. XIV. In \textit{Bolling v. Sharpe}, the Supreme Court
Despite creating this heightened scrutiny standard, the Court in *Korematsu* upheld the government’s internment of Japanese Americans.\(^{133}\) Although the Court found Japanese Americans were subjected to undue discrimination, a majority agreed that the threat of Japanese spies during World War II posted a sufficient threat to national security warranting state-sanctioned discrimination.\(^{134}\)

As opposed to the mildly elevated scrutiny accorded to racial classifications prior to *Korematsu*, the courts of the early twentieth century applied *Lee Optical*’s rational basis test, with no extra bite, to legislation that discriminated against women.\(^{135}\) Often, such legislation expressed the chauvinistic attitudes asserted by state legislatures. For instance, traditional gender roles likely fueled Michigan’s sexist bartending laws. These laws prohibited women whose husbands or fathers did not own liquor-licensed establishments from obtaining a bartender’s license.\(^{136}\) In upholding Michigan’s legislation under the *Lee Optical* test, one might infer the Supreme Court’s reluctance to provide greater scrutiny to gender-based legislation was motivated by a desire to preserve those laws and attitudes that encapsulated traditional gender roles. Granting greater scrutiny to such classifications would only increase the likelihood that traditional gender roles, embodied by such legislation, would be shattered and women would come closer to political and social equality.\(^{137}\)

Intent on resisting an elevation of gender classifications, during the 1970s the Supreme Court, under the guise of its established deferential standard of review, used heightened scrutiny to strike down state sanctioned gender classifications.\(^{138}\) At the same time, Justice Brennan expressed his disagreement

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133. *Korematsu*, 323 U.S. at 224.
134. *Id.* at 217.
137. *See, e.g.*, BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963). In this ground-shattering work, Friedan questioned traditional gender roles. In doing so, she called for the empowerment of women rather than their submission to paternalistic legislation.
138. In *Reed v. Reed*, the petitioner presented a host of compelling arguments, asking the Court to find sex a suspect classification. 404 U.S. 71, 76-77 (1971). Refusing to do so, the Court stretched its rational basis standard in striking down a state law favoring men as administrators of estates. *Id.* at 77. Justice Burger conceded that the state’s purpose of “reducing the workload on probate courts by eliminating one class of contests” was legitimate. *Id.* at 76. Paradoxically, such a legitimate purpose would have easily passed the *Lee Optical* test; however, the Court opted to strike down the legislation. *Id.* at 77. Applying more bite than that granted under the older standard, Burger asserted that despite the state’s legitimate
with the Court, continually urging the other Justices to categorize sex as a suspect classification.139 As reflected in Reed v. Reed and Goesaert v. Cleary, the Court refused to elevate gender to a heightened class.140 It was not until 1976, in Craig v. Boren,141 that the Court reached a compromise when it adopted an intermediate standard of review for gender classifications.142 One of the most vehement and articulate legal advocates of the 1970s Feminist Movement was future Justice Ruth Bader Ginsburg.143 After unsuccessfully advocating for the strict scrutiny standard for gender classifications, Ginsburg presented a compromise between her own position and that of the Court’s majority.144 In Craig, she attacked an Oklahoma statute that prohibited the sale of beer to males under the age of twenty-one and to females under the age of eighteen.145 Ginsburg’s strategy was to challenge a statute that discriminated against men, thereby calling all legislation that discriminates on the basis of gender into question.146 Perhaps playing on the sympathies of a male dominated Court, Ginsburg was successful in convincing its members to adopt intermediate review.147

Resting somewhere between the legitimate purposes of the rational basis test and the compelling interest of the strict scrutiny standard, the Court articulated its new standard for gender classifications.148 Under this standard, all gender classifications had to serve an important government interest.149

purpose, the statute violated the Fourteenth Amendment’s Equal Protection Clause by distinguishing solely on the basis of sex. Id.

140. See Reed, 404 U.S. at 76-77; Goesaert, 335 U.S. at 466.
141. 429 U.S. 190 (1976).
142. See id. at 198-99.
143. See Toni J. Ellington et al., Justice Ruth Bader Ginsburg and Gender Discrimination, 20 U. HAW. L. REV. 699 (1998). Despite her legal success, Justice Ginsburg suffered a great deal of discrimination in making her way to the Supreme Court. While at Harvard Law School, she was asked by the Dean how she could justify taking up one of the limited spaces in the class that could have been given to a man. Furthermore, although she was a member of the Harvard Law Review, upon graduation, not one New York City law firm would hire her. After several years, she joined the American Civil Liberties Union and began a strategic attack against gender discrimination. Prior to Craig v. Boren, Ginsburg continually argued in favor of treating gender as a suspect class, which should be afforded strict scrutiny. Although the Supreme Court ruled in her favor in Reed v. Reed, the justices refused to afford gender classifications the strict scrutiny she advocated. After a remarkable career as a legal advocate for gender rights, she was appointed to the Supreme Court in 1993.

144. Craig, 429 U.S. at 192-93.
145. See Ellington, supra note 140, at 734-35.
146. See id. at 721.
147. See id. at 737.
148. See Craig, 429 U.S. at 197.
149. Id.
Furthermore, the classification had to “be substantially related to achievement of those objectives.” However, in United States v. Virginia, the Court redacted the important government interest language of Craig, and replaced it with a stricter standard—the government now had to show an exceedingly persuasive justification for the classification. While it is apparent that this language raised the level of scrutiny afforded gender classifications, the degree to which it did so is not clear; the Court has not yet clarified whether it elevated gender classifications to strict scrutiny.

D. The Analytic Test for Subjecting Classifications to Strict or Intermediate Scrutiny

When legislative schemes disfavor groups possessing a particular trait or characteristic, there is a strong incentive for those subjected to unfavorable discrimination to have the distinguishing characteristic labeled suspect. As the level of scrutiny increases, the likelihood that the legislation in question will survive the Court’s constitutional analysis decreases. Thus, a number of classes vehemently argue that their characteristics are similar to those already elevated by the Court and should trigger a heightened standard of review. Because the Court has recognized this tendency, it has set forth several factors that guide its inquiry.

In making these determinations, the Court considers three factors. First, the Court asks whether the group has suffered a history of purposeful

150. Id.
152. Id. at 532-33.
153. Id.
154. For instance, Korematsu v. United States is the only case where the government’s policy of racial discrimination survived strict scrutiny. See 323 U.S. 214 (1944). Thus, short of national security, which itself is unlikely to pass constitutional muster in the future, it is difficult to make out a compelling government interest sufficient to justify racial discrimination. Conversely, in cases such as Massachusetts Board of Retirement v. Murgia, where the Supreme Court was forced to evaluate the legitimacy of the railroad’s mandatory retirement policy, members of the bench agreed that some may be physically capable of working past the mandatory retirement age, but concluded that age discrimination is only subject to rational basis scrutiny and in turn the mandatory retirement policy passed this test by serving a legitimate government purpose. 427 U.S. 307 (1976).
155. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Frontiero v. Richardson, 411 U.S. 677 (1973); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (arguing that legislation which discriminates on the basis of religion, sexual preference, illegitimacy, alienage, and age, should be subject to a heightened level of scrutiny).
156. See Watkins, 875 F.2d at 724-26 (Norris, J., concurring).
157. Id.
Second, it asks whether the group lacks political power to obtain redress from the government. Lastly, the Court inquires whether the discrimination embodies a gross unfairness sufficiently inconsistent with the ideals of equal protection so as to term it invidious. While making a determination regarding this last factor, the Court conducts several additional inquiries by asking whether: (1) the disadvantage is defined by a trait that "frequently bears no relation to ability to perform or contribute to society;" (2) the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; and (3) whether the trait defining the class is immutable.

Despite the central role immutability plays in equal protection analysis, the Court has failed to clarify what it means by the term. Although litigants rely on prior opinions, the Court's scant discussions on immutability leave one with little help. For instance, in *Caban v. Mohammed*, Justice Stewart's dissent relegated his immutability discussion to one sentence, tersely stating, "Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive, but often subtle discrimination." Similarly, in *Holland v. Illinois*, the majority gave a cursory look to immutability, stating "the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender or ethnic background, undeniably [gives] rise to 'an appearance of unfairness.'" These discussions are not unique. They exemplify the degree of consideration the Court typically affords immutability.

158. *See*, e.g., *Cleburne Living Ctr.*, 473 U.S. at 440.
160. *See* *Watkins*, 875 F.2d at 724.
162. *See*, e.g., *Cleburne Living Ctr.*, 473 U.S. at 440.
163. *See*, e.g., *Frontiero*, 411 U.S. at 686.
164. *See supra* text accompanying notes 2 & 4.
165. *See* *Caban v. Mohammad*, 441 U.S. 380 (1979) (invalidating a New York law granting a mother, but not the father, of an illegitimate child the right to block the child's adoption by withholding consent).
166. *Id.* at 398 (Stewart, J., dissenting).
168. *Id.* at 496.
169. *See* *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (declaring "we acknowledged that governmental classification on the immutable characteristic of race runs counter to the deep national belief that state-sanctioned benefits and burdens should bear some relationship to individual merit and responsibility); see also *Frontiero*, 411 U.S. at 686 (stating "since sex, like race and national origin, is an immutable characteristic"
Because the Supreme Court has yet to provide a thorough definition of "immutability," lower federal courts have been forced to ascertain a trait’s immutability by speculating as to the Supreme Court’s intended definition and analogizing the nature of the trait to race or sex. In *High Tech Gays v. Defense Industrial Security Clearance Office*, the Ninth Circuit addressed whether policies and laws classifying individuals according to sexual preference are subject to strict scrutiny. By engaging in the aforementioned analysis, the court concluded homosexuals are not a suspect class.

While addressing immutability, the court relegated itself to a cursory discussion comparing homosexuality to race. In finding that classifications based on sexual preference are not subject to strict scrutiny, Judge Brunetti stated, "Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from [a] trait such as race ...." This limited definition, analogizing race and sexual preference, can be traced to the Supreme Court’s failure to clarify what it considers immutable.

While the Court has set forth some fairly comprehensible parameters in its equal protection jurisprudence, immutability does not fall under this heading. The scant attention paid to this term has left its meaning ambiguous. In turn, such confusion has trickled down to lower courts, litigants, and legal scholars.

IV. AMERICA’S EVOLVING RACIAL IDEOLOGY

The Supreme Court has announced that race and sex are immutable, without providing a rationale for its announcement. Given the lack of authority supporting this position, lower courts and litigants are increasingly left wondering how to interpret immutability. Is the Court suggesting race is forever unalterable, both in reality and theory? Is race immutable because one is born black, white, Asian, or Latino? Perhaps race is simply a matter of perception, but the Court has determined it is immutable because it plays such a prominent role in our everyday lives. Given the Court’s reliance on analogies, how can lower courts or litigants argue that a characteristic such as religion is immutable without answers to the aforementioned inquires? These answers would undoubtedly aid in illuminating what causes race to be immutable. The

determined solely by the accident of birth, the imposition of special disabilities . . . would seem to violate ‘the basic concept of our system’ ....

170. The Court has continually given a cursory overview of the immutability concept; in turn, providing no substantive definition. Rather, the Court typically reflects upon characteristics such as race, sex or national origin, noting that they embody the qualities of immutability. *See also supra* text accompanying notes 2 and 4.
171. 895 F.2d 563 (N.D. Cal. 1990).
172. *Id.* at 573.
173. *Id.*
IMMUTABILITY WATERS

The problematic nature of these questions is largely embedded in a historical analysis of racial classifications and their effect on judicial opinions. Thus, tracing evolving perceptions of racial classifications is helpful. While chiding those who cling to a scientific perspective on racialization, this Part examines whether the judiciary adopted an implausible approach and whether it continues to do so at present.

Although differences in skin color have existed throughout human history, the concept of race is a fairly recent phenomenon. Starting in the seventeenth century, scientists, scholars, and legal institutions began to awaken racial consciousness by asserting not only that humanity could be separated into races based on skin color, but also that scientific authority supported this racialization. Drawing on this phenomenon, eighteenth century Europeans and Americans who relied on the works of Johann Blumenbach and J.H. Van Evrie, could easily justify the subjugation of Africans by claiming that such persons were “made” to be conquered. Due to the plethora of scholarship supporting a biological distinction among the races, it was not until recently that scientists and scholars were able to penetrate, and ultimately refute, this scientific perspective by presenting the more plausible contention that racialization is a social phenomenon. Despite this understanding, it is not at all clear that this country’s judiciary has unreservedly perceived race as a social, rather than biological, phenomenon.

A. Social Constructions Prior to the Seventeenth Century

Unlike differences between the sexes, which have always been recognized amongst members of society, the concept of race did not appear in popular literature until after the fifteenth century. As Professor C. Loring Brace notes, race was not mentioned in the original language of the Bible nor in the writings of the ancients. Herodotus, the heralded Greek historian, made no

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174. See, e.g., Saulny, supra note 90.
175. Id.
176. See Jacobson, supra note 24, at 31 (citing Johann Fredrich Blumenbach, On the Natural Varieties of Mankind (1865)).
177. See id. at 33.
178. See generally id.
179. See generally The Holy Bible. The Bible may not in fact be the oldest text available, but it is the earliest work which the average individual can point towards. In the Book of Genesis, Adam and Eve were created several days after the sun, moon, and stars. Genesis 1:14-27.
180. See Michael Omi & Howard Winant, Racial Formation in the United States From the 1960s to the 1980s 64 (1986).
181. See Saulny, supra note 90.
reference to races or the concept of race in his writings. Furthermore, during Marco Polo’s thirteenth century travels throughout Europe and Asia, he classified people as “idolaters” or “the eaters of this or that,” rather than according to their skin color.

Initially, since wealthy European farm owners recruited indentured servants from England, there was little need for racial construction to legitimize the exploitation of cheap labor. Rather, due to the English recession during the seventeenth and eighteenth centuries, those eager for work and land traveled to America to find an abundance of each. In the labor system of the time, landowners made no distinction between white and black indentured servants. This reflects the fact that race was a non-factor in America’s early labor markets. However, with the revitalization of British markets, work and land in England became increasingly available, prompting many to return home. In light of this departure, wealthy American landowners were forced to turn elsewhere for a cheap labor supply. This demand was by no means limited to the American colonies. For instance, European colonies in the Caribbean Islands were affected just as greatly by these economic trends and participated in calling for cheap labor.

Fortunately for those European merchants and explorers who had already begun to dissect Africa, this demand could not have come at a better time. Capitalizing on a more stable community, European traders utilized their advantages in dominating and capturing Africans. It has been argued that European domination should be attributed to historical happenstance—factors such as geography and climate. Nonetheless, such domination began and Europeans would soon need to rationalize their enslavement of others.

182. Id.
184. LERONE BENNETT JR., supra note 98, at 36.
185. Id.
186. Id. at 35-37.
187. Id. at 37.
188. Id.
189. BENNETT, supra note 98, at 42.
191. See id.
192. See Saulny, supra note 90.
B. The Great Chain of Being and Its Role in American Law

Given the need to justify involuntary servitude, numerous theories arose proposing a natural, or divine, hierarchy among the races. While using skin color to rank those they discovered throughout the world, Europeans determined that individuals who were black and brown rested at the bottom of a natural hierarchy. Such theorists justified this position by stating, "it is white in color, which we may fairly assume to be the primitive color of mankind, since ... it is very easy to degenerate into brown, but very much more difficult for dark to become white." America’s early legal scholars did not discount these scientific and popular conceptions of race. The notion of a Great Chain of Being was embedded in both colonial legislation and early judicial opinions.

While leading the scientific charge for racial classification, Johann Frederich Blumenbach, an eighteenth century scholar, presented the prevailing view on European racial ideology. Blumenbach, relying on differences in complexion, hair, and skull, divided the races into five classes: (1) the Caucasian, or white race, which consisted of mainly Europeans; (2) the Mongolian, or yellow race, who are currently represented by Asians; (3) the Ethiopian, or Negro race, who hailed mainly from Africa; (4) the American, or red race, which were largely Native Americans; and (5) the Malay, or Brown, who were mostly inhabitants of India. The arbitrary nature of these classifications is perhaps best reflected in his explanation for why he chose the term Caucasian for whites:

I have taken the name of this variety from Mount Caucasus, both because its neighborhood ... produces the most beautiful race of men ... and because all the physiological reasons converge to this, that in that region, if anywhere, it seems we ought with greatest probability to place the autochthones of mankind ... That stock displays ... the most beautiful form of the skull, from which, as from a mean and primeval type, the others diverge.

194. Id.
195. JACOBSON, supra note 24, at 1 (quoting JOHANN FREDRICH BLUMENBACH, ON THE NATURAL VARIETIES OF MANKIND (1775)).
196. LÓPEZ, supra note 5, at 5-6. The popularity and general acceptance of this view of race is demonstrated by the fact Blumenbach’s classification system was cited by the ever popular Webster’s Dictionary. Id.
197. JACOBSON, supra note 24, at 1 (quoting BLUMENBACH, supra note 176).
Blumenbach was not alone in promoting scientific racialism. Many scholars of the time followed Charles Darwin’s lead, transposing his views on nature to Euro-American imperialism. These scholars justified their stances by noting that Darwin himself contemplated such imperialism when he stated, “When civilized nations come into contact with barbarians the struggle is short.” Others, such as J. H. Van Evrie, drew upon Blumenbach’s theories and added a religious twist. Van Evrie went further than Blumenbach in exploring the human cranium as means of justifying the white ascendancy. In reference to the white face he stated, “beautiful as they may be to the eye, are rendered a thousand times more so by our consciousness that they reflect moral emotions infinitely more beautiful. Can anyone suppose such a thing possible to a black face?” Van Evrie asserted that God created each of his creatures to serve a useful purpose. In light of this purposeful creation, blacks were not only slaves by religious right, but slavery represented their “natural position.”

Long debate has ensued as to whether the law created this biological construction of race or whether scientific racialism prompted a change in the law. Regardless of which came first, it is undisputed that legal institutions were not immune from this phenomenon. During the Post-Reconstruction Era, the Supreme Court considered several cases that reflected the prevailing belief in the natural inferiority of African-Americans. In Plessy v. Ferguson, despite agreeing that blacks may have some political rights, Justice Brown stated, “in the nature of things, [the Equal Protection Clause] could not have been intended to abolish distinctions based upon color, or to enforce social, as

198. Charles Darwin, perhaps the most renowned scientist, popularized the concept of “survival of the fittest.” Darwin postulated that those species which survived did so as a result of their being able to adapt to their environment. Thus, those animals with rewarding physical characteristics who continually procreated are least likely to suffer extinction. During the early 20th century, many social theorists applied Darwin’s theories to civilized society and the marketplace in creating what was known as “social Darwinism.” See CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (London 1859) available at http://pages.britishlibrary.net/charles.darwin/texts/origin859/origin_fm.html. (last visited Feb. 7, 2003).
199. JACOBSON, supra note 24, at 36.
200. Id. (quoting DARWIN, supra note 198).
201. See id. at 37.
202. Id.
203. Id. at 37 (quoting J.H. VAN EVRIE, THE NEGRO AND NEGRO SLAVERY 89, 108 (1863)).
204. JACOBSON, supra note 24, at 37 (quoting VAN EVRIE, supra note 203).
205. Id.
distinguished from political equality...."207 Thus, the Court conceded that there is a natural distinction between the races, even if it is not legally or politically enforced.208 The outcome of the case prohibited blacks from riding in railway cars reserved for whites. Thus, the Court’s statement that the two races need not socially intermingle enforced segregation meant to ensure the superiority and purity of the white race.209

The Court pressed this biological construction by explicitly referring to physical distinctions between races.210 It stated, “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.”211 Rather than distinguish between skin color, a physical characteristic, and race, a socially constructed trait, the Court unreservedly supported the notion that race has always existed in physical variations.212

Lastly, while considering statutory schemes distinguishing among the races, the Court implicitly rejected a sociological approach to racial construction. It instead supported those statutory classifications drawn according to blood content. During the Post-Reconstruction Era, numerous state legislatures proposed and passed what became known as Jim Crow laws. These laws aimed to keep the populations segregated.213 However, because visible characteristics could not always suffice in discerning one’s race, many states adopted a system of segregation focusing on blood content.214 In doing so, these states purported that since black and white blood were discernible, a clear boundary could be drawn where one’s formerly white blood had been contaminated by a requisite amount of black blood so as to render the individual “colored.”215 Although the Plessy Court was unwilling to conclude that an objective blood-based boundary existed by which one could distinguish blacks from whites, it still endorsed such an arbitrary classification system.216 By deferring to state authority in the creation of classificatory schemes, it nonetheless supported the view that black and white blood exists. Yet, it refrained from drawing a bright-line distinction between the two. Thus, not

207. See id. at 544 (emphasis added).
208. Id.
209. See id.
210. Id. at 551.
211. Plessy, 163 U.S. at 551.
212. Id.
213. JACOBSON, supra note 24, at 232-33.
214. See Braman, supra note 10, at 1394.
215. Id. Although state legislatures may have used the terms “white” or “black blood” as a mere symbol of one’s ancestry, the fact that the races were spoken of in terms of blood content nonetheless led the masses to believe that scientific differences existed among the races.
216. Plessy, 163 U.S. at 552.
only did state laws reflect the prevailing view that race has biological origins, but the Supreme Court itself also endorsed the state’s scientific racialism.

Many attempted to link race and science. However, the arbitrary nature of statutory schemes made it inevitable that proof of race’s social construction would occasionally appear. The states’ inability to agree on a fixed percentage of blood for determining racial status was a true reflection of the capriciousness of these classificatory schemes. For instance, “while North Carolina held to the ‘one drop rule,’ in which a person with any African ancestry was classified as a negro, Virginia and Michigan held to the one-fourth rule.”217 Ohio’s scheme differed from these in that the state deemed white anyone whose lineage was one-half white.218 Such inconsistency undermined the popular belief that race existed in nature. These inconsistences stemmed from the fact that race itself was an arbitrary construction. Thus, those desiring to understand true origins of racial classification were able to recognize that these inconsistent ratios reflected an inability on the part of scientists and legislators to create a scientific link to racial constructions.

Those who were not inclined to acknowledge race’s social nature were often left with no choice but to circumvent the topic to maintain the status quo. The Court’s opinion in Plessy is illustrative of this strategy.219 Although the Court acknowledged that no singular definition or racial boundary exists, it refused to reprimand the states for attempting to create and assert such a definition.220 Rather than concede that race has no biological roots, the Court effectively avoided a discussion of arbitrary line-drawing by simply deferring to the states.221 In this respect, even those in favor of racial separatism could not avoid recognizing the shaky ground upon which racial classifications existed. When confronted with this problem, they chose to ignore it.222 However, as new and competing theories on the origins of racial classification developed, judges were stripped of their scientific backing in distinguishing the races. As a result, the deference previously accorded state legislatures was called into question.

While it would be easy to say that the Court had been led astray by the prevailing scientific beliefs of its time, it is by no means clear that all scientists have given up on drawing correlations between biology and race. In the 1990s, Doctors Charles Murray and Richard Herrnstein revitalized the trend of linking

217. See Braman, supra note 10, at 1394.
218. Id.
219. See Plessy, 163 U.S. at 537.
220. See id. at 551.
221. See id. at 549.
222. See id.
In their book, The Bell Curve: Intelligence and Class Structure in American Life, they accurately portray the gross economic disparity between whites and minorities. In relaying these statistics, however, their basic contention is that inherited intellectual differences are the cause of this inequality. By implication, they purport that blacks and Latinos lack the inherent intellectual capacity to elevate their financial status. Such language is resoundingly similar to the views expressed by early twentieth century "whites" with respect to Jews, Italians, and Irish. However, the Bell Curve represents these previously impoverished groups who were ostracized from mainstream society as white. Drawing on the similarity between previously racialized groups and the current plight of minorities, critics of the Bell Curve contend that unquantifiable data, such as social circumstances are the true cause of this economic disparity rather than one's IQ. In this respect, the fight against a minority of scientists who continue to expound older scientific theories of race moves forward and as it does, it inevitably taints the perceptions of judges throughout this country.

V. THE COURT'S PERSISTENT STRUGGLE WITH THE IMmutability Concept

In reflecting on the transition of the Jews, Italians, and Irish, Matthew Frye Jacobson asserted that "by the 1950s what was 'forgotten' was that these groups had ever been distinct races in the first place." While some may fail to remember, it is important that members of the American judiciary do not forget what this transition period symbolizes: race's truly social origins. As courts struggle with race and immutability, it is imperative that they do not relapse into agreeing with the pseudoscience of the past. Because the Supreme Court has failed to give a precise and substantive definition of immutability and has instead used race as a primary example of its manifestation, one will inevitably appeal to an individualized and personal understanding of racial classifications when discerning what the Court means by immutable. Thus, as

224. Id.
225. Id.
226. Id.
227. Id.
228. See, e.g., Claude S. Fischer et al., Inequality by Design: Cracking the Bell Curve Myth (1996).
229. Jacobson, supra note 24, at 246.
race has been understood in various ways—both biological and social—so too can the concept of immutability.

However, given the overwhelming majority of scientists that have settled on the nature of racial classifications, the Court should settle on a definition. The Court's failure to do so may have a resounding impact on the nation's perception of judicial credibility and consistency. First, where the Court continues to appeal to an outdated and discredited biological construction of race, the Court undermines its credibility. Second, where the Court purports to follow current, social-scientific theory in construing the immutability concept, but alludes to scientific racialism, lower courts are left with little guidance. In turn, the racial perceptions of lower courts will often guide their interpretation of immutability. This causes inconsistency in determining which traits are elevated to a level of heightened scrutiny. While the Supreme Court purports to follow the social scientific approach in its comprehension of race, it is apparent from the Court's opinions that it continues to foster a biological conception for racial classification.

The Court should explicitly adopt Judge Norris's "effective immutability" terminology set forth in Watkins v. United States Army. However, if the Court is unwilling to provide such a substantive definition, it should consider discarding immutability altogether.

A. The Ninth Circuit to the Rescue: Interpreting the Supreme Court's Definition of Immutability

Recognizing the Supreme Court's problematic reliance on analogy, Judge William Norris of the Ninth Circuit Court of Appeals interpreted the term on behalf of the Court. In his concurrence in Watkins, Judge Norris examined the traits that the Supreme Court decided are immutable, concluded the Court's interpretation of immutability must fall, at the very least, within his "effective immutability" definition. Judge Norris outlined three potential interpretations of equal protection immutability. First, he suggested immutable could mean "strictly immutable" in the older, Blumenbachian sense. However, he contended that the Supreme Court has never meant that "members of the class [are] physically unable to

230. 875 F.2d at 699, 726 (Norris, J. concurring).
231. Id. at 725-26.
232. See id. at 725-27.
233. Id. at 726.
234. See id.
change or mask the trait defining their class." Reviewing the traits the Court has accepted as immutable, he noted one’s sex is alterable by operation, aliens may naturalize, lighter skin blacks can pass as white, and pigment injections may be used to change skin color. Second, Judge Norris offered an “effectively immutable” interpretation, which he contends the Supreme Court has adopted. He stated, “At a minimum ... the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.” Lastly, he suggested that given a broad reading of the Supreme Court’s caselaw, immutability could “describe those [characteristics] that are so central to [one’s personhood]” that no matter how easy it may be to alter them, it would be offensive to ask one to change. Author Kenji Yoshino referred to this interpretation as “personhood immutability.” In conclusion, Judge Norris asserted one can presumably rely on the “effective immutability” standard and might adopt the “personhood immutability” approach under a more capacious interpretation of the Court’s caselaw.

B. Did the Ninth Circuit Get it Right?

While Judge Norris has seemingly cleared the muddy waters left by the Supreme Court, it is not clear his explication is sound. Not only have legal scholars disagreed with Norris’s interpretation, but Supreme Court opinions reflect diverging interpretations of immutability. In addition, litigants interpret the Court’s immutability concept as closer to that of "strict immutability." As Professor Kenji Yoshino contends, the Ninth Circuit acted hastily in concluding that the Supreme Court’s caselaw, if read broadly, supports

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235. Watkins, 875 F.2d at 726.
236. Id.
237. See id.
238. Id.
239. Id.
241. See Walker, 875 F.2d at 726.
242. See Yoshino, supra note 240, at 494 (disagreeing with Judge Norris’ interpretation); see also Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (describing race, sex, and national origin, but not alienage, as immutable characteristics).
243. In Watkins, Judge William Norris used the term “strict immutability” to describe the most limited of the three potential definitions of the concept of “immutability.” In light of its decisions as well as characteristics the Supreme Court has afforded heightened scrutiny, Judge Norris contends that such a limited definition could not possibly reflect the meaning of immutability intended by the Court.
"personhood immutability." While personhood immutability focuses on whether a person should change, the Supreme Court has continually "emphasized the descriptive issue of whether a person can control a characteristic." Yoshino cites Frontiero v. Richardson, a decision where the Court described race, sex, and national origin as immutable, but not alienage. Furthermore, he contends that the courts have continually drawn a distinction between corporeal and social traits. If a trait is perceived to be defined by nature rather than by culture, then the courts are more apt to label it immutable. Thus, race and sex are deemed immutable. However, the courts are unwilling to label traits immutable where they are perceived to be defined by culture. For instance, religion and alienage do not fall within the immutable category. Thus, Yoshino concludes the Ninth Circuit's interpretation is not a true reflection of the Court's immutability analysis.

Although the Supreme Court purports to view race as a social phenomenon, an analysis of its opinions reveals that the justices refuse to completely detach from strict immutability. In Saint Francis College v. Al-Khazraji, the Supreme Court recognized the evolution of race theory and agreed that most scientists now perceive race as a social phenomenon. However, the Supreme Court went on to state "the Court of Appeals was thus quite right in holding that §1981 'at a minimum' reaches discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive grouping of homo sapiens." This statement is a clear reflection of the residual effects of scientific racialism. Yet, shortly afterwards, the Court paradoxically asserted that distinctive physiognomy is not necessary to qualify for §1981 protection. As Professor Neil Gotanda contends, "the Court's equivocating in Saint Francis College suggests that the Justices are not yet comfortable with abandoning entirely the security of

244. See Yoshino, supra note 240, at 494.
245. Id.
246. Id.
247. Id. at 495.
248. See id. at 494.
249. Yoshino, supra note 240, at 491.
250. 481 U.S. 604 (1987). In this case, Majid Ghaidan Al-Khazraji, a college professor, argued that Saint Francis College violated 42 U.S.C. § 1981, which prohibits racial discrimination in the creation of private as well as public contracts, by failing to afford him tenure. Id. at 606. The Supreme Court affirmed the Third Circuit opinion, which held that although Arabs are presently considered white, Al-Khazraji can still suffer racial discrimination as an Arab under § 1981. Id. at 608.
251. Id. at 610 n.4.
252. See id. (emphasis added).
253. Id. at 613.
immutable racial categories. Such subtleties add to the perpetuation of biological constructions conjuring up older perceptions of race, justifying the inferiority of such groups.\textsuperscript{254} Thus, where the Court equivocates as to race's conceptual origins, it creates confusion in its definition of immutability.

This confusion is reflected by the arguments presented by litigants. For example, in \textit{Dahl v. Secretary of the United States Navy},\textsuperscript{255} Mel Dahl's attorney attempted to elevate homosexuality to a suspect class. In doing so, he asserted that sexual orientation is genetically predetermined.\textsuperscript{256} Yet, such an argument would fly in the face of reason if the litigants agreed with Judge Norris's argument that the Supreme Court has asserted an "effective immutability" standard. Judge Norris explained that neither sex nor race are biologically predetermined. If Dahl's attorney believed this standard was held by the Supreme Court, it would make little sense to argue that sexual orientation is biologically predetermined while sex, itself, is not. It seems likely that his attorney perceived the Supreme Court held a biological view of race and sex. The Dahl plaintiff's argument was not an anomalous one,\textsuperscript{257} thereby reflecting the common belief that the Supreme Court has not accepted Judge Norris's "effective immutability" standard. Instead, the Court's approach rests much closer to "strict immutability."

It is apparent that the legal community disagrees with Judge Norris's valiant attempt to read an "effectively immutable" interpretation into the Court's ambiguous immutability concept. Although the Court purports to engage in a social-scientific understanding of race, it cannot shake old scientific theories of race.\textsuperscript{258}

C. Implications of the Ambiguous Nature of Immutability

Where immutability requires an understanding of racial classifications, the degree to which the Court clings to biological notions of race will inevitably pose a number of problems. Not only will lower courts be left with little guidance as to which characteristics warrant heightened scrutiny, but the judicial credibility of the Supreme Court itself is undermined when members of the Court espouse outdated scientific theories of race.\textsuperscript{259}

\begin{itemize}
\item \textsuperscript{254} Neil Gotanda, \textit{A Critique of "Our Constitution is Color-Blind,"} 44 STAN. L. REV. 1, 30 (1991).
\item \textsuperscript{255} 830 F. Supp. 1319 (E.D. Cal. 1993).
\item \textsuperscript{256} \textit{See id.} at 1323-24.
\item \textsuperscript{257} \textit{See} Steffan v. Perry, 41 F.3d 677, 688 (D.C. Cir. 1994). In Steffan, plaintiff's attorney similarly argued that homosexuality is genetically predetermined and therefore the trait should be characterized as suspect.
\item \textsuperscript{258} \textit{See} Gotanda, \textit{supra} note 254, at 29.
\item \textsuperscript{259} \textit{Id.}
\end{itemize}
When interpreting the immutability concept, lower courts have been left the choice of delineating the Supreme Court’s interpretation (which as detailed above, has been shown to be an exceedingly difficult task) or imposing their own definitions of immutability. Under either scenario, an inconsistent jurisprudence will inevitably result. This inconsistency is perhaps best reflected by the conflicting stances taken by lower courts addressing the immutable nature of religion. Although the Sixth Circuit has found that religion does not fall within the class of immutable traits, the Seventh Circuit has consistently aligned religion with race and sex in classifying the characteristic as immutable. Recently, the Eastern District of Pennsylvania expressed a distinct view. It stated that religion does not technically qualify as immutable, but because it is “a characteristic so deeply rooted for most that it is almost immutable.” Thus, the Supreme Court’s failure to adopt a substantive definition of immutability, combined with its equivocating view on the nature of racial classification, has left lower federal courts with little guidance in deciphering which traits should be aligned with race and accorded heightened scrutiny.

This failure has weakened the Court’s credibility. As the Court conceded in Al-Khazraji, current scientific theory overwhelmingly supports the position that racial classifications are social in nature. Because law touches every aspect of society, it is absurd to expect judges to have an expert understanding of every area to which cases may extend. For this reason, it is imperative that given a case involving issues in which members of the Court do not have the requisite background, it displays a willingness to defer to relevant scholarship. In the present situation, the Court should recognize that pseudoscience has historically dominated mainstream racial discourse. The Court should acknowledge that it has been tainted by residual misconceptions. As a result, it should afford special deference to scientific authority when grappling with discussions of racial classifications. Instead, the Court has only purported to afford such deference. As exemplified by Saint Francis College, members continue to assert lingering Blumenbachian precepts. Such equivocating inevitably strikes a blow at the Court’s credibility.

Lastly, and most importantly, regardless of whether the Court’s allusions to scientific racialization are conscious, such statements are nonetheless morally reprehensible. While most modern scientists have unreservedly discredited all biological approaches to racialization, the Court is unwilling to

264. Id.
completely detach itself from those theories which fostered and sanctioned the institution of slavery. Time and again, the judicial branch has expressed sorrow for the atrocities committed upon so many African-Americans. Although the legal walls of slavery have been shattered, the mental barriers that preserved this abhorrent institution have only been gradually eroded. It was the Euro-American mind that created this justification for slavery and only that mind can fully end it. In this respect, more important than the rulings upholding equality, is the content of the Court's opinions in which they did so; it is here. In order to take the moral highroad, the Court must avoid its occasional allusions to scientific theories of racial classification.

The seemingly harmless problem of according no substantive definition of immutability has left our judiciary in a precarious state. As the legal community perceives the Court as holding on to outdated theories of racial classification, the Court must evolve to preserve judicial integrity and consistency. The moral aspect of this quandary should provide enough motivation for the Court to remedy this problem.

D. Viable Remedies

The Court's failure to define immutability has a negative impact on judicial decisionmaking. This problem is only exacerbated by the Court's analogizing characteristics to race as well as its continued allusions to scientific racialization. To alleviate the aforementioned concern, the Court should discontinue immutability by analogy. In its place, the court should explicitly adopt Judge Norris's "effectively immutable" standard. Such a solution is especially promising given that the Court has already purported to adopt this position. However, if the Court is unwilling to do so, given the declining use of the immutability factor coupled with the minimal value it adds to equal protection analysis, the Court should discard the concept altogether.

Because the Court has already expressed a desire to treat race as a social phenomenon, it should explicitly adopt the "effectively immutable" standard. By adopting this standard, lower courts would no longer need to analogize characteristics to race. If the Court explicitly stated that an immutable trait is one that is exceedingly difficult to change, lower courts and members of the legal community at large would understand that where the Court has stated that

265. See, e.g., Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954). In Brown, the Court expressed its sympathy for children who received a low-grade level of education due to a continued belief in the inferiority of minorities. Id. at 494. Moreover, the Court displayed its distaste for the language in Plessy v. Ferguson that sanctioned a half century of segregation. Id. at 494-95.

266. See, e.g., Al-Khazraji, 481 U.S. at 610-13 (purporting to discredit scientific theories of racial classification).
race is immutable, it means race is a social phenomenon. The Court would also bolster its credibility by providing a clearer perception of racial classification and acknowledging the legitimate role of modern science in law. Moreover, lower courts would undoubtedly be relieved of the onerous task of deducing whether the Supreme Court perceives as immutable only those qualities that are biologically determined. Where a trait need not be strictly immutable, lower courts would more consistently concur in the characteristics they accord heightened scrutiny. Lastly, the negative imagery invoked when alluding to scientific theories of race would be cast aside. The Court would no longer support theories advancing slavery and the denigration of one race to another.

In the alternative, if the Court is unwilling to adopt the "effectively immutable" standard, discarding the immutability concept altogether is a viable solution. Doing so would have little impact on the Court's equal protection analysis, and would remedy many of the aforementioned concerns. In this regard, perhaps the most effective solution to the Court's equivocation is simply deleting the immutability concept from its equal protection analysis. In doing so, the Court would no longer have to grapple with the difficult issues it faces when interpreting immutability. Although this suggestion merely circumvents some deeper problems, the Court appears to be heading in this direction. For instance, in Cleburne v. Cleburne Living Center and San Antonio Independent School District v. Rodriguez, the Court expressed its uneasiness with immutability and seemed to foreshadow its decreasing role in equal protection jurisprudence. Because the Court has a substantial number of factors in equal protection decisions, the loss of the immutability concept would be minimal since these other factors can easily fill the small gaps which would be left behind. While this option merely circumvents the solution, it is nonetheless an option that would clear murky immutability waters.

VI. CONCLUSION

Given the aforementioned concerns, the Supreme Court must adopt a new approach in addressing immutability. The Court's vacillating between Blumenbachian science and modern social science creates inconsistency and destroys the credibility of our nation's judiciary. It also undermines the purpose of the Equal Protection Clause. As Neil Gotanda stated, "such subtleties add to the perpetuation of biological constructions conjuring up older perceptions of race, justifying the inferiority of such groups." For all of these reasons, the Court must clear the tense air surrounding immutability and race.

268. Gotanda, supra note 254.