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DETERMINING THE (IN)DETERMINABLE: RACE IN BRAZIL AND THE UNITED STATES

D. Wendy Greene*

In recent years, the Brazilian states of Rio de Janeiro, São Paulo, and Mato Grasso do Sul have implemented race-conscious affirmative action programs in higher education. These states established admissions quotas in public universities for Afro-Brazilians or afrodescendentes. As a result, determining who is "Black" has become a complex yet important undertaking in Brazil. Scholars and the general public alike have claimed that the determination of Blackness in Brazil is different than in the United States; determining Blackness in the United States is allegedly a simpler task than in Brazil. In Brazil it is widely acknowledged that most Brazilians are descendants of Aficans in light of the pervasive miscegenation that occurred during and after the Portuguese and Brazilian enslavement of

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Professor Kimberlé Crenshaw has explained that "Black" deserves capitalization because "Blacks like Asians [and] Latinos ... constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, Race, Reform, and Entrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1332 n. 2 (1988) (citing Catharine A. MacKinnon, Feminism, Marxism, Method and State: An Agenda for Theory, 7 Signs 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate since it "has deep political and social meaning as a liberating term." Neil Gotanda, A Critique of "Our Constitution is Color-blind," 44 STAN. L. REV. 1, 4 (1991). I agree with both Professors Crenshaw and Gotanda and for both reasons, throughout this Article when I reference people of African descent individually and collectively the word, Black, will be represented as a proper noun.
Africans. As a result, Brazilians ubiquitously profess their African ancestry. Yet, a highly stratified racial classification system exists in Brazil whereby the guiding principle for determining race is one's physical appearance—hair texture, skin color, nose size, eye shape, for example. However, it is commonly assumed that the rule of hypodescent—the presence of one African ancestor defines an individual as Black—determines an individual’s “Blackness” in the United States. Accordingly, ancestry allegedly determines Blackness in the United States dissimilarly to Brazil, where one’s physical appearance is determinative.

Contrary to the proposition that race, and specifically Blackness, is fundamentally different in Brazil and the United States, Professor Greene contends that one's physical appearance is the primary determinant of Blackness in both American nations. Indeed, one's ancestry is necessarily implicated in determining race based on “physical appearance,” as this method of classifying race is grounded in socially mediated presumptions concerning how an individual's physical appearance denotes his or her genetic makeup. Thus, in this Article, Professor Greene mitigates the void in Brazil/U.S. comparative scholarship discussing race-conscious affirmative action by delineating the universality of race, racial hierarchy, and racial ideology in Brazil and the United States.

In doing so, Professor Greene first examines African slavery in Brazil and the United States, which is crucial to the understanding of race, racial ideology, and racial hierarchy in the two nations. Part I explores the differences and similarities between the conception of race, specifically focusing on the construction of Black, white, and multi-racial classifications. Part II also discusses the influence of slavery and settlement patterns on the contrasting racial ideologies in both American nations—“racial democracy” in Brazil and “racial purity” in the United States. Additionally, in this section Professor Greene argues that a mutual racial hierarchy and attendant racial physiognomy developed and endure despite the divergent racial ideologies, settlement patterns and slavery law in Brazil and the United States.

In Part II Professor Greene provides a comprehensive analysis of historical and contemporary racial determination cases decided by American courts and the various methods these courts appropriated to determine an individual's race. Significantly, Professor Greene’s examination of racial determination cases debunks the widely propagated notion that the rule of hypodescent is actually applied when determining an individual’s “Blackness”. These racial determination cases also illuminate the salience of physical appearance in determining race as well as the paradoxical nature of race—specifically Blackness and whiteness—in the Americas; race is contextual, subjective, and malleable yet simultaneously fixed, as physical constructs of Blackness and whiteness have transcended geography, time, ideology, and demography.
This Article concludes in Part III with an evaluation of the determination of Blackness in Brazil in informal and formal milieus; the viability of Brazilian arbiters adopting U.S. judicial racial determination methods in the context of race-conscious affirmative action in higher education; and the potential consequences of doing so. According to Professor Greene, using entrenched constructs of Blackness and whiteness when determining the proper beneficiary for affirmative action in higher education will hopefully integrate Afro-Brazilians into educational and professional realms they have been systematically and often automatically denied entry and to which their lighter-skin counterparts have been provided access. Moreover, Afro-Brazilians' participation in these spheres may induce the dismantlement of an enduring racial hierarchy and concomitant system of racial inequality—present in both Brazil and the United States—whereby Blacks disproportionately occupy the most disenfranchised positions and whites the most privileged, and socially mediated signifiers and meanings of Blackness and whiteness respectively reinforce this status quo.

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INTRODUCTION

On January 20, 2009 Barack Obama was inaugurated as the 44th President of the United States. Throughout President Obama's candidacy and after his victory, one of the primary queries raised by the media revolved around his race: is America "ready" for a Black president? Even

2. See, e.g., John Meacham, The Editor's Desk, Newsweek June 2, 2008, available at http://www.newsweek.com/id/138504 (reporting findings of a Newsweek poll which indicate twice as many Americans in a 2008 poll claimed that the United States is ready
though it is publicly known that Obama's mother is a white American from the Midwest and his father is a native of Kenya, the press as well as most Americans would describe Senator Obama as the first Black president of the United States, rather than the first mixed-race president. The general depiction and acceptance of Senator Obama as Black rather than multi-racial generates important questions related to America's common understanding of race. In the United States, is Obama deemed Black because he has self-identified as Black? Is Obama defined as Black due to his known African ancestry? Or is Obama generally regarded as Black in the United States, despite his known white parentage, because of his physical appearance—one which conforms to a socially constructed image of Blackness?

Since the era of Jim Crow, the rule of hypodescent—the presence of one ancestor of African descent makes an individual's race Black—has been articulated as the guiding principle for determining one's "Blackness" and "whiteness" in the United States. Accordingly, ancestry allegedly determines Blackness in the United States dissimilarly to Brazil, where one's physical appearance is determinative. In Brazil it is widely acknowledged that most Brazilians are descendants of Africans in light of the pervasive miscegenation that occurred during and after the Portuguese and Brazilian enslavement of Africans. Therefore, one's physical appearance—hair texture, skin color, nose size, eye shape, etc.—determines one's race in Brazil. Contrary to scholarly opinion "[u]nlike in the United States, race in Brazil refers mostly to skin color or physical appearance rather than to ancestry" and public adherence to this idea, one's physical


4. E.g., Rebecca Reichmann, Introduction in Race in Contemporary Brazil 1, 4 (Rebecca Reichmann ed., 1999) (avowing "[m]ost Brazilians, regardless of appearance, admonish visitors that all Brazilians share an African racial heritage").

5. Edward E. Telles, Race in Another America: The Significance of Skin Color in Brazil 1 (2004). Accord Edith Piza & Fúlia Rosenberg, Color in the Brazilian Census, in Race in Contemporary Brazil, supra note 4, at 37, 37; Antonio Sérgio Alfredo Guimarães, The Misadventures of Nonracialism in Brazil, in Beyond Racism: Race and Inequality in Brazil, South Africa, and the United States (hereinafter Beyond Racism) 157, 161 (Charles V. Hamilton ed. et al., 2001) (explaining after "anthropological studies of the 1950s and 1960s . . . a consensus was reached in Brazil that it was physical appearance and not origin that determined someone's color, as if there were some precise biological way to define races, and as if all forms of appearances were not themselves conventions").

6. E.g., Beasley, supra note 3 (stating "[h]istorically, segregation and the one-drop of blood rule left little room for racial ambiguity in the United States, where one is either
appearance is the primary determinant of Blackness in both American countries. Indeed, an individual's ancestry is necessarily implicated in determining race based on his or her physical appearance, as this method of classifying race is grounded in socially mediated presumptions concerning how an individual's physical appearance denotes his or her genetic makeup. Moreover, constructions of race and racial ideology in both countries share the same institutional roots: race-based slavery. Arguably American concepts of race were developed in concert with the systematic enslavement of millions of darker skinned peoples by Europeans with lighter pigmentation. Accordingly, a racial hierarchy erected, whereby individuals displaying physical markers associated with whiteness were accorded the most privileged status and those whose phenotypes signified Blackness were accorded the most degraded status.

In recent years, determining who is "Black" has become a complex yet important undertaking in Brazil in light of the implementation of race-conscious affirmative action programs in the states of Rio de Janeiro, São Paulo, and Mato Grasso du Sol. Brazilian judicial and legislative bodies have not prescribed formulaic criteria for classifying an individual's race. Since rights and privileges have been granted and denied on the basis of race throughout U.S. history, however, U.S. courts have determined an individual's race when the provision or denial of these rights and privileges has been challenged on the basis of race. As a result, U.S. courts have developed a rich body of racial determination law or judicial tests and decisions determining race that may provide insight and guidance to black or white.

7. My proposition that physical appearance—for example, skin color, hair color, hair texture, lip and nose size—is the primary factor used to determine race in no way discounts the import of other physical and/or "mutable" characteristics such as language, clothing, accent, or hairstyles, which have also been used to define an individual's race historically and contemporarily in both countries. See Antonio Sérgio Alfredo Guimarães, The Misadventures of Nonracialism in Brazil, in BEYOND RACISM, supra note 5, at 157, 159 (acknowledging that "in addition to other physical features (hair texture, format of nose and lips), [color or race in Brazil] also includes non-corporal markers such as dress, speech, mannerisms, and so on."); See also D. Wendy Greene, "Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?" 79 U.Colo. L. Rev. 1355, 1369 (2008) (arguing skin color, hair texture and facial characteristics are not the only signifiers of race in the United States but other characteristics like social behavior, speech, and dress have also been racialized throughout U.S. history).

8. Legislatures, governmental agencies, and courts have all played important roles in the development of racial determination methods and thereby the socio-legal construction of race. The contexts in which U.S. courts have determined race are analogous to the present situation encountered by Brazilian arbiters. Therefore, this Article primarily examines U.S. judicial modes of racial determination rather than detail the various racial
Brazilian arbiters currently designating an individual's race for affirmative action purposes. These cases illustrate that for U.S. judges and juries who have been charged with determining Blackness, racial constructs based on physical appearance, not the rule of hypodescent, have steered their legal pronouncement of race.

This Article examines the alleged complexity of determining who is Black or Afro-Brazilian for affirmative action purposes in higher education while surveying United States racial determination jurisprudence. This Article is not intended to serve as a dissertation on the legality of race-conscious affirmative action or the efficacy of these programs in the United States and Brazil. Since the United States is considered a global forerunner in the implementation of race-conscious affirmative action in higher education and employment, numerous scholars have debated the validity, constitutionality, and utility of race-conscious affirmative action in Brazil through a U.S./Brazil comparative lens. However, there is a paucity of literature exploring fundamental issues in facilitating race-conscious programs: specifically, who is the proper beneficiary; how should this determination be made; and can Brazilian arbiters adopt U.S. judicial modes of determining race to effectuate their race-conscious affirmative action programs? The objective of this Article is to mitigate this void in comparative scholarship by demonstrating the universality of race and the law's role in constructing race, racial ideology, and racial hierarchy.

First, this Article discusses African slavery in Brazil and the United States, which is crucial to the understanding of race, racial ideology, and racial hierarchy in the two nations. Part I explores the differences and similarities between the conception of race in Brazil and the United States, specifically focusing on the construction of Black, white, and multi-racial classifications. Part I also considers the influence of slavery and settlement patterns on the contrasting racial ideologies in both classification schemes developed by federal agencies and state legislatures. See Luther Wright, Jr., Who's Black, Who's White and Who Cares? Reconceptualizing the United States' Definition of Race and Racial Classifications, 48 VAND. L. REV. 513 (1995), for a discussion on racial determination modes for census purposes. See also Zaid A. Zaid, Note, Continually Creating Races: The Census in the United States and Brazil, 20 NAT'L BLACK L.J. 42, 62 (2006–2007).

9. See Abdias do Nascimento and Elisa Larkin Nascimento, Dance of Deception: Race Relations in Brazil, in BEYOND RACISM, supra note 5, at 105, 108. The Nascimentos explain that the official color categories for African descendants, preto for individuals of a darker complexion and pardo for mulatto and mestizo individuals, are commonly referred as negro, afro-brasileiro, or afro-descendente. Id. The English terms, "Black," "African Brazilian," and "people of African descent" represent the preto and pardo categories. Id.

American nations—"racial democracy" in Brazil and "racial purity" in the United States. Additionally, this section illustrates that a mutual racial hierarchy constructed around physical appearance developed and endures despite the divergent racial ideologies, settlement patterns and slavery law in Brazil and the United States.

Next, Part II examines a series of racial determination cases decided by American courts historically and contemporarily and the various methods these courts appropriated to determine an individual's race. This survey of racial determination cases illuminates the salience of physical appearance in determining race as well as the paradoxical nature of race—specifically Blackness and whiteness—in the Americas; race is contextual, subjective, and malleable yet simultaneously fixed, as physical constructs of Blackness and whiteness have transcended geography, time, ideology, and demography. Part III concludes with a consideration of Brazilian arbiters adopting American judicial modes of determining race and the potential consequences of doing so.

I. SLAVERY, RACE, AND RACIAL IDEOLOGY IN BRAZIL AND THE UNITED STATES

The variance in settlement patterns and the importation of Africans greatly affected racial constructs in Brazil and the United States. Both factors brought about a distinctive demography within the American nations and consequently racial classifications representative of each country's populace. Currently, Brazil possesses the second largest population of African descendants in the world; only Nigeria has more. The massive importation of African slaves to Brazil for nearly four centuries largely accounts for this statistic. Between the mid-1500s and the late 1800s, an estimated four million African slaves were transported to Brazil. In comparison, approximately 560,000 Africans were brought through the transatlantic slave trade to the colonial and post-colonial United States over the course of two centuries. This drastic disparity in the influx of Africans contributed to the diverse demographic landscapes found in the two American nations as well as their differing racial classification schemes.

Throughout most of Brazil's colonial history, laws promulgated by the Portuguese Crown forbidding marriage between whites and Blacks or

Indians were in effect. Eventually, the Crown permitted the marriage between whites and *caboclos* (the offspring of an Indian and a white), yet Blacks and mulattoes continued to be excluded. However, local conditions in Brazil consistently mooted these anti-miscegenation laws. Generally, in colonial Brazil, a small white population persisted; "[a]s late as the seventeenth century, whites were predominantly European by birth." Brazil encountered a shortage of Portuguese or white women, especially during the first century of settlement. In fact, according to sociologist Carl Degler, by the eighteenth century "the number of black women available as wives, concubines, or mistresses probably exceeded the number of white men." Combined, these conditions resulted in "permissive attitudes toward miscegenation between white men and women of African descent" and widespread miscegenation between white men and Black women. However, in light of statistics Degler reports in his pivotal comparative examination of slavery and race relations in the United States and Brazil, *Neither Black Nor White*, white males and Black female slaves could not have been entirely responsible for the pervasive miscegenation throughout Brazil.

Degler maintains that African male slaves were imported in significantly greater numbers than females because they were stronger and able to serve in more diverse occupational capacities. Therefore, a plausible inference could be made that sex between African male slaves and white


15. Id. See also Fausto, supra note 12, at 26 (noting "a 1755 decree went so far as to encourage marriages between Indians and whites and maintained that there was 'nothing wrong' with such unions . . . [yet] years later, the viceroy of Brazil dismissed a militia chief [who was an Indian] because he 'displayed sentiments so low to marry a black woman, staining his blood with this union and making himself unworthy of the office of militia chief').


17. DEGLER, supra note 14, at 229. Professor Fausto also confirms that most of the slaves brought from Africa were young men. Fausto, supra note 12, at 18. See also Donald Pierson, NEGROES IN BRAZIL 111 (The University of Chicago Press, 1942) (explaining "[d]uring at least the first century of colonization relatively few European women emigrated to Brazil" and the few European women initially settling the land were prostitutes or orphans "sent out from Lisbon by the Crown at the insistent request of Padre Nobrega.")

18. DEGLER, supra note 14, at 229.

19. DANIEL, supra note 16, at 29. G. Reginald Daniel avers that despite legal prohibitions against marriages between whites and Blacks throughout the majority of the colonial period and a continuing bias against them after the ban was repealed, "[i]n practice, fleeting extra-marital relations, extended concubinage, common-law unions, and marriages involving European men and women of color became the norm and were approved, if not encouraged, by the prevailing unwritten moral code, as well as by the church and the [Portuguese] Crown." Id.

20. DEGLER, supra note 14, at 66.
and indigenous women was also largely responsible for the abounding population of mixed-race persons in Brazil. Nonetheless, by 1822, over one-third of the Brazilian population was enslaved.21 "Better than seventy percent of the population consisted of blacks or mulattoes, slave, *liberto*, and free."22 In effect, the small white population and disproportionately larger population of non-whites necessitated that Brazil adopt a racial classification system mirroring this disproportion as well as the array of physical appearances resulting from the influx of African slaves and prevalence of interracial sex.

Race-based slavery and colonization in Brazil produced an enduring racial classification system. Brazilian racial classification schemes were imposed to safeguard the racial hierarchy by which a small minority of wealthy, white Europeans occupied the highest strata of the social pyramid, the free people of color the intermediate status, and the African slaves the lowest position. In Brazil, "[w]hether one was free or enslaved was closely linked to color and ethnicity."23 The demarcation between persons and things, or free people and slaves, was embodied in colonial Brazil's "nomenclature for racial mixtures: people were known as mulattos; *mamelucos*, or mixtures of Indian and white; *curibocas* or *caboclos*, 'near whites or descendants of white men'; and *cafusos*, or mixtures of Indians and Blacks."24 Whites also created additional racial/status distinctions


22. *Liberto* was an intermediate status between slavery and freedom. E.g., Fausto, *supra* note 12, at 133. "The standard form for the manumission of slaves in Brazil was the Alforria." Cottrol, *Lingering Shadow, supra* note 11, at 57. "The Alforria was given entirely at the discretion of the slave owner, and was often accompanied by conditions." Id. Professor Boris Fausto further illustrates the quasi-free status of *libertos*:

Until 1865, a paid manumission could be revoked if an ex-master merely claimed the person was ungrateful (known as "ingratitude"). On top of this, on paper or in practice, being freed was often contingent on a set of restrictions, especially that of continuing to serve the old masters. Legislation after 1870 maintained this custom when it conditionally freed children and old people.

FAUSTO, *supra* note 12, at 133.

Naturally, *libertos*' quasi-free status "maintained, or possibly increased, patron-client ties between *libertos* and former masters." Cottrol, *Normative Normalism, supra* note 21, at 896 n.44. Significantly, "[the Brazilian] Constitution of 1824 made *libertos* citizens, although they were prohibited from voting." Id. In fact, "the 1824 Constitution insured that political power would remain in the hands of slaveholding elites...[as] [p]roperty and income qualifications for voting allowed few men who were not of the elite, slaveholding class the opportunity to participate in politics." Id. at 897.

23. *Id. at 896*.


25. *Id. at 25–26.*
within the slave community “according to their origins, to the length of
time they [lived] in Brazil, and to their skin color.” 26 Typically, “mulattos 
and crioulos (slaves of African descent born in Brazil) were preferred for
domestic service, as artisans, and as supervisors” and “[t]he darker slaves,
especially the [boçais, or African-born slaves], were given the heaviest
work.” 27 Meanwhile, “at the top of the social pyramid were the wealthy
rural landowners and merchants engaged in foreign commerce ... [who]
combined to form the colonial dominating block presid[ing] over the
masses of slaves and freeman of lower social standing.” 28
Conflated representations of race and status promulgated during
Brazil’s colonial period proved to be quite influential; they were reflected
in official documentations after Brazil acquired its independence from
Portugal in 1823. Brazil’s first national census taken in 1872 included the
following color/racial categories: white, preto, pardo, and caboclo. 29 Pardos
were those offspring of the union of pretos and whites; caboclos were the
indigenous population and their descendants. 30 These four categories are
merely a sampling of the infinite and particularized racial categories that
emerged during slavery and since. 31 For example, anthropologist Harry
Hutchinson explicated the racial classification system found in the com-

munity of Reconcavo, located in Northeastern Brazil, during the 1950s. 32
From the lowest status to the most elevated, Carl Degler reports Hutchin-
son’s findings:

Pretos (blacks) or preto retinto (dark black)

Cabra (slightly less than black)

Cabo verde (Cape Verde) (lighter than the preto but still quite
dark, but with straight hair, thin lips, and narrow, straight nose)

Escuro (literally meaning “the dark one,” but is still lighter than
preto)

Mulato escuro (dark mulatto)

Mulato claro (light mulatto)

Pardo (light mulatto) Sarara (light skin with red or blond hair,
which is kinky and curled)
In 1976, Pesquisa Nacional por Amostragem de Domicílios (the National Household Survey or PNAD) conducted by the Brazilian Institute of Geography and Statistics reported that Blacks classified themselves using 135 different terms. However, from his recent re-analysis of this survey, Professor Edward E. Telles uncovered that the preponderance of Brazilians used a few terms to self-classify: Branco, Moreno, Pardo, Moreno Claro, Preto, Negro, and Claro.

Brazilian racial classification schemes defining a person based on the slightest variation of physical characteristics presumably associated with Black ancestry and/or white ancestry could either elevate or demote an individual on the racial ladder. The implementation of such a highly stratified method of categorizing race evidences an extreme effort on behalf of the white minority to preserve their economic, social, and political dominance over masses of people of mixed and unmixed African descent. Additionally, because of its relatively relaxed approach to manumission, which contributed to the rapid growth of free people of color, it was imperative for Brazil to develop a racial taxonomy based on infinite physical distinctions that simultaneously maintained its racial hierarchy and recognized the country's widespread miscegenation. Consequently, Brazil's acknowledgement of the overwhelming presence of interracial sex and marriage in its racial classification system, or what is currently coined as "multi-racialism," was a natural response to conditions that Portuguese/Brazilian slavery and settlement produced.

Demography in the British colonies, however, sharply contrasted that in colonial Brazil. In most colonies, whites outnumbered people of

33. Id. at 103.
34. E.g., Reichmann, supra note 4, at 8.
35. Telles, supra note 5, at 82.
36. See generally Klein, supra note 12, at 224–27 (emphasizing that the differences between free non-white populations in Iberian and non-Iberian regions were partly attributable to divergent attitudes toward manumission). According to Klein, “[b]y the beginning of the 19th century freedmen had come close to surpassing the number of slaves in most of the Iberian colonies” in contrast to non-Iberian areas, where freedmen “represented but a small fraction of the slaves.” Id. at 224.
37. Reichmann, supra note 4, at 7 (declaring “[i]n official accounts, the fluid color line flows directly from miscegenation”).
38. The racial demography in the United States continues to sharply contrast that of Brazil. According to the United States Census, non-Hispanic Blacks constitute 12.3 percent of the population, people of Hispanic origin 12.5 percent and whites 75.1 percent. Elizabeth M. Grieco & Rachel C. Cassidy, Overview of Race and Hispanic Origin Census 2000 Brief 3 (March 2001), available at http://www.census.gov/prod/2001pubs/cenbr01-1.pdf. Significantly, as the Hispanic population rises and public acknowledgment of interracial unions increases, advocates have petitioned the United States Census Bureau to include a multi-racial category on the Census. They have appropriated Brazil's
African descent, South Carolina being a notable exception. By 1700[,] the total population of New England was approximately 90,000, of which [B]lack residents numbered only one thousand. Throughout the eighteenth century, [B]lack residents increased to 16,000 or 2.4 percent of the population. The greatest population of Blacks lived in Massachusetts, most of which resided in Boston and the largest proportion of Blacks lived in Rhode Island. In 1715, approximately 50,000 slaves and 369,200 whites resided in the British North American colonies.

According to G. Reginald Daniel, "North Carolina and further northward—particularly New England, and the Mid-Atlantic colonies of New York, New Jersey, Pennsylvania, and Delaware—were settled by large numbers of Europeans with families." Where white women were present in relatively significant numbers, as in colonial Virginia and Maryland, miscegenation was less common or at least less openly acknowledged. A greater parity between white women and white men and the preservation of the European family unit resulted in a more rigid posture toward miscegenation in the British North American colonies than in Brazil. However, these demographic factors did not prevent interracial sex and marriage in the British colonies and later, in free states. During the eighteenth century, "[f]ree white men married African slaves, sometimes the only women they knew, and white female servants accepted offers of marriage from black men, both slave and free." Nevertheless, in comparison to Brazil, the significantly lower importation of African slaves into the colonies and states, the radically greater population of white settlers, along with the more balanced ratio of white women and men contrib-

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"multi-racial" view of race to buttress the implementation of this category. See generally Tanya Kateri Hernandez, Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison, 87 CORNELL L. REV. 1093 (2002) (discussing the movement for a multi-racial category on the U.S. Census and proponents' misguided reliance on Latin American racial classification methods and racial ideology to bolster the category's adoption as a means of dismantling racism and racial prejudice).

39. Cottrol, Lingering Shadow, supra note 11, at 29 n.74. See also Kevin Mumford, After Hugh: Statutory Race Segregation in Colonial America, 1630–1725, 43 AM. J. LEGAL HIST. 280, 302 (1999) (stating South Carolina was the first colony on record to report a Black majority which included free Blacks and slaves).
40. Id. at 298.
41. Id.
42. See Id.
43. Daniel, supra note 16, at 86.
44. Id. at 85.
47. Id. at 87.
uted to a smaller proportion of mixed-race offspring in the United States.⁴⁸

Like in Brazil, racial classification schemes reflected the demography of British North America. According to the late A. Leon Higginbotham, Jr., and Barbara Kopytoff, "[i]n [colonial] Virginia, (one of two colonies to create a legal definition of race)⁴⁹ there were only three racial classifications of any legal significance, though there were far more combinations and permutations of racial mixture ... 'white,' 'Indian,' and 'Negro and mulatto.'"⁵⁰ In 1705, the Virginia legislature designated the term, mulatto, for a mixed-race individual who was "the child of an Indian, or the child, grandchild, or great grandchild of a Negro."⁵¹ On a national scale, Black and mulatto categories were represented in each United States Census from 1850 to 1920, except for 1880 and 1900.⁵² Census enumerators were directed to distinguish precisely between blacks, mulattoes (an individual who had three-eighths to five-eighths African ancestry), quadroons (an individual possessing one-fourth African ancestry) and octoroons (one who possessed one-eighth or less African ancestry).⁵³

Significantly, the 1920 U.S. Census stopped making a distinction between mulattoes and Blacks; the mulatto category was deleted from the Census. This extraction was not due to a change in demography, as multi-racial North Americans continued to exist. As will be further discussed in the next section, this amendment which grouped all mixed-race offspring of Black and white unions into the Black category was motivated by

⁴⁸. G. Reginald Daniel reports the statistical findings on the population of free people of color as accounted in the 1850 U.S. Census:

[M]ulattoes composed a larger percentage (24.8 percent) of the African-descent population in the North [who were free] than in the nation as a whole (11.2 percent). The numbers of Free Coloreds in the Upper South (203,702) exceeded those in the Lower South (34,485) and composed a larger percentage of the total African-descent population (12.5 percent versus 3.5 percent, respectively) .... [T]here were larger numbers of blacks in the ranks of Free Coloreds in the Upper South (78,556 mulattoes and 125,146 blacks) than in the Lower South (23,683 mulattoes and 10,802 blacks), because of the large-scale manumissions that took place around the time of the American Revolution .... [T]he percentage of mulattoes in the ranks of Free Coloreds in the Upper South (38.6 percent) was only little more than half of the percentage in the Lower South (68.7 percent).

Id. at 96-97.


⁵⁰. Id. at 1976.

⁵¹. Id. at 1977.


⁵³. Id.
notions of presumed impermeable racial boundaries—genetic and spacial—which *de jure* and *de facto* segregation and the promotion of white racial purity solidified. However, wholesale treatment and classification of mulattoes as Blacks was not a new phenomenon in the United States.

"Throughout the antebellum period in Anglo North America, most individuals of African descent, multiracial as well as black, were slaves."\(^{54}\) In the North and Upper South whites represented the majority of the population. Therefore, "to differentiate individuals of varying degrees of African ancestry in order to gain the collaboration of multiracial individuals, whether slave or free, against a black slave majority,"\(^{55}\) like in Brazil, was not fundamental to the formation of British North America.\(^{56}\) "The paucity of Portuguese settlers in Brazil left social and economic space for a free Afro-Brazilian class capable of filling such roles as free artisan, truck farmer, and enlisted soldier, among others, that were filled by poor whites in the slave societies of North America."\(^{57}\) In Brazil, "mulattoes were also able to benefit from formal family ties with whites, such as legal recognition as legitimate children of white fathers."\(^{58}\) In general, a relatively greater acceptance of free people of color and the prospect of their improved socio-economic status was present in Brazil than in British North America.

Notably, in the South during the colonial period, a greater legal acceptance of free Blacks existed than during the nineteenth century antebellum period.\(^{59}\) After the colonies gained their independence from Britain, "[t]he new states settled or admitted into the Union in the nineteenth century tended to have a low legal tolerance for free blacks and their small free Afro-American populations."\(^{60}\) Because of the large population of non-slaveholding whites, free Blacks and mulattoes were not needed to serve in occupations critical to the success of the large-scale plantation and slave economy of the South, like militia, slave overseers,

\(^{54}\) *Id.* at 96.  
\(^{55}\) *Id.*  
\(^{56}\) *See id.*  
\(^{57}\) *Cottrol,* *supra* note 21, at 900. Compare Donald Pierson, *Negroes in Brazil* 161 (1942) (providing a cultural explanation for the greater presence of free Blacks and mulattoes in certain employment sectors in Brazil than in the United States). According to Donald Pierson,  

Free blacks, as well as free mulattoes, were able to establish themselves in manual occupations more readily than their brothers in the United States because the descendants of Europeans in Brazil have ordinarily looked down upon manual labor, as attested by the common saying: 'Trabalho é para cachorro e negro' (Work [that is, hard manual labor] is for Negroes and dogs).  

*Id.* at 161.  
\(^{58}\) *Cottrol,* *supra* note 21, at 900–01.  
\(^{59}\) *Cottrol,* *supra* note 11, at 47.  
\(^{60}\) *Id.* at 49–50.
Determining the (In)Determinable

Therefore, in most Southern states, free Blacks and mulattoes did not occupy an intermediate status between master and slave, between Black and white. Accordingly, in the "U.S. South, any term describing a racially blended background generally has included African ancestry, been equated with mulatto, and been translated into black."62

The status of free Blacks and mulattoes in the South was unstable and precarious. Fearful of free Blacks and mulattoes becoming socially equal to whites and of slaves rebelling in order to attain this station, white lawmakers severely restricted the freedom of free Blacks and mulattoes and imposed upon them a perpetual condition of legal inferiority.63 According to historian Ira Berlin, "[t]hroughout the South, free Negroes found their mobility curbed, their economic opportunities limited, and their civil rights all but obliterated."64 For example, in 1782, the Virginia legislature mandated the enslavement of free Negroes who defaulted on their taxes.65 In 1793, Virginia also initiated the proscription of free Negroes immigrating to the state.66 By 1795, free Blacks had to post a bond of two hundred pounds as a prerequisite to enter North Carolina, and if they did not fulfill this requirement, they were arrested, imprisoned, and sold at a public auction.67 In 1800, South Carolina enacted an absolute prohibition against the entry of free Blacks.68

Southern states also implemented registration systems for free Blacks.69 The Virginia legislature "required urban free Negroes to register with the town clerk ... [and a] free Negro who failed to register was fined five dollars and could be sold into servitude ..."70 Other southern states followed Virginia's lead. Maryland adopted Virginia's system with minimal changes in 1805, and in 1806, Tennessee implemented a comparable registration system.71 The Georgia Assembly went even further by not only passing registration laws for free Blacks but also "subjecting all urban free Negroes to the same regulations as slaves."72 Essentially,
antebellum Southern law and society treated free Blacks and mulattoes as members of the most degraded class along with slaves.

The South was not alone in its similar treatment of Blacks and mulattoes. For example, in 1697 the Massachusetts Bay colony mandated that "'if any Negro,[or] Molatto, shall commit Fornication with an English' then [he] 'shall be whipped'."

73

In Boston, Massachusetts, mulattoes were not allowed to keep hogs or swine without a master's consent. Additionally, mulatto servants like Blacks, had a 9:00 p.m. curfew. In New York City, mulattoes could not sell oysters, and in the State of New York, mulattoes could not enjoy, hold, or possess certain forms of real property.74

Furthermore, large groups of European immigrants settled in the North who occupied lower level positions in the Northern industrialized economy, which prevented free Blacks and mulattoes from occupying an intermediate position similar to Brazilian free people of color in urban areas.75

As in the South, free Blacks and mulattoes in the North occupied the lowest level in the social and racial hierarchy. This unique grouping of free Blacks and mulattoes in the same class as slaves throughout most of the South and mulattoes with Blacks in the North has had a long-lasting influence on the North American view of Black and white. Currently, in the United States, Blackness and whiteness are conceived as "hermetically sealed, mutually exclusive categories." 76 In fact, it was not until the year 2000 that the United States Census Bureau allowed census respondents to select multiple racial and ethnic categories.77

A. Race, Racial Ideology, and Racial Hierarchy

In Brazil and the United States, the law of slavery developed and enhanced the social constructs of race, racial hierarchy as well as racial ideologies that permeate current understandings of race throughout the Americas. However, when comparing slavery law and its consequences it is easy to over-generalize a legal institution, which lasted for over four

73. Mumford, supra note 39, at 293.
75. See DANIEL, supra note 16, at 108.
76. Cottrol, supra note 11, at 52.
centuries in Brazil and over two centuries in the United States, and its effects. Yet, at least one postulate concerning race-based slavery across the Americas can be safely articulated: inherent in American slavery law was the presumption of natural inferiority of Africans and African descendants and superiority of whites. Unfortunately, this fundamental principle that facilitated the systematic subordination of African descendants continues to influence American ideals concerning Blackness and whiteness. Indeed, at the axis of their respective national ideologies—racial democracy in Brazil and racial purity in the United States—is the privileging of whiteness and the debasement of Blackness.

B. Brazil: A “Racial Democracy”

“Serious work on the comparative history of race relations began in the 1940s and 1950s with studies of slavery and its consequences in the United States and Latin America.”78 In his seminal comparative work, Slave and Citizen: The Negro in the Americas, anthropologist Frank Tannenbaum theorized that Spanish and Iberian slave codes' recognition of slaves' humanity, the paternalistic role of the Catholic Church in the institution of slavery, and slave masters' relatively “milder” treatment of slaves in Brazil were responsible for the greater reception of people of color in the citizenry and a more fluid concept of race in Latin America than in the United States.79 However, numerous variables, such as regional variations, culture, religion, economic controls, racial and gender ratios, and class structure influenced the adoption and adherence to slavery laws and their impact on social thinking and practices.

To encapsulate over four hundred years of law and its effects simply does not account for the myriad changes that naturally occur over time. Yet, the presence of an already-existing body of slavery law which the Portuguese settlers were familiar with and could easily appropriate as they settled and exploited the land with the help of their free labor source—indigenous and African peoples—significantly influenced the contours of Brazilian racial ideology, which openly acknowledged multi-racialism. Conversely, the absence of slavery law that British settlers could utilize as they exploited Native American and African labor to develop the colonial and post-colonial United States shaped an American racial ideology that simultaneously recognized interracial sex and endorsed racial purity.

By the time the Portuguese commenced colonizing Brazil, their dealings with slavery in general and specifically African slave labor were quite extensive. In the early 1400s, Portuguese explorers and traders arrived on the sub-Saharan coast with the primary interest of exploiting

78. Fredrickson, supra note 45, at 3.
gold and slaves, with pepper, ivory, and other products as a secondary interest. \[^{80}\] However,

... only with the introduction of sugar production to the Atlantic islands and the opening up of the Western Hemisphere to European conquest at the end of the 15th century [was] a new and important use found for slaves ... Portuguese interest in its African trade slowly shifted from a concern with gold and ivory to one primarily stressing slaves. \[^{81}\]

Even before delving into the trans-Atlantic slave trade, the Portuguese possessed well-developed slave codes deriving from the slave law of ancient Rome. Roman slave law treated slaves as chattel for purposes of the commercial codes and as persons for purposes of the criminal codes. Portuguese and later Brazilian slave codes prescribed methods of manumitting and disciplining slaves closely resembling those found in Roman law. The Portuguese/Brazilian manumission policies largely contributed to the expansive class of free people of color and their acceptance into larger society. There was a sizable class of free or manumitted Africans and Afro-Brazilians during the Brazilian colonial period. \[^{82}\] Indeed, at the close of the Brazilian colonial period nearly 42 percent of Blacks and mulattoes were free. \[^{83}\]

However, like their Roman predecessor, Portuguese/Brazilian slave systems deemed emancipation as a "fundamental right of masters to dispose of their [slave] property as they saw fit." \[^{84}\] "[M]anumission could also occur at the will of the slave or the state, and this could be done in the name of state interest or even of economic efficiency." \[^{85}\] Also in accordance with Roman legal precedent, slave law in Brazil dictated that children of masters and slave women were to be freed at birth. \[^{86}\] Although "[a] number of masters simply disregarded this rule, keeping their children enslaved. The doctrine's importance as a legal norm nonetheless should not be overlooked [nor should the] significance that U.S. law did not recognize a similar doctrine." \[^{87}\]

In Brazil, slaves could also enter into enforceable contracts with their masters for their manumission. \[^{88}\] Unlike other American slave societies, "Iberian [slave societies] not only continued to accept and support the traditional methods of manumission but also actively accepted and codified the [slave's] route of self purchase." \[^{89}\] Self-purchase arrangements

\[^{80}\] KLEIN, supra note 12, at 14.
\[^{81}\] Id.
\[^{82}\] FAUSTO, supra note 12, at 27.
\[^{83}\] Id.
\[^{84}\] KLEIN, supra note 12, at 5.
\[^{85}\] Id. at 6.
\[^{86}\] Cottrol, supra note 11, at 56.
\[^{87}\] Id. at 56–57.
\[^{88}\] Cottrol, supra note 21, at 904–05.
\[^{89}\] KLEIN, supra note 12, at 220.
"further encouraged the growing number of freedmen, who in turn gave their support to increasing levels of manumission." In Brazil, the free colored population grew at an enormous rate throughout the eighteenth and nineteenth centuries. Even the massive arrival of African slaves in the nineteenth century did not impede the growth of this population. In fact, by the time the slave trade ended in Brazil, the population of free colored people exceeded the numbers of the total number of slaves. By the time of Brazil's first national census in 1872, there were a reported 4.2 million free colored persons compared to 1.5 million slaves and 3.8 million whites.

Naturally, slave codes not only sought to control the behavior and status of slaves, but also the activity and rank of the growing population of free colored citizens and libertos, or freed slaves. Significantly, under Portuguese and Brazilian slave law free people of color and libertos were given full citizenship. However, citizenship did not bring about equality for free people of color and former slaves. Indeed, Professor Herbert Klein contends, "[t]he laws and practices of the Ibero-American societies were those of an essentially racist society in which free blacks and mulattoes would enter as lower caste within a highly stratified system." Professor Boris Fausto refers to the freedom of free Blacks and mulattoes during the colonial period as "ambiguous". According to Fausto, "[w]hile they were formally considered free, in practice [free Blacks and mulattoes] ended up being arbitrarily enslaved, especially when their color or their features identified them as black." Furthermore, sumptuary laws denied free colored women the right to wear clothes and jewelry worn by free white women; free colored persons the right to a university education and the practice of a liberal profession; and even free people of color the entry to some skilled professions. Undoubtedly, regulation of "colored" bodies and the lack of control over white bodies buttressed the presumed inferiority of African descendants and the putative superiority of whites in Brazilian social thinking.

The "fluid" multi-racial categories, the absence of antimiscegenation statutes, the comparatively greater vertical and horizontal mobility of African descendants in addition to the nonexistence of de jure racial segregation (unlike in the United States) during and after slavery in Brazil, indeed, helped to make the country's designation as a "racial
democracy” possible. However, these distinctive dynamics of Brazilian socio-legal institutions did not indicate national approval of racial mixing and its visible African heritage. In fact, “Brazil entered the twentieth century a society highly stratified by race with significant degrees of color prejudice.”

Professor Robert Cottrol notes that “[t]hose prejudices and stratifications would in turn be augmented by the growth of scientific racism in the latter part of the nineteenth century and the early part of the twentieth [century].” Based on notions of heredity, pseudo-scientific theories were promulgated and disseminated in an effort to “improve” the human race. Public policy makers around the world were largely influenced by eugenicists’ theories, triggering social policies which reified white (genetic) superiority and Black (genetic) inferiority.

Brazilians created a unique variety of eugenics to specifically handle Brazil’s “race problem”—the country’s allegedly “inferior” gene pool attributed to its large presence of Blacks and mulattoes. “Brazilian scholars used a theory of constructive miscegenation and proposed a solution of ‘whitening’ through the mixing of whites and nonwhites.” Whitening, as prescribed by eugenicists, became the major basis of Brazil’s immigration policy. To facilitate the goal of “whitening” the country, Brazilian states implemented policies to recruit European settlement, in addition to financial incentives, while the federal government expressly barred African and Asian immigration.

By the 1890s, Brazil loosened their restrictions on Asian immigration, permitting Chinese and Japanese immigrants and eventually allotting five percent of the total number of immigrants each year to Asian entry. However, policies continued to forbid native peoples of African nations from settling in Brazil. In 1934, the new Brazilian constitution only allowed whites to immigrate into Brazil and even barred “the settlement of blacks or Asians regardless of their country of origins, a measure presumably designed to curtail immigration from other Latin American nations.” Brazilian policy makers hoped to replace the labor force formerly consisting of African slaves with European immigrants while simultaneously “whitening the Brazilian gene pool” and “diluting Brazil’s large Black population.” In fact, the Brazilian delegate announced to the

99. Cottrol, supra note 11, at 63.
100. Id.
101. E.g., Telles, supra note 5, at 28.
102. Id. at 28.
103. Id. at 29.
104. Cottrol, supra note 11, at 64. See also, e.g., Telles, supra note 5, at 29.
105. Cottrol, supra note 11, at 64.
106. Id.
107. Id.
108. Telles, supra note 5, at 29. See also Reichmann, supra note 4, at 24 (affirming that “Gilberto Freyre’s works were widely hailed as the definitive portrait of Brazil’s
1911 Universal Races Congress in London that the national mission was to eliminate African descendants by the year 2012. To fully achieve its goal of whitening the population through the gradual extinguishment of Blacks, the Brazilian government also promoted racial intermixing.

The publication of Gilberto Freyre’s *Casa Grande e Senzales (The Masters and the Slaves)* alone “transformed the concept of miscegenation from its former pejorative connotation into a positive national characteristic and the most important symbol of Brazilian culture.” According to Freyre, Brazil’s extensive miscegenation bolstered “Brazil’s harmonious race relations and its racial democracy.” Inspired by Freyre’s suppositions, Brazil began to publicly embrace its multi-racial character and no longer overtly espoused a racial ideology amounting Brazil’s widespread miscegenation to a nation imbedded with racial inferiority. Brazil’s miscegenation and representative racial classifications, fashioned in large part by Brazil’s slave law, now symbolized a “racial democracy”—a country populated with persons neither Black nor white but simply Brazilian. Brazilians were consequently viewed as a desirable amalgamation of the country’s European, indigenous and African racial and cultural constituents.

C. The United States: A “Racially Pure” Nation

Unlike the Portuguese, British colonists who settled the eastern seaboard of the colonial United States did not have a well-developed body of slavery law to employ while appropriating Native Americans and Africans as their free labor source. British common law did not acknowledge slavery. In fact the common law deemed slavery as “unlawful, contrary to unique racial ‘paradise,’ formalizing the popular myth of racial democracy and giving it the legitimacy of social scientist’s stamp”).

109. Nascimento and Nascimento, supra note 9, at 121 (citing Thomas E. Skidmore, *Black into White: Race and Nationality in Brazilian Thought* Oxford University Press (1974)).


112. Telles, supra note 5, at 33.


114. Elisa Larkin Nascimento, *It's in the Blood: Notes on Race Attitudes in Brazil from a Different Perspective*, in *Beyond Racism*, supra note 5, at 509, 510 (acknowledging “since the publication of Gilberto Freyre’s works in the 1930s, Brazil’s social fabric and national personality absorbed not only the ideal of antiracialism but also a positive value change elevating the society’s perception and acceptance of African descendants and their culture”).
natural law, and an institution that could not be maintained in England.\footnote{115} Therefore, it was necessary for the British colonists to formulate supportable explanations for their aberrant system of human bondage. Significantly, the British initially rationalized the enslavement of Native Americans and Africans on religious bases.\footnote{116} Yet, as Native Americans and Africans increasingly converted to Christianity, religious differences could no longer serve as a viable justification for their enslavement.\footnote{117}

Eventually, British colonists, like the Portuguese, created a system of human slavery based on physical appearances, or rather the distinctions between readily identifiable features. Furthermore, British colonists and later Americans had to develop even more elaborate rationalizations for the enslavement of humans, as they touted liberal philosophies of liberty, equality and natural rights of men. Thus, white slave owners, philosophers, and politicians, like Thomas Jefferson, articulated formal defenses of slavery in concert with the country’s philosophical origins, yet grounded in the presumption of whites’ natural superiority and Blacks’ innate inferiority.

Also, in contrast with Brazil, U.S. slavery law was not generally sympathetic to miscegenation and emancipation. They were both viewed as perils to an entrenched legal, social, political and economic hierarchy based on race.\footnote{118} In a world where slavery was increasingly justified on the

\footnotetext[115]{Cottrol, supra note 11, at 45.}
\footnotetext[116]{E.g., EDMUND MORGAN, \textit{AMERICAN SLAVERY, \textit{AMERICAN FREEDOM 331-33} (1975).}
\footnotetext[117]{E.g., Id.}
\footnotetext[118]{In the United States, the level of receptivity or hostility to manumission fluctuated over the course of two hundred plus years of legalized slavery. Acclaimed historian Ira Berlin explains in \textit{SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH} that after the American Revolution, manumissions increased significantly throughout the North and the South. \textit{Supra}, note 63. By 1805, all Northern states provided for gradual emancipation. \textit{Id.} at 21. By 1810, more than 100,000 free Blacks lived in the South, consisting of five percent of the free population and approximately nine percent of the overall Black population. \textit{Id.} at 15. On the heels of the War, Southern states repealed prohibitions against private manumission of slaves and liberalized manumission statutes. \textit{Id.} at 29. Immediately after the Revolutionary War, a significant amount of slaveholders, in part motivated by religious doctrine and espousals of liberty, also freed their slaves. \textit{See id.} at 30. Generally, whites’ sentiments concerning free and enslaved Blacks had become more relaxed. Accordingly, “[c]onfronted with the growing number of freedom suits, Southern courts occasionally responded sympathetically by liberalizing the rule of descent and expanding the range of evidence acceptable in freedom suits.” \textit{Id.} at 33. This overarching general receptiveness to freedom triggered the rapid escalation of free Blacks in the South. \textit{See generally id.} at 49. Indeed, “[b]y 1810, the 108,000 free Negroes were the fastest-growing element in the Southern population . . . [and despite the rapid growth of Southern whites and slaves] the free Negro population outstripped both.” \textit{Id.} at 49. However, not too long after the Revolutionary War, both the Lower and Upper South began restricting manumission. In 1806, Virginia required all Blacks to leave the state a year after being freed or they faced summary re-enslavement. \textit{Id.} at 102. South Carolina began regulating manumissions for the first time and Georgia completely barred private manumission of slaves. \textit{Id.} at 101.
racial grounds of both the inherent inferiority and the dependent nature of blacks, the presence of free, “self-sufficient blacks provided a stark and unwelcome contradiction to the reigning ideology.” 119 White male legislators “did not intend for blacks to be considered as human beings within a state of society, and thus free and independent persons with ‘inherent rights.’” 120 Therefore, in both the North and the South, offspring of Black and white unions may have been termed “mulatto” but they were grouped with Blacks, subject to like disabilities and degradation. 121

The nomenclature promulgated in British North America in tandem with U.S. slave law recognized the existence of interracial sex yet did not finely distinguish physical characteristics exhibited by offspring of interracial unions as did the Brazilian racial classification systems. Nonetheless, during the antebellum era, the determination of race centered on an individual’s phenotype and ancestry—not on exact proportions of “blood”. 122 Daniel Sharfstein maintains that “the [one-drop] rule’s

119. Control, supra note 11, at 51.
121. See generally Berlin, supra note 63. Race and racial boundaries are quite contextual. Therefore, a monolithic experience for people of African descent does not exist. The diverse experiences of African descendants in the United States largely depended on demography, economic factors, and socio-legal controls. For example, after the Haitian Revolution the Lower South experienced a large influx of free people of color from Saint Domingue and Haiti. Id. at 35–36, 114–15. As a result, a sizeable intermediate class of free people of color developed in the Lower South mostly consisting of mulattoes. Id. at 99. According to Berlin, “[t]he elevated status of the free people of color and the lowly condition of slaves in the Lower South allowed a three-caste system much like that of the West Indies to develop wherever free Negroes were numerous.” Id. at 198. Free people of color were often utilized as a buffer class against Indian and slave revolts and tensions between slaves and whites. Id. at 112, 214. Whites supported the prosperity of and the provision of rights to free people of color; even permitting free people of color “to vote, to testify in court, and ultimately to pass in to the white caste.” Id. at 214. Furthermore, free Blacks in the Lower South “collect their own wages, accumulate property, and control their own family life” which distinguished them greatly from slaves. Id. at 233. A number of free Blacks accumulated significant material and social wealth. See generally id. at 271–83. However, in the Upper South according to Berlin, “[t]he fact that Upper South freemen, like slaves, were overwhelmingly black in color and rural in residence reinforced the long-standing belief that free blacks were more black than free.” Id. at 188. Therefore, whites in the Upper South did not view free Blacks as capable of serving as a buffer between whites and slaves and did not use them in this capacity as frequently as in the Lower South. See id. at 189. Despite the distinctions, free Blacks were still quite marginalized and suffered numerous disabilities in the Upper South and Lower South.

122. During the antebellum period, some states did not enact statutes defining the requisite amount of African ancestry making a person non-white. For example, in 1835, Missouri enacted a statute barring Blacks and mulattoes from marrying whites as did Arkansas in 1838. Charles F. Robinson, II, Dangerous Liaisons: Sex and Love in the Segregated South 10 (2003). Similarly, as of 1831 the South Carolina legislature had not established any proportions of blood defining who was white, mulatto, or negro. State v. Hanna, 18 S.C.L. (2 Bail.) 558 (S.C. App. 1831). In fact, in South Carolina, until the 1840s
Growing ideological prevalence in the free North... presage[d] its eventual codification in the South after slavery's demise."

Ironically, the one-drop rule was first widely propagated by Northern abolitionists in their fight for freedom:

The strategic equation of everyone who was socially recognized as black with anyone who had "one-drop of African blood in his veins" helped abolitionists articulate the inhumanity of Southern statutes and the unreasonable extremes demanded by the slave power. Abolitionists invoked the one-drop rule most often not in castigating the South for turning free blacks into slaves, but rather in showing that the South could enslave free whites."

Therefore, decades before Southerners embraced the rule of hypodescent and almost one hundred years prior to its codification by a Southern legislature, Northerners advanced the notion that Blackness derived from one African ancestor. Additionally, Northerners predated the South in its system of racial segregation and proscription. According to historian C. Vann Woodward, these mechanisms of subordination were rooted in the North and had "reached an advanced age before moving South in force."

Not until serious threats of abolition, and thus the portended demise of white supremacy, materialized in the South did Southerners respond with a peculiar defense of slavery: the maintenance of white racial identity. With the loss of the Civil War and the entrance of millions of freed Blacks of mixed and unmixed descent into society, Southerners fought arduously to perpetuate the status quo established during slavery. Southerners thereby appropriated ideals of white racial purity and the one-drop rule to ensure the continued subordination of Blacks and other people of color and supremacy of whites.

Ideology and law aimed to preserve the "purity" of the white race gained muscle after the Civil War and reached their apex in the late nineteenth and early twentieth century. Jim Crow laws mandating "separate but equal" public accommodations, inferior public schools for Blacks,

both known and visible mulattoes could become white by behavior and reputation and could marry into white families. F. James Davis, Who Is Black? One Nation's Definition 35 (1991). Like Brazil, "in South Carolina mulattoes who were 'proper acting,' a quality determined by their wealth and education, could even apply for legal standing as 'White.'" Trina Jones, Shades of Brown: The Law of Skin Color, 49 Duke L.J. 1487, 1509 (2000).


124. Id. at 651.

residential segregation, and in some states, separate Bibles for whites and Blacks testifying in court became the norm throughout the South by the late 1800s. Then, in 1896, the United States Supreme Court in Plessy v. Ferguson decreed "separate but equal" the law of the land.

"[B]y 1890 every Southern state except one, Louisiana, had placed an anti-miscegenation law in its civil code, and most state supreme courts has affirmed the law's constitutionality." Anti-miscegenation statutes defined the legal quotient of African ancestry to make an individual legally Black and provided harsh penalties for those individuals who contravened these statutes. According to Charles F. Robinson, II,

[t]he Progressive Era witnessed an expansion of the rhetorical opposition to miscegenation. Through speeches and professional and popular writings, progressives expressed their unequivocal hostility to all notions of racial mixing. Progressives also widened the intimacy color line by enacting tougher anti-miscegenation laws. At both the state and city levels, legislators enhanced penalties for violations and decreased the amount of African ancestry that a person could have and legally marry whites. With such measures progressives hoped to eradicate the interracial coupling.

For the first time in United States history, in 1924, Virginia passed the first anti-miscegenation statute adopting the one-drop rule. As a result, whites were prohibited from marrying an individual with any known racial ancestry aside from white. Other states and municipalities soon followed in Virginia's footsteps. Consequently, these statutes conferred upon persons of mixed African and white ancestry a degraded and restricted legal status that denied them the opportunity to garner the rights and privileges associated with possessing "pure white blood". With slavery law in their lineage, racial segregation laws and anti-miscegenation

126. See generally id.
127. 163 U.S. 537 (1896).
128. ROBINSON, supra note 122, at 49.
129. Id.
130. Id. at 97.
131. Id. at 101.
132. Id. Interestingly, most anti-miscegenation statutes prohibited interracial marriage and not sex, according to Robinson. Accordingly, the enforcement of these anti-miscegenation statutes targeted public, domestic interracial relationships. Id. at 103–04.
133. Georgia, Alabama, Louisiana, and Mississippi also passed more restrictive anti-miscegenation laws during the 1920s. Id. at 101. Also, Houston, Texas passed an ordinance which banned whites from cohabiting or having sexual intercourse with persons of African descent and in doing so, broadened the definition of Black persons from the third generation rule adopted by the State to one including any person with "African blood in his or her veins of whatever quantity." See id. at 103.
statutes, which clearly demarcated the boundaries of Blackness and whiteness, erupted throughout the South. Together these laws cultivated modern American racial ideology: the espousal of racial purity and the hypodescent rule.\textsuperscript{134}

Though numerous states passed laws defining the requisite quota of African ancestry that made an individual legally Black, in day to day affairs when racial distinctions were attempted to be made, a person’s appearance mattered most.\textsuperscript{135} Nevertheless, by the twentieth century, the racial purity ideology white Southerners advanced in their quest for continued white supremacy—which arguably originated in the North—solidified the modern U.S. concept that the presence of one African ancestor defines Blackness and the lack thereof defines whiteness. Merely possessing white ancestry could no longer facilitate ascension within the North American racial hierarchy.

Indeed, the discovery of Black ancestry for those who physically appeared white could automatically relegate such persons to Blackness, the most degraded class.\textsuperscript{136} 

Branquamiento—the ideal of whitening one’s self and/or children by marrying a white person or accumulating material wealth—has been widely accepted in Brazil, but was essentially impossible for those who physically appeared non-white in the United States. The reality in Brazil “that some white ancestry, coupled perhaps with social position, could make an individual white despite some [known] Afro-American history,”\textsuperscript{137} was impractical in the United States by the early twentieth century.

\textsuperscript{134} Professor Robert Cottrol also explains that at the beginning of the twentieth century, unlike Brazil, the interest of the United States was not to “whiten” the population. \textit{Supra} note 11, at 65. Brazil’s demography played a key role in the development of its racial ideology of racial democracy. Demography in the United States similarly influenced the development of its racial ideology of racial purity. According to Professor Cottrol, “the expressed concerns of white North Americans [who historically constituted nearly a ninety percent majority] were in maintaining a white majority and preserving the racial purity of the U.S. white population.”). \textit{Id.}

\textsuperscript{135} \textit{Robinson, supra} note 122, at 55.

\textsuperscript{136} \textit{Wall v. Oyster}, 36 App.D.C. 50, 1910 WL 20844 (App. D.C. 1910). In \textit{Wall v. Oyster}, the District of Columbia Court of Appeals ruled that a young girl, whose father was seven-eighths Black and whose mother was white, was “colored” or Black, despite the girl’s “white physical appearance” and neighbors’ and friends’ treatment of her as white. \textit{Id.} at 1, 5. In issuing its ruling, the court acknowledged the urgent petitioning of the court to save the young girl from “a cruel hardship [that] will be inflicted upon [her]” if the court determined she was colored. \textit{See id.} at 5. Such a ruling would prohibit the girl from attending a white secondary public school and force her to attend a “separate but equal” school reserved for colored children. \textit{See id.} at 1.

\textsuperscript{137} See Cottrol, \textit{supra} note 11, at 66.
In Brazil, notions of racial purity for whites like those espoused in the United States are essentially nonexistent.  

138 Also, unlike the United States, where segregation separated the population into black and white, Brazil has celebrated middle categories and avoided legislating rules for racial classification.  

139 However, despite the contrasts in demography, slave law, and ensuing racial ideology—racial democracy in Brazil and racial purity in the United States—the enslavement and subordination of Africans and their descendants in Brazil and the United States spawned a common racial hierarchy. Within this mutual racial hierarchy whiteness symbolized the most esteemed and privileged status—an identity to seek and acquire—and Blackness signified the most debased and marginalized—an identity from which to escape. Scholars posit that the “spectrum of classifications” Afro-Brazilians have recently employed for self-identification purposes “reflect a desire to be identified as 'not totally black,' or 'almost white,' thus diminishing the social negativity that their African blood conferred.”  

140 Moreover, the construction of phenotypes associated with Blackness and whiteness, in order to bestow the attendant privilege or debasement, also transcended demographic, legal and philosophical differences. The paradoxical yet unifying nature of racial formation in the Americas—what G. Reginald Daniel coins the “ternary racial project” or the division of the population into whites, multiracial individuals and Blacks—is the guarantee that “multiracial individuals [are] stigmatized for every feature they shared with blacks and rewarded for every degree of approximation to the European psychosomatic norm.”  

141 Accordingly, Brazil and the United States’ mutual physiognomy of Blackness and whiteness have determined one’s race and status in both American societies, which the following sections examine more fully.

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138. TELLES, supra note 5, at 105.
139. Id.
140. Reichmann, supra note 4, at 8 (citing Sueli Carneiro referring to the 1976 National Household Survey (PNAD) conducted by the IBGE requesting 50,000 respondents to state their race or color without any predetermined categories whereby 135 identifying terms were used by the participants). Reichmann also reports more recent findings by United Nations Rapporteur Maurice Glele-Ahanhanzo, who also observed that “when subjects were asked to identify their color in the 1991 national census, more than a hundred shades of color were 'used to describe themselves, out of a desire to distance themselves as far as possible from the colour black.'” Id.
141. DANIEL, supra note 16, at 34.
142. Id.
II. CONSTRUCTING RACE: THE ROLE OF U.S. COURTS

Throughout United States history, white lawmakers designed laws delegating racialized rights, privileges, and disabilities; foremost was the legal system of racial slavery. Accordingly, race dictated the provision or denial of numerous rights—the rights to freedom, bearing arms, voting, owning property, holding a political office, serving as a juror, and even becoming a citizen—all of which were expressly reserved for whites. When these rights and others were desired by individuals whose “whiteness” was questionable, colonial and post-colonial U.S. courts were often assigned the important task of clarifying this ambiguity by determining the individual’s race. Like the law of slavery, racial determination case law is essential to the construction and maintenance of race, racial ideology, and racial hierarchy.

This section surveys historical and contemporary racial determination cases decided by U.S. courts. In doing so, this case analysis deconstructs a widely accepted tenet—in the United States, one’s race is objective and fixed—by illustrating that race is a subjective, contextual, and malleable construct. Thus, when U.S. courts determined an individual’s race, often simultaneously determining the person’s legal, social, and political status, they often adopted new criteria and presumptions, or manipulated prongs of a previously established racial determination test to achieve a desired outcome. Moreover, courts historically and presently have relied heavily on physical constructs of race in promulgating various determination methods. The following chronological overview of racial determination cases exposes the salience of physical appearance and the inoperativeness of the hypodescent rule in determining an individual’s Blackness or whiteness when put into question and, therefore, the commonality of determining race in the United States and Brazil.

A. Race as Physical Appearance and Beyond in the Nineteenth Century: Hudgins v. Wright and White v. Tax Collector

Throughout United States history, ascertaining whether an individual is white, Black, or neither has been an extremely important quest for judges and juries. Hudgins v. Wright, one of the most widely discussed freedom suits, which was decided by the Supreme Court of Appeals of Virginia in 1806, highlights the very essence of racial determination in the Americas as well as the significance of defining race. In Hudgins, three generations of women petitioned the court for their freedom. Jacky, Maria, and Epsabar Wright alleged they were the descendants of a Native American woman by the name of Butterwood Nan. However, Hudgins,
a slaveowner, claimed “that they were descended from a negro woman by an Indian”145 and thus, were Black and his slaves.146 The court’s determination of the Wrights’ race as Native American or Black was momentous, for Hudgins was decided at “a time when the determination of a person’s race as black in Virginia was life-altering in a way that could establish bondage or freedom, and, in some cases life or death.”147

By 1806, the colonial legislature of Virginia had departed from the English common law rule declaring that an individual’s status derived from his or her paternal line. The colonial body adopted the rule partus sequitur ventrem, by which an individual’s status follows his or her maternal line.148 Accordingly, three generations—mother, daughter, and granddaughter—rested their claim to freedom on the presence of free Native American female ancestors on their maternal side. Several witnesses testified that Butterwood Nan and her father were known to be Indian,149 and Butterwood Nan’s daughter, Hannah, was regarded in the community as an Indian and possessed “long black hair [and] the right Indian copper colour.”150 However, the fact that Jacky, Maria, and Epsabar Wright, all of varied gradations of color, visibly appeared white to the jurists, rendered them free.151

145. Id.
146. Id.
148. In 1662, the colonial legislature passed an act which declared that the free or slave status of children conceived by a Negro woman and an English father followed the slave or free condition of the mother. E.g., MORGAN, supra note 116, at 333.
149. Hudgins, 11 Va (1 Hen. & M.) at 142.
150. Id. at 134.
151. According to Professor Onwuachi-Willig, the trial court judge, Chancellor Wythe rejected Hudgins’ claim and granted the women their freedom on two bases: “(1) [t]he women did not look black, but instead had the appearance of a person of white and American Indian ancestry; and (2) [s]lavery violated Virginia’s Declaration of Rights and thus was illegal in the state.” Onwuachi-Willig, supra note 147, at 155. However, on appeal Judge Tucker sustained Chancellor Wythe’s conclusion yet “rejected his former teacher Chancellor Wythe’s decision ... to grant the Wrights freedom on the grounds that slavery was illegal in Virginia.” Id. at 163. Consequently, Judge Tucker affirmed Chancellor Wythe’s initial ground for granting the Wrights’ freedom—their “white” physical appearance. Indeed, the trial and appellate judges were influenced by the Wrights’ whiteness. See id. at 155–56 (reporting that Hudgins’ attorney, Edmund Randolph, “insisted [on appeal] that Chancellor Wythe had been improperly influenced by the plaintiff’s white appearance ... [and that] their physical appearance was not an appropriate basis for decision, for ‘[w]hether they are white or not, cannot appear to this Court from the record.’”) (quoting Hudgins, 11 Va. (1 Hen. & M.) at 134–35). See also Hudgins, 11 Va. (1 Hen. & M.) at 141 (Roane concurring: “[i]n the present case it is not and cannot be denied that [the Wrights] have entirely the appearance of white people ...”). But see Onwuachi-Willig, supra note 147, at 165 (opining that the Wrights’ “fate as either free American Indian women or legally-defined black slaves depended not just upon the fairness of their skin or the
By recognizing these three women were of mixed white and Native American ancestry, the court simultaneously accepted the existence of miscegenation and the inexistence of white racial purity. According to Daniel Sharfstein, “the litigants were living proof that dark could become light.” Although they claimed Native American ancestry, they appeared indistinguishable from the lawyers and judges and relied upon this fact in their quest for freedom. Even Hudgins' lawyer, Edmund Randolph, conceded that that the Wrights looked white. The Hudgins court, however, acknowledged the fluidity of race; one's race was not necessarily dictated by one's ancestry or fractions of “blood.” Yet, in separate concurring opinions, both Judges Roane and Tucker attempted to make sense of the Hudgins' white physical appearance. Thereby, both judges endeavored to erect impermeable racial boundaries between Black and white purely on the basis of physical appearance and its presumed manifestations.

According to Judge Tucker, a person with “pure” or of equal degrees of African ancestry will display the “characteristic marks that Nature has stampt [sic] on the African and his descendants” even when the darker skin color “disappears or becomes doubtful”: “a flat nose and woolly head of hair.” Similarly, Judge Tucker explained that the “jet black lank hair” characteristic of the Native American perpetuated despite miscegenation. Judge Tucker avowed an intransience of race as well as a clear demarcation between races based on a presumed persistence of racialized physical traits. Judge Roane, however, did not expressly affirm the permeability of the Wrights' physical appearance but the exercise of their non-black identity and their recognition as non-black by neighboring whites.

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152. Sharfstein, supra note 123, at 622.
153. “The women, through attorney George K. Taylor, stressed the most commonly used proxies for race—skin color and outward appearance—to establish their claim to freedom ... [i]mportantly, Taylor asked, ‘what more than strong characteristic features would be required to prove a person white?’”). Onwuachi-Willig, supra note 147, at 156 (quoting Hudgins, 11 Va. (1 Hen. & M.) at 135). Taylor even propounded to the court “[t]his is not a common case of mere blacks suing for their freedom; but of persons perfectly white.” Id.
154. Randolph's concession was restricted to the notion that the Wrights were incidentally phenotypically white and not “biologically” white. Specifically, he asserted that “[t]he circumstance of appellees' being white, has been mentioned, more to excite the feelings of the Court as men, than to address them as Judges.”). Hudgins, 11 Va. (1 Hen. & M.) at 136.
155. See Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 YALE L.J. 109, 141-42 (1998) (opining that in early nineteenth century racial determination cases like Hudgins, “the fluidity that characterized these cases results from the greater permeability of the border between Indian and white, the conflation of ‘race’ and ‘nation’ in the definition of ‘Indian’ and the lesser stigma attached to the Indian "race" by whites”).
156. Hudgins, 11 Va. (1 Hen. & M.) at 139-40.
157. Id. at 139.
tuity of racialized physical traits. Rather, he asserted that when interracial unions between Native Americans, whites and Africans occur, “it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring, and certainly impossible to determine whether the descent from a given race has been through the paternal or maternal line.”

Yet, Judge Roane also consented to the ideal that race was permanent by likewise sanctioning the prototypical and stereotypical physical constructs of Blackness, whiteness, and Indianness proffered by Judge Tucker: Blacks of pure and mixed African ancestry possessed “a flat nose and woolly hair”; Native Americans were “copper coloured with long jetty black, straight hair”; and whites exhibited “a fair complexion, brown hair not woolly or inclining thereto, with a prominent Roman nose.” Appropriating these racial constructs, Judge Roane concurred with assigning a heightened burden of proof in freedom suits to claimants who appeared Black:

in the case of a person visibly appearing to be a Negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom; but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew [sic] that he is a slave.

Significantly, centuries ago in Hudgins, Judges Roane and Tucker articulated not only the physical contours of a person of African, Native American, or white ancestry but also the actual and perceived status of an individual who bore the attendant physical markers, which predominates in subsequent cases of racial determination and current instances of determining race in American society. As the early nineteenth century justices elucidated, despite the known fluidity and convergence of racial boundaries, a permanent, fixed binary system of race and status can co-exist. Dark skin color, a large nose, “kinky” or “woolly” hair continuously signifies Blackness and the most subordinated status. Similarly, fair skin, straight hair, and a Roman nose has consistently symbolized the socially constructed polar opposite of Blackness—whiteness—the most privileged status.

Forty years after the Hudgins case, South Carolina justices conveyed American truisms of racial determination in White v. Tax Collector of Kershaw District. First, the court declared that status equates to race and vice versa: the question of whether “persons alleged to be colored and

158. Id. at 141.
159. Id. at 140.
160. Id. at 141.
claiming to be white [is a] case relating to the status of [such] persons." Secondly, the court rejected the one-drop rule and any other mechanical "blood" rule affixed to determining one's race. White, like Hudgins, is an "antebellum case of racial determination [which] continued to contain a reality of racial migration within rhetoric affirming the certainty of racial difference." The White court, too, declared that Blackness manifested itself physically and was visibly detectable: "if the color and other characteristics of African descent be distinctly marked and obvious, the condition of the person is determined by inspection only."

Simultaneously, the White court undermined the intransience of Blackness by contending that people even with the same proportions of mixed African and non-African descent "may present such different complexions and features" could be assigned to different racial castes. Therefore, physical characteristics were "a very uncertain criterion of caste." Nevertheless, the court insisted on maintaining the rhetoric of racial distinctiveness when physical appearance failed to "accurately" assign one's race. According to the court, an individual's whiteness or non-whiteness could be determined by an individual's behavior: "[h]abit and education have so strongly associated with the European race the enjoyment of all the rights and immunities of freedom, that color alone is felt and recognized as a claim." Thus, White v. Tax Collector aptly illustrates Professor Ian Haney Lopez's poignant observation that "the legal construction of race pushes in many different directions on a multitude of levels, sometimes along mutually reinforcing lines but more often along divergent vectors, occasionally entrenching existing notions of race but also at other times or even simultaneously fabricating new conceptions of racial difference."

Moreover, the White court held that the issue of determining an "ambiguous" person's race—"where color and features are doubtful—must partake more of a political than legal character, and in great degree, be decided by public opinion, expressed in the verdict of a jury," i.e., the determination of race is not based solely on requisite amounts of "negro blood," rather it is socially-mediated. In so holding, the court implicitly affirmed three central principles concerning "blood rules". In large part, blood rules were created in isolation of the community consensus on what characteristics define whiteness or non-whiteness.

162. Sharfstein, supra note 123, at 626.
163. White, 1846 WL 2283, at *2.
164. Id.
165. Id.
166. Id.
167. Id.
169. White, 1846 WL 2283, at *2.
Secondly, they were enacted and applied to determine the race of an individual who did not unequivocally comport with the physical characteristics attributed to Blackness. Thirdly, the application of blood rules was not the primary method used by arbiters to determine an individual's race.

The court also affirmed yet another important concept illuminated through racial determination cases: race is contextual, subjective, malleable, and manipulable. Accordingly, the White court fortified the view that U.S. courts throughout history when determining an individual's race "were not absolutist about blood purity, regularly turning to other criteria in drawing the color line." The additional criteria that the South Carolina court invoked to ascertain whether the ambiguous looking person could be conferred membership into the white race and its associated privileges was an assessment of his "reputation, reception in society, and exercise of the privileges of a white man." The inclusion of "reputation or performance evidence" was first adopted by the South Carolina judiciary in 1831 in State v. Hanna.

According to Professor Ariela Gross in her groundbreaking law review article on racial determination cases, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South" "reputation or performance evidence" was widely accepted throughout the South during the nineteenth century. Professor Gross explains the performative and legal aspects of race which gained increased importance in the southern United States during the mid-nineeteenth century:

To be white was to act white: to associate with whites, to dance gracefully, to vote. Blood may have been the signified, but the signifiers were social acts. More than that, the signifiers of race were not only social and political but also prescriptive and legal. [To be a white man] meant to be a citizen, a civic being, someone who could do certain kinds of things ... Judges gave greater weight to particular kinds of racial performance. At the appellate level, when courts referred to performances of whiteness, it was civic performances they found determinative.

Indeed, the appellate court in White assessed the evidence presented at trial demonstrating whether Elijah Bass had ever exercised "rights of citizenship", i.e., rights of whiteness in order to affirm or reject the jury's

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170. Sharfstein, supra note 123, at 598.
171. White, 1846 WL 2283, at *2.
174. Id. passim.
175. Id. at 162–64.
decision that Elijah Bass and his children, the relators in the action, were not white and were therefore rightfully subjected to the capitation tax free negroes, mulattoes, and mustizos\textsuperscript{176} were required to pay.\textsuperscript{177} In support of their claim to whiteness, the Bass children offered numerous grounds. They asserted that they were educated as free white persons with other white neighborhood children; the entire family associated with whites as whites and demonstrated good character; and their father owned property and slaves.\textsuperscript{178} A former tax collector even attested that Elijah Bass had never paid the capitation tax imposed on free Negroes, mulattoes and mustizoes.\textsuperscript{179} Additionally, two of the three children had white spouses.\textsuperscript{180}

The court ruled that the evidence the Bass children presented was insufficient to position their father "among the constitutional freeman of the State"\textsuperscript{181} and thereby deem them "sufficiently white" to grant a new trial. Even though there was no knowledge that the children had been denied the rights and privileges of a free white person,\textsuperscript{182} the court based its ruling on the fact that their father, "Elijah Bass[,] never exercised, or claimed to exercise, the rights of citizenship in any particular."\textsuperscript{183} Furthermore, according to the court, the children's allegations concerning "respectability would give as good a claim to [whiteness] to a large number of mulattoes; . . . [however,] marriage with a white person has never been held to elevate a colored person into the class of citizens; nor has mere social intercourse."\textsuperscript{184}

It appears that the court was attempting to enforce a rigid yet indecipherable distinction between social whiteness—exercising the social privileges of whites, e.g., marrying a white person, attending white schools and churches, residing in white neighborhoods—and racial/legal whiteness—exercising the civic duties of a white man, e.g., voting, holding political office, testifying in a court of law. Significantly, it was alleged that Elijah Bass served as a witness in a lawsuit "in which free white persons were parties."\textsuperscript{185} Upon closer examination, it also seems as if the court's refusal to acknowledge the Bass's potential whiteness was influ-

\begin{itemize}
\item \textsuperscript{177} Friends of the Bass children brought the original action on their behalf and sought a new trial from the Court of Appeals of Law of South Carolina. See generally White, 1846 WL 2283, at *1–3.
\item \textsuperscript{178} Id. at *1–2.
\item \textsuperscript{179} Id. at *1.\textsuperscript{180} See generally id. at *1–3.
\item \textsuperscript{181} Id. at *3.
\item \textsuperscript{182} Id. at 2.
\item \textsuperscript{183} Id. at *3.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id. at *1.
\end{itemize}
enced by two equally important factors: the physical appearance of Elijah Bass and his daughter, Martha White, and the overarching socio-political (and quite possibly the judge's personal) objective in precluding "participation in the rights of citizenship by any who bear in their persons the traces of their servile origin."186

The court was not seeking to erect a strict demarcation between whiteness and Blackness per se. Rather, the court sought to create a clear boundary between whiteness and non-whiteness. Notably, in the opening sentences of the majority opinion, the court outlined the three distinct classes of people in South Carolina—citizens, i.e., whites, slaves, and mulattoes and mustizoes—and recognized interracial unions, the permeability of racial distinctions and the problems miscegenation caused for unsuspecting whites. The court proclaimed, "the constant tendency of [mulattoes] to assimilate to white, and the desire of elevation, present frequent cases of embarrassment and difficulty."188

It appears that the court's objective in affirming the jury's decision was to preserve the intermediate class allotted for mulattoes as well as to ensure that mulattoes would not be able to elevate to whiteness, especially for those mulattoes whose physical appearances evidenced Blackness. The court noted that the skin color of Elijah Bass and his daughter, Martha White, denoted their African ancestry.189 The presiding trial judge stated the following in his report:

Elijah Bass was in court. He was a dark quadroon, if he was one; from his color he appeared to be a mulatto. Their mother was in court. She was a white woman . . . . Mrs. White [Elijah Bass' daughter] shewed [sic] plainly the corrupt blood. Her brother, William Bass, to my eye, appeared an ordinary white sand hill boy . . . . Martha was married to a white man, a Scotchman. Her child, at the breast, was a fair, blue-eyed child; no one (not knowing its mother,) would say that it had any admixture of African blood.190

Based on the trial judge's report and their observations of the Bass family, the majority of the judges presiding over the appeal for a new trial sustained the jury's decision that Elijah Bass and his children were not white.191 Pursuant to the court's ruling, the Bass children were required to

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186. Judge Frost wrote the majority opinion with Judge Evans and Judge Wardlaw concurring. However, Judge Frost's ruling was not a unanimous decision. Judge Butler was absent from the proceedings. Id. at *3. Judges Richardson and O'Neal dissented, simply stating that a new trial should have been granted. Id.

187. Id. at *2.

188. Id.

189. Id. at *1, 3.

190. Id. at *1.

191. Id. at *3.
pay the capitation tax from which whites were exclusively exempted and from which the family was previously immune.

The case of the Bass family brilliantly unveils the fluidity of race. For at least two generations, the Bass' were considered white within their community despite their known mixed heritage. And, for at least twenty-five years, Elijah Bass did not have to pay a capitation tax. Yet, the tax collector who in all likelihood was a white person did not perceive the Bass children as white when he surveyed the neighborhood and potentially other whites in the neighborhood. Thus, the tax collector's (and the judges') individual determinations illustrate that one's race is not natural, objective, and fixed; it is quite contextual, relational, and subjective—one's race, like beauty, is in the eye of the beholder. Likewise, the fact that the court openly acknowledged the Bass' "social whiteness" but determined that the absence of certain behaviors disqualified them from "racial/legal whiteness" further substantiates the contextual, subjective and malleable nature of race; for, in the eyes of the law, the Bass' were not racially fit to acquire the privileges of whiteness yet in the eyes of society, the Bass' sufficiently displayed their "whiteness".

It is also important to note Elijah Bass' grandchildren were not relegated to the same racial disability as their parents and grandfather. Without any assessment of their "reputation, reception in society, or exercise of the privileges reserved for white [men]," the appellate court upheld the jury's decision that "the grandchildren of Elijah Bass, the children [conceived by] one of his sons with a white woman, were white." In fact, the court found "no inconsistency between the verdict in this case, and that which found the grandchildren of Elijah Bass ... to be white persons." Thus, *White v. Tax Collector* depicts another important truism of racial determination cases: arbiters do not only manipulate judicial criterion for determining race, but they also simply abandon established principles to achieve a desired outcome. In many cases, as seen in the next case discussion of *In Re Cruz*, the objective is to reify the fiction of racial purity and to maintain white superiority and privilege.

**B. Racial Determination in the Early Twentieth Century: In Re Cruz**

In 1790, Congress enacted the first naturalization statute that reserved naturalized citizenship for "free White persons." Congress

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192. See generally *id*. Mr. Shannon, a tax collector, testified that from 1819 to 1827 during his employ, Elijah Bass did not pay a capitation tax to him or to his predecessors or successors until some point in the 1840s.

193. *Id.* at *3. Interestingly, the trial record did not indicate that Martha White's child was also deemed white. See *id*.

194. *Id*.


196. Act of March 26, 1790, ch. 3, 1 Stat. 103.
amended the statute in 1870, extending the right to "aliens of African nativity and to persons of African descent."197 Whites and Blacks, therefore, were the only racial groups permitted to become naturalized citizens. The determination of race was a prerequisite to becoming a naturalized citizen198 and U.S. federal judges were subsequently responsible for deciding this important legal issue. In 1936, the federal court in the Eastern District of New York was charged with this duty in In Re Cruz, a naturalization case, or what Professor Ian Haney Lopez refers to as a "prerequisite case"199. Of the fifty-two reported prerequisite cases, Cruz is the only case in which a petitioner alleged African ancestry to become a naturalized citizen.200 Consequently, this is the only reported prerequisite case where a court had to determine an individual's Blackness.

The petitioner, Bernedito Cruz, claimed that he possessed one-fourth African ancestry and three-fourths Native American ancestry.201 The court enumerated various "blood statutes" enacted throughout the country by the beginning of the twentieth century. The court's survey depicted a broad range of proportions of African ancestry which allegedly denominated an individual Black: one fourth, one-eighth, one-third, and less than one-fourth.202 The court declined to follow any of these legislative constructs, but nonetheless adopted an equally arbitrary standard of defining Blackness. The court further cited to other rulings that held that an individual of one-fourth white ancestry and three-fourths Native American ancestry could not be admitted to citizenship as a white person.203 Likewise, the court decided that Bernedito Cruz, being one-fourth African, could not be admitted to the United States citizenry as a Black person.204

Interestingly, when the federal court denied Bernedito Cruz's petition, the racial ideology of the "one-drop" rule had reverberated throughout the nation for well over one hundred years and had recently become codified in Virginia and Georgia. However, the court did not apply the rule of hypodescent in deciding this case, as would be expected by scholars (and members of the general public) who proclaim that in the United States—the presence of one African ancestor—determines one's

198. It is important to note that in 1857, the United States Supreme Court decided race was a general prerequisite to American citizenship. See Dred Scot v. Sanford, 60 U.S. 393 (1857). The Court held that Blacks were not citizens of the United States and therefore unable to exercise the rights and privileges guaranteed under the Constitution. Id. at 404-05.
199. HANEY LOPEZ, supra note 168, passim.
200. See generally id.
201. In re Cruz, 23 F. Supp. 774 (1938).
202. Id. at 775.
203. Id.
204. Id.
Blackness. In light of this case's socio-historical context, the court's rejection of the one-drop rule and its simultaneous manipulation of racial determination norms illustrate a well-established pattern of courts in racial determination cases: to preserve the fiction of white racial purity and in this particular instance, the attendant privilege of citizenship.

By the time the *Cruz* litigation surfaced, nativist thought was rampant throughout the United States. Anti-Asian forces were at large on the West Coast. Jim Crow was the law throughout the southern United States and racial stratification in education, employment and housing were the norm in the North. Indeed, the emergence of social Darwinism at the beginning of the twentieth century "helped to strengthen the emerging Jim Crow order in the South and elsewhere in the nation." Many adherents of social Darwinism saw Afro-Americans (and people of color generally) as an inferior people destined to perish in the competition between the races. Despite the scientific community's shift away from such theories in the 1920s and 1930s, racism still had strong support in mainstream culture. White North Americans still wished to "[maintain] a white majority and preserve the racial purity of the U.S. white population."

The law also facilitated the propagation of popular racist sentiment and the enactment and enforcement of U.S. immigration policies followed suit. In 1924, Congress established the National Origins Act, which significantly restricted immigration from Southern and Eastern Europe, "hop[ping] to prevent 'Dirty Europeans' from polluting the nation's Anglo-Saxon heritage." In similar spirit, the court in *Cruz*, like preceding and subsequent courts, did not appropriate the widely espoused one-drop rule in determining the petitioner's Blackness to ensure that only whites and "assimilable" groups be conferred U.S. citizenship. The rule of hypodescent, again, is shown to be merely a racial ideology and not a rule applied in actual instances of racial determination.

The court's repudiation of the one-drop rule was commonplace in cases of racial determination; however, a closer examination of *In Re Cruz* evinces that the court took extraordinary steps to maintain white racial purity and privilege. The court formulated its own determination norm rather than adopt the legislative constructs enacted at the time. By the 1930s, local and state legislatures throughout the United States had significantly restricted the amount of African ancestry one could possess to


207. *Id.* at 38.

208. *Id.* at 87.


be considered not only what we contemporarily deem white but also non-white—Native American, Mexican, and Spanish. For example, Oklahoma legally classified Native Americans as whites, Arizona classified Mexicans as whites, and both states passed anti-miscegenation laws. Thus, legislators made a concerted effort to ensure persons with an infinitesimal amount of African "blood" could only claim Blackness. Consequently, to maintain the semblance that American citizenship was exclusively reserved for whites, the court in Cruz had to significantly depart from not only the prevailing legislative trend of determining Blackness, but more importantly judicial norms of determining Blackness.

The court held the following:

in order for a petitioner to qualify [for naturalized citizenship under the statute], his African descent must be shown to be at least an affirmative quantity, and not a neutral thing as in the case of the half blood, or a negative one as in the case of the one-quarter blood.

The court rationalized its holding based on a comparison of other naturalization cases in which petitioners claimed one-fourth white ancestry and were not deemed white by the courts. As a result, the petitioners were disqualified from becoming naturalized citizens. Therefore, under the pretense of "equity" the court promulgated a parallel standard for Bernedito Cruz: he, too, could not qualify for citizenship on the same amount of African ancestry.

Moreover, the In re Cruz court articulated a more stringent racial qualification for those seeking naturalized citizenship on the presence of African ancestry. Petitioners had to demonstrate an "affirmative quantity" of African ancestry—more than half of their traceable ancestors had to be of African descent. It is apparent that the court formulated this standard to solidify the physical construct of whiteness and prototypical image of an American without expressly stating its rejection of the petitioner's claim for citizenship was in part based on physical prerequisites. In 1936, the court's incorporation of a "comparative method" and the invocation of a "blood" construct that increased the requisite African ancestry to ascertain an individual's Blackness were anomalies for racial determination cases.

211. See id. at 109-110.
212. In re Cruz, 23 F. Supp. at 775.
213. Id.
214. Unlike other racial determination contexts, in prerequisite cases courts did not expressly adopt physical appearance as a factor in determining whiteness. See, e.g., Ozawa v. United States, 260 U.S. 178 (1922) (rejecting the petitioner's claim that his skin color qualified him as white, and thus rejecting the color test as a method of determining an individual's "whiteness"). However, it is highly improbable that courts deciding prerequisite cases did not consider a petitioner's physical appearance when issuing a ruling on the petitioner's "whiteness" or "non-whiteness."
Yet, the creation and reconfiguration of racial determination methods to assist the reification of white racial purity, privilege and superiority were quite the norm. In Re Cruz further demonstrates the mutability and subjectivity of race. At one given moment, an individual could be “Black” and thus barred from marrying a white person, yet not “Black” and precluded from naturalized citizenship.

C. Moving Toward a New Millennium Yet Mired in the Past:
The Malone and Perkins Cases

Affirmative action and employment discrimination are modern contexts in which U.S. courts determine an individual’s race as a decisive issue. Interestingly, the methods U.S. jurists presently employ are standards promulgated centuries ago. Thereby, a historical overview of racial determination cases demonstrates that notions of race are not trapped in history, ensconced in a particular place and time; they continue to be perpetuated and accepted as existing norms. The 1994 Massachusetts case Malone v. Civil Service Commission best demonstrates the saliency of racial constructs beyond time and place.

In 1977, upon discovering the existence of a Black great-grandmother, twin brothers stated on their employment applications with the Boston Fire Department that they were Black.216 Previously in 1975, the Malone brothers submitted applications with the fire department—on which they stated they were white—and had been denied employment.217 After the fire department became subject to a court decree mandating increased minority hiring, the brothers allegedly became aware of a Black ancestor. Consequently, the brothers claimed they were Black on their second employment application. Their assertion proved to be successful. They were subsequently hired by the fire department and worked with the department for over twelve years. However, the brothers’ success ended.

In 1988, while in the process of reviewing promotion lists, the Boston Fire Commissioner discovered the brothers were identified as Black.218 This finding surprised the Commissioner because he thought the brothers were white.219 An investigation to uncover the veracity of the Malones’

217. Malone, 646 N.E.2d at 151 n.3.
218. Yang, supra note 216, at 388.
219. See id.
alleged racial identity and an administrative hearing ensued. The hearing officer found that the brothers had willfully and falsely claimed they were Black in order to benefit from the affirmative action program and were terminated.

During the administrative hearing, the Malones were allowed to rebut their "allegedly false race designation either by 1) showing that they had "acted in good faith," or 2) demonstrating that they were in fact "Black". The Malones attempted to prove their "Blackness". To determine the Malones' requisite "Blackness," the hearing officer employed the exact three-prong test that judges first appropriated in nineteenth century racial determination cases like White v. Tax Collector: "1) visual observation of physical features; 2) documentary evidence establishing black ancestry, such as birth certificates; and 3) evidence that the Malones or their families held themselves out to be black and are considered black in the community."

Regarding the first prong of the racial determination test, the officer stated, "I visually observed the Malone brothers at the hearing. They each appear to me to have fair skin and fair hair coloring, to have Caucasian facial features. Based on my visual observation, they do not appear to be black." Therefore, the brothers did not satisfy the initial criteria to prove their race. The brothers attempted to satisfy the second prong and simply brought forth no evidence to fulfill the third prong. They offered birth certificates for three generations, which all affirmed white racial identity, and an inconclusive photograph of a woman they asserted was their Black maternal grandmother. Based on this evidence, the hearing officer concluded that the Malone brothers were not Black and reviewing courts upheld the officer's finding.

The Malone case triggers important questions concerning the weight of the three criteria used in determining the brothers' race. If the Malones' great grandmother could have been "conclusively" identified as Black based on physical characteristics historically and contemporarily associated with Blackness, would the brothers be considered Black based on the presence of one Black ancestor despite a prototypical/stereotypical white physical appearance? Would the brothers have to be socially accepted as Black as well? To be determined Black did the Malones simply have to exhibit physical characteristics associated with Blackness, despite

220. The commissioner informed the personnel administrator he had reason to believe that the brothers falsely claimed minority status on their application to be appointed to the fire department. Malone, 646 N.E.2d at 151.
221. Id.
222. Yang, supra note 216, at 388.
223. Malone, 646 N.E. 2d at 151 n. 4.
224. Id. at 389.
225. Malone, 646 N.E.2d at 152 n.5.
226. Id. at 151–52.
family members’ birth certificates affirming white racial identity? Or, would the weight of the criteria depend on the context in which racial identity is asserted or defended?

In accordance with historical and contemporary racial determination cases, the hearing examiner in the Malone case employed the three-prong test where the race of an “ambiguous” individual was to be determined. Therefore, in all likelihood, if the brothers visibly appeared Black to the hearing examiner, then the additional prongs—community recognition and ancestral evidence—would not have been applied.

Perkins v. Lake County Dep’t of Util.\textsuperscript{227} validates the controlling nature of phenotype when whiteness and Blackness are being assessed. In Perkins, the plaintiff alleged that he was discriminated against on the basis of race and national origin\textsuperscript{228} in violation of Title VII.\textsuperscript{229} The central issues before the Perkins court were whether national origin and race were synonymous and whether a Native American claiming discrimination had to present infallible ancestral, social reputation or performance evidence to prove he or she was Native American.\textsuperscript{230} The court decided that the Native American plaintiff was not required to offer such evidence to prove ancestry or race.\textsuperscript{231}

The court proclaimed that defining race in the United States has been “ill-defined,” “subjective,” and “arbitrary.”\textsuperscript{232} Yet, “when racial discrimination is involved[,] perception and appearance are everything.”\textsuperscript{233} Thus, the court regarded race as a stable, superficial physical construct and in fact, appropriated notions of Blackness to support its proposition and ultimate ruling. According to the court, evidence of an African American’s ancestry or “blood” is not needed to determine who is African American:

\begin{itemize}
  \item \textsuperscript{227} 860 F Supp. 1262, 1266 (N.D. Ohio 1994).
  \item \textsuperscript{228} Mr. Perkins claimed race discrimination in his complaint. \textit{Id.} at 1264. The Perkins court also treated Perkins’ claim as a national origin claim. \textit{Id.} at 1266. The court used national origin and race interchangeably throughout the opinion. \textit{See id.}
  \item \textsuperscript{229} \textit{Id.} at 1266.
  \item \textsuperscript{230} \textit{See id.} at 1272–77 Significantly, the Perkins court expressly denounced the appropriation of the one-drop rule to determine whether an individual is Black. \textit{Id.} at 1271.
  \item \textsuperscript{231} The court specifically held “the fact of [Mr. Perkins'] and his employer’s belief in his status as an American Indian, added to which is his apparent physical resemblance to Native Americans and his family’s belief in and propagation of his Indian heritage” sufficiently supported Mr. Perkins’Title VII claim of national origin discrimination. \textit{Id.} at 1277. Mr. Perkins presented evidence of his “American Indian appearance” through the deposition testimony of Melton Fletcher, “the program coordinator for the North American Indian Cultural Center.” \textit{Id.} at 1269. The court acknowledged “as to Plaintiff’s personal appearance … there was no doubt in [Fletcher’s] mind that Plaintiff is a Native American.” In fact, Fletcher testified “[Perkins] appeared to look like an Indian to me. He certainly—I’ve been around a lot of native people, and him walking in my door, I—it would be very hard for me to mistake him for anything else” because of his facial characteristics and complexion. \textit{Id.} at 1270.
  \item \textsuperscript{232} \textit{Id.} at 1271.
  \item \textsuperscript{233} \textit{Id.} at 1277.
\end{itemize}
African Americans do not have to demonstrate that their relatives lived in Africa, or that they visit the site of their roots, or that they are involved in any kind of cultural activities associated with Africa. They only have to appear to be African Americans to be deemed members of the protected class.\textsuperscript{234}

Furthermore, the court noted that African Americans were "more readily identifiable minorities \ldots [therefore,] it is difficult to imagine an employer challenging an employee's status as an African American and requiring proof of ancestry in a Title VII case in which a black Plaintiff alleged employment discrimination."\textsuperscript{235} In doing so, the Perkins court adopted the comparative and subjective socially derived image of Blackness expressed in Hudgins v. Wright centuries prior: Blacks exhibit a dark skin tone, a flat nose and woolly hair, and individuals who did not exhibit the required skin color can still be deemed Black based on a combination of other physical features that signify their Blackness.

Despite the bias and inconsistency of assigning physical characteristics to race and thereby determining race, the consistency as to which outward appearances designate Blackness, whiteness, and otherness are entrenched into our social and legal constructions of race. Consequently, the Perkins court pronounced a rule of racial determination which encapsulates this understanding. Even if the plaintiff does not expressly identify as a particular race, the individual is entitled to Title VII protection if the employer believed that the plaintiff was a member of protected class based on some objective evidence, which "may consist of physical appearance, language, cultural activities, or associations."\textsuperscript{236} Hence, like early racial determination cases, Malone and Perkins expose the canons of U.S. racial determination jurisprudence: courts' application of racial determination methods evinces both the paradoxical nature of race—objective and constant yet fluid, subjective, and contextual—and the inapplicability of the hypodescent rule.

III. THE APPLICATION OF U.S. RACIAL DETERMINATION METHODS TO THE BRAZILIAN CASE

Like other scholars, Carl Degler has opined, the "amazing array of terms and gradations is testimony to the Brazilian emphasis upon appearance rather than upon genetic or racial background, which is the key to the North American definition of the Negro."\textsuperscript{237} In his Note, "Not as Easy as Black and White: The Implications of the University of Rio de Janeiro's

\begin{itemize}
\item \textsuperscript{234} Id. at 1276.
\item \textsuperscript{235} Id. at 1278 n.20.
\item \textsuperscript{236} Perkins, 860 F. Supp. at 1278.
\item \textsuperscript{237} DEGLER, supra note 14, at 103. See also Piza and Rosemberg, supra note 5.
\end{itemize}
Quota-Based Admissions on Affirmative Action Law in Brazil," Ricardo Rochetti similarly argues that unlike the United States, Brazil's view of race "does not appear to subscribe to any type of genetic-based racial classification that relies on descent." Instead, there appears to exist within Brazilian society a much more "fluid" concept of racial classification than in U.S. society. Therefore, according to Rochetti "[b]ecause of Brazil's 'color-based' notions of racial classification, governmental, educational, and business entities will be unable to sustain affirmative action schemes predicated on race [like those implemented in the United States]."

To say that in Brazil race is fluid and that race only constitutes skin color and not ancestry and that Blackness in the United States is static as it is solely defined by the presence of one Black ancestor are overly simplistic claims. The infinite gradations of color that presumably define an individual's race in Brazil indeed take into account one's ancestry; the myriad racial labels demarcate the various physical characteristics an individual exhibits which have been and continue to be linked to Black and/or white ancestry. Furthermore, a closer examination of race in Brazil and the United States reveals that conceptualizations of mobility and rigidity are components of both nations' systems of racial categorization. Professor Tanya Hernandez advances a thoughtful explication on the commonality of race in the Americas:

Latin American racial distinctions, which are visually based on phenotype, have been described as a "prejudice of mark" because they seem to focus on physical appearances rather than origins. This descriptor stands in supposed contrast to the U.S. model, known as a "prejudice of origin," which makes racial distinctions based chiefly on heritage or ancestry. Yet, in operation, the prejudice-of-mark's use of phenotype effectively incorporates ancestry into the process or act of racialization, both formally and informally. Similarly, a prejudice-of-origin approach to racial distinctions pragmatically incorporates observations of phenotype into considerations of ancestry. The Latin American model is promoted as flexible and therefore less focused on maintaining rigid racial distinctions, whereas the U.S. model is promoted as static and therefore reliable in its consistency. But in practice, the rigidity built into "fluid" Latin American visual assessments, and the

238. Rochetti, supra note 10, at 1460 (discussing the inefficacy of U.S. style race-conscious affirmative action programs because of Brazil's more fluid racial classification system).
239. Id. at 1461.
240. Rochetti, supra note 10, at 1461; see, e.g., Racusen, supra note 10, at 793 (arguing that "Brazilians identify in many different categories that connote color and appearance rather than race and origin").
imprecise and thus necessarily fluid visual assessments that form a part of the rigid traditional U.S. model, both mix and deploy the politics of fluidity and rigidity to maintain a hierarchical preference for Whiteness in both places. 241

Despite both nations' fluidity in determining race, a fixed construction of Blackness and whiteness exists. Currently, in Brazil and the United States the instant determination of who is Black and who is white is largely based on similar racial constructs articulated almost three centuries ago in Hudgins v. White: dark skin, woolly or "kinky" hair 242, and a broad nose signify Blackness or a predominance of African ancestors; fair skin, Roman nose, and straight hair signify whiteness or a heightened presence of white ancestry.

In an effort to minimize "racial fraud" and to ensure that darker Brazilians would be the beneficiaries of the affirmative action program, in 2003 Mato Grasso du Sol, the third Brazilian state to implement affirmative action in higher education, formed a Commission of Black students, professors, and activists to verify applicants' claims that they were afrodescendentes. 243 After reviewing photographs of the applicants, the Commission rejected 76 of the 530 applicants because they did not possess the requisite phenotype. 244 According to the President of the State Council for the Defense of Negro Rights (CEDINE), Naercio Ferreira Fernandes de Souza, the rejected applicants did not display the Negro Preto [the Black Negro] phenotype: "thick lips, flat nose, and frizzy hair." 245 According to Professor Antonio Sérgio Alfredo Guimarães, 246 whiteness in Brazil is identified as "precisely this mixture, light skin, white

241. Hernandez, supra note 38, at 1109-23.
242. Rebecca Reichmann discusses the decision of a Brazilian judge in 1996 prohibiting a Brazilian singer, Tiririca, from publicly performing her popular country-rock song, "Look at Her Hair" which "berated a black woman's 'steel wool' hair, likening its smell to a skunk." Reichmann, supra note 4, at 28. A portion of the pejorative song lyrics is as follows:

... Look, look, look at her hair
It looks like a brillo to scrub a pan
When she passes by, she gets my attention
But her hair, it's hopeless
Her stink almost made me faint ....

Telles, supra note 5, at 154.
244. Id. at 819.
245. Id.
246. Dr. Guimarães is a Professor of Sociology at the University of São Paulo. He specializes in race relations in Brazil with a concentration on the construction of racial and national identities.
More often than not, these physical constructs rather than the knowledge of remote African or white ancestors determine how an individual is classified and treated in both American societies.

In an interview with Professor Guimarães, Professor Sérgio Adorno recounts witnessing racial discrimination while shopping in a bread store in Perdizes, a middle-class district of São Paulo city. According to Professor Adorno, when he arrived an older Black woman was waiting to be served while the store attendant assisted a blond woman from Perdizes. After the attendant finished serving the white female customer, he turned to Professor Adorno to assist him instead of the older Black woman. Professor Adorno insisted that the woman be helped first and the attendant retorted, "[n]o, she can wait a little." Professor Adorno surmises that the basis for the attendant’s unsuccessful attempt to assist him (Professor Adorno demanded that the woman be served before him) was the attendant’s assumption that the Black woman was a domestic worker in the area. He further observed that the attendant though also Black “was being courteous to a white person at the cost of a black person who was in line.”

This instance of racial discrimination demonstrates the universality of Blackness, as both Professor Adorno, a white Brazilian, and the store attendant, an afrodescendente, classified this older woman as Black. At the same time and in the same place, for both observers of different races this woman satisfied the physiognomy of Blackness. Moreover, Professor Adorno apparently satisfied the oppositional race/status construct of whiteness. Thereby, for the store attendant the woman’s “Blackness” justified his discriminatory and subordinating treatment toward her and Professor Adorno’s “whiteness” justified preferential and superior treatment. For Professor Adorno, however, the older woman’s status in the line deserved respect regardless of his or her physical appearance. This anecdotal evidence affirms that the principal method U.S. courts have applied when determining race and Brazilians employ to determine race in social

247. Interview with Friar David Raimundo Santos in Beyond Racism, supra note 5, at 538, 543. According to Dr. Guimarães, in Brazil this phenotype is called “good appearance” or boa aparência, which people of color in Brazil have used “to climb higher in life and forge their path identifying themselves as whites.” Id.

248. Dr. Adorno is an Associate Professor of Sociology and Co-Director of the Center for the Study of Violence at the University of São Paulo.

249. Antonio Sergio Alfredo Guimarães, Interview with Sérgio Adorno in Beyond Racism, supra note 5, at 525, 536.

250. Id.

251. Id.

252. Id.

253. Id.

254. Id.
Determining the (In)Determinable

situations—physical appearance—can also be appropriated by Brazilian arbiters assigned the task of determining whether an individual is Afro-Brazilian and thus a proper beneficiary of recent affirmative action programs in higher education.

Generally, when determining Blackness or whiteness, U.S. courts have applied four precepts: 1) physical appearance; 2) ancestry; 3) community recognition; and 4) racial performance. As the previously discussed racial determination cases demonstrate, neither ancestry nor origin has been the sole determinant of Blackness or whiteness in the United States. Historically and contemporarily physical appearance has served as the primary determinant for courts determining race. In cases where physical appearance was not “conclusive” or the individual’s race was deemed “ambiguous”, courts considered additional evidence of ancestry, community recognition or reputation, and racial performance. Accordingly, Brazilian decision-makers, like U.S. courts, can employ the physical constructs associated with Blackness or non-whiteness to designate an applicant Afro-Brazilian.

In Brazil, “Blacks (pretos or negros) in popular conceptions of the term are those at the darkest end of the color continuum, but in an increasingly used sense of the term (negro), it includes mulattos or browns as well.” Despite the mutability of self-classification in Brazil, “one’s appearance constrains millions of Brazilians to being black . . . [as] [t]here is virtually no ambiguity when making distinctions between white and black (preto) or in many cases but far from most cases, between white and brown.” Indeed, individuals whose physical appearances connote to others preto, negro, pardo and even mulatto are more likely to encounter similar stigmatization and marginalization. Therefore, applicants who fit the socially constructed and accepted phenotype of a preto, negro, mulatto or pardo could justifiably be deemed Afro-Brazilian for affirmative action purposes.

In post-slavery Brazil, “[t]he uppermost levels of society continued to be overwhelmingly European Brazilian . . . [and] [t]he lowest levels remained overwhelmingly African Brazilian and disproportionately black.”

255. Telles, supra note 5, at 218.
256. Id. at 219 (emphasis added).
257. According to Telles, “mulattos or morenos are valued as the quintessential Brazilians in national beliefs, although they are often marginalized in reality and are much more similar to Blacks than whites in the Brazilian class structure.” Telles, supra note 5, at 218. Due to structural racial inequality and racism, mulattos, morenos, and negros constitute half of the poverty stricken population in Brazil, the majority of the working class and a minority of a small middle class population. See id. at 220. Therefore, I submit that lighter skinned Afro-Brazilians should also be deemed proper beneficiaries of affirmative action.
258. Daniel, supra note 16, at 40. See also Nascimento and Nascimento, supra note 9, at 108 (describing the darker complexions of poverty and disenfranchisement in Brazil). The Nascimentos contend...
In contemporary Brazilian society, it is a factual observation “that the complexion of favelados (shantytown dwellers) is darker than that of those who live in upper-income neighborhoods and that few Afro-Brazilians can be found on university campuses.” Edward E. Telles confirms this personal reflection:

Although hidden behind the façade of miscegenation, [in Brazil] a racist culture is ubiquitous in all social interactions among whites, browns, and blacks in virtually all social situations. It is based on a web of beliefs and subordinate positions that are the proper place for browns and blacks and that social spaces that involve control and access to resources should be occupied by whites. From vertical relations like hiring and promotions to horizontal ones like hanging out with friends or enduring the dating market, slights against blacks and browns accrue to the many other slights that preceded them, often harming the self-esteem of brown and especially black persons. Such treatment intensifies with each successively darker shade of skin color.

Hence, by the time both countries abolished slavery—the United States in 1865 and Brazil in 1888—common racial constructs and racial hierarchy had become deeply entrenched into each nation’s fabric. These racial constructs and corresponding racial hierarchy shaped conceptions of Blackness and whiteness long after slavery’s demise, and continue to do so even currently. Accordingly, like U.S. courts, Brazilian arbiters can employ the primary method of determining Blackness when ascertaining the proper beneficiary of affirmative action in higher education: classification on the basis of physical appearance.

In the case of the “ambiguous” applicant, Brazilian arbiters can also consider evidence of ancestry and/or community reputation. Even though it is a more common phenomenon in Brazil than in the United States, racial hierarchy and segregation are etched indelibly in contrasting landscapes of luxury and privation ... African Brazilians in disproportionate numbers live in urban shantytowns called favelas, mocambos, or palafitas. To visit Rio de Janeiro's Central Station [the train and bus station for the Rio de Janeiro's metropolitan area] is to witness dangerously dilapidated trains taking hours to transport mostly black workers from the huge metropolitan area called the Baixada Fluminense to their jobs in the capital city ... The racial contrast between a public school in Baixada—or poor suburbs or favelas almost anywhere in Brazil—and a university in a rich area like Rio de Janeiro's Zona Sul is [Black and white].
States for children to be racially classified differently than their parents and for siblings who have the same parents to not share the same racial classification, ancestral evidence can still be used to determine an applicant’s race.\(^{261}\) If the applicant’s parents have declared themselves negro, preto, mulatto, or pardo, then the ambiguous applicant can also be classified as one of these categories. Like in the case of the Malone brothers, evidence of a remote African ancestor would be insufficient to support a determination of Blackness. A rule of this sort could preclude potential meritless claims of many Brazilians who acknowledge African ancestry yet do not sincerely classify themselves as Afro-Brazilian and are only doing so to be admitted to public universities under the affirmative action program. Moreover, such a rule would not undermine the prevailing norm that most Brazilians define themselves as white while recognizing their African ancestry.

If necessary, Brazilian arbiters could also consider evidence of community reputation or recognition. However, arbiters should be extremely cautious in permitting this type of evidence as it has the tendency to be even more subjective, biased, and unreliable. Often, members of the community are submitting their personal ideals about how the individual and/or his or her family comports with their preconceived notions of what it means to be member of a particular race. Unfortunately, Afro-Americans in the U.S. and Brazil are similarly stigmatized because of the physical manifestation of their African ancestry. For example, secondary teachers in Brazil have been found to put more energy and time in educating lighter-skinned children “because they believe that [these] children are more likely to succeed, and thus a good education will be more beneficial to them.”\(^{262}\) Brazilian schools frequently use textbooks that depict Blacks as “lazy, uncivilized, and violent”\(^{263}\) and Brazilians accept these perjorative stereotypes as true and treat non-whites and whites accordingly.\(^{264}\)

\(^{261}\) Id. at 93–94, 148–49 (explaining that results from the 1991 census show that parents classify their children in multiple categories; however, when both parents are black or white a significant majority of children are classified the same color as their parents and when there is a white mother and a brown father, 55 percent of the children are classified as white).  

\(^{262}\) Id. at 158.  

\(^{263}\) Id.  

\(^{264}\) According to Telles, 43 percent of respondents in a 1995 survey believed that “negros are only good in music and sports.” Id. at 153. He also reports a conversation with a teacher in Southern Brazil who opines that lighter-brown students “are more disciplined and study harder” and Black students “can’t learn, they are lazy, and they give up right away. They only want to know about samba and soccer. It’s in their blood.” Id. at 158. Naturally, such depreciatory notions associated with darker-skinned individuals and positive characteristics attributed to individuals with lighter skin color, which are generally accepted in Brazil and are consciously and unconsciously acted upon in individual interactions, play a defining role in the relative advancement of afrodescendentes and their lighter-skinned counterparts in social, educational, and employment spheres.
In addition to what children observe while in school, Brazilians’ images of Blacks and whites are shaped by a media that reifies negative stereotypes about Blacks and positive stereotypes about whites. “[N]on-whites on television are often invisible or relegated to menial roles . . . [b]y contrast, white persons and white families are cast as the symbols of beauty, happiness, and middle-class success.” As a result, if those members of the community attesting to an individual’s Blackness or whiteness consciously or unconsciously subscribes to these pervasive characterizations in determining the race of the applicant, their testimony can perpetuate or even engender new racial stereotypes, which can create more harm than good. Indeed, the continued proliferation of racial stereotypes that degrade Blacks and esteem whites simply fortifies the racial hierarchy that race-conscious affirmative action programs in their most progressive form seek to dismantle. Thus, only if necessary should community reputation or recognition evidence be considered, and such cases should be strictly limited to attestations regarding the race the applicant self-classifies, the race(s) members of the applicant’s family have deemed themselves, or instances where the applicant has been discriminated against because of his or her race.

The fourth precept historically used in determining Blackness, “racial performance,” which has been omitted in contemporary cases, should likewise not be applied in the Brazilian case. This determination method presumes that whites and Blacks uniquely and inherently exhibit certain types of behaviors that are mutually exclusive and distinctly identifiable. I argue that this type of evidence even more than reputation evidence has the clear potential of perpetuating harmful racial stereotypes and ideology as well as reinforcing the marginalization that Afro-Brazilians currently encounter in Brazilian occupational, educational, and socio-economic spheres.

Despite the divergent conceptualizations of race in the United States and in Brazil, the salient and important commonality found in both

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265. Id. at 155.
266. See also Racusen, supra note 10, at 826–27 for several possible ways Brazilian arbiters could use when determining whether an individual is an afrodescendente for affirmative action purposes in higher education. Racusen’s alternatives are a compilation of racial determination methods employed in India and the United States:

(1) visual examination of the individual by the determining body; (2) documents that demonstrate an individual’s intentions and/or self perception; (3) the individual’s testimony of self-perception, behavior or self-presentation, or discriminatory experiences; and (4) the testimony of others, including one’s family, neighbors, co-workers, or members of various reference groups about the individual’s self-perception, reputation in the community, self-presentation and behavior, discriminatory experiences, and physical appearance.

Id.
countries is that physical appearances trump when it comes to determining an individual's race and status and how one is viewed and treated in society. "External definitions of race are especially important because they often impart power and privilege in social interactions to lighter-skinned persons." Indeed, the overwhelming majority of individuals who hold positions of political, economic, and social power in Brazil as well as those who are upper and middle level professionals are white. Results from a Brazilian National Household Survey taken in 1996 by respondents who live in the São Paulo metropolitan area confirm the racial disparities within the Brazilian professional class. The survey revealed that "white males are two to three times more likely than their non-white counterparts of the same lower-class origins to become mid-level professionals and the relative chances of whites becoming high-level professionals are even greater." The survey also demonstrated that "the large majority of women who are professionals come from families where their fathers are also professionals." As stated earlier, the racial makeup of the Brazilian professional class is significantly white. Consequently, non-white females are disproportionately marginalized within unskilled, semi-skilled, and skilled jobs in contrast to their white counterparts.

Based on the survey's findings Edward E. Telles theorizes:

it [is] startlingly clear that race, independent of class, region, and a money-whitening effect, is a powerful force determining one's life chances. Moreover, an often forgotten fact is that the reproduction of racial differences in social mobility from one generation to the next contributes to increasing racial inequality over time and not merely maintaining it. In the unlikely event that racial differences in mobility will suddenly end, given the extent of Brazil's current racial inequality, it would still take several generations for Brazil to reach racial equality.

In light of educational statistics, Telles' forecast concerning the dismantling of racial inequality may be accurate. According to one study, approximately two-thirds of Afro-Brazilian children obtain a basic

267. Telles, supra note 5 at 218.
268. I.K. Sundiata, Late Twentieth Century Patterns of Race Relations in Brazil and the United States, Phylon 48: 65 (1987)).
269. See Telles, supra note 5, at 143-44.
270. Id. at 145.
271. Id.
272. Based on the survey results, Telles concludes "for non-white females, a ceiling effect occurs between unskilled and semiskilled or skilled jobs....While nonwhite males encounter a glass ceiling that prevents them from entering middle-level professional jobs and above, nonwhite women seem to be stuck in boots that are glued to the floor of the occupational structure." Id.
273. Id. at 222.
education in comparison to 85 percent of white children.\footnote{274} Once finished with elementary school, a Black child has a 40 percent chance of attending secondary school whereas a white child has a 57 percent chance.\footnote{275} Additionally, white students who graduate from high school are almost twice as likely to attend college than their Afro-Brazilians who graduate from high school.\footnote{276} Thus, not only is the need for increased access to secondary education, higher education, and consequentially professional and political spheres for \textit{afrodescendentes} genuine, but also \textit{afrodescendentes'} unequal access to these institutions on the basis of a physical appearance signifying pejorative notions presumptively deriving from their African ancestry, their Blackness, is likewise real.

\textbf{CONCLUSION}

Despite an exaggerated perception that the United States possesses a clearly defined method of determining who is Black, by employing the "one-drop" or hypodescent rule, and who is white—the absence of any Black ancestry—there is no precise and absolute method of determining race. Race is a social construct that is highly subjective, malleable, relational, and contextual. However, the massive enslavement and subordination of those persons who possessed a darker pigmentation, textured hair, and broader noses, by individuals who in relation to the former possessed a lighter pigmentation, straighter hair texture, and more narrow nose, engendered a concept of what is Black and what is white purely based on physical appearance which transcended geography, demography, ideology, and time.

Even though the courts and legislatures have expressly adopted numerous methods of determining race based on phenotype, ancestry, and social recognition unlike in Brazil,\footnote{277} in both countries racial constructs based on physical appearance is the primary mode of determining who is Black and white. Indeed, historical and contemporary racial determination cases in the United States demonstrate that courts first determine

\footnotesize{\textsuperscript{274} Nascimento \& Nascimento, \textit{supra} note 9, at 115. \\
\textsuperscript{275} Id. \\
\textsuperscript{276} Id. \\
\textsuperscript{277} Even though instances of racial determination in Brazil to which I have cited throughout this Article have not occurred within a formal legal context, members of Brazilian society have determined an individual's race based on his or her physical appearance, ancestry, and social recognition, as have U.S. courts. Whether these considerations are applied in a formal legal context or a mundane social context is inconsequential. The confluence of physical appearance, concepts of ancestry and social recognition has generated similar constructs of Blackness and whiteness in Brazil and in the United States. As previously explained, U.S. courts have appropriated these shared constructs of Blackness and whiteness. Brazilian arbiters can likewise employ the racial determination methods U.S. courts have appropriated when determining who is Black for purposes of race-conscious affirmative action in higher education.}
whether an individual's phenotype satisfies the socially prescribed constructs of race before any additional inquiry is made. Moreover, Brazil and the United States share mutual physical constructs of whiteness and Blackness—which signify the “proportions” of white and/or Black ancestry an individual possesses—as well as their associated meanings. Therefore, Brazilian and U.S. arbiters share a common base line when determining whether an individual is Black and Brazilian arbiters can appropriate standards applied by U.S. courts when deciding the proper beneficiary of race-conscious affirmative action programs in higher education.

One may argue that appropriating the same physical constructs developed to enslave and oppress people of color should not be used presently to determine an individual’s race. However, we do not yet live in a world where these physical constructs do not affect an individual's status, treatment, or opportunity in American society. In both American nations, it is a stark and unsettling reality that the overwhelming majority of individuals who are poor, marginalized, undereducated, and underserved exhibit similar darker skin complexions and facial characteristics—a physical appearance signifying to society a predominance of African ancestry and putative inherent inferiority.

Ideally, using the entrenched constructs of Blackness and whiteness when determining the proper beneficiary for affirmative action in higher education will integrate Afro-Brazilians into educational and professional realms to which they have been systematically and often automatically denied entry and their lighter-skin counterparts have been provided access. Thus, it is my hope that the active presence of Afro-Brazilians in institutions of higher education, professions, and positions of economic and political power will ultimately dismantle the pejorative notions associated with Blackness, the privileging of whiteness, and the stigmatization individuals of visible African descent encounter. Moreover, Afro-Brazilians’ participation in these spheres may induce the abolition of an enduring racial hierarchy and concomitant system of racial inequality—present in both Brazil and the United States—whereby Blacks disproportionately occupy the most disenfranchised positions and whites the most privileged, and socially mediated signifiers and meanings of Blackness and whiteness respectively reinforce this status quo.