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THE DEVIL IN THE DETAILS: ON INTELLIGENT DESIGN, RACIAL CONSPIRACY THEORIES, AND THE THEOLOGY OF WHITENESS

Brant T. Lee*

I. INTRODUCTION: THE PUZZLE OF RACIAL INEQUALITY

It is a central problem in the great American conversation about race to explain persistent racial inequality. The dominant narrative tells us that, historically, racial inequality was caused directly and simply, by explicit and intentional racial discrimination based on unreasoning race hatred. The paradigmatic examples are slavery and segregation; the icon is Bull Connor. Together, the Civil War and the civil rights movement comprise America’s delivery from this original sin. In law, this redemption is reflected in the Emancipation Proclamation and in it is a central problem in the great American conversation about race to explain persistent racial inequality. The dominant narrative tells us that, historically, racial inequality was caused directly and simply, by explicit and intentional racial discrimination based on unreasoning race hatred. The paradigmatic examples are slavery and segregation; the icon is Bull Connor. Together, the Civil War and the civil rights movement comprise America’s delivery from this original sin. In law, this redemption is reflected in the Emancipation Proclamation and in

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the fulfillment of the Civil War-era constitutional amendments through Brown v. Board of Education and the antidiscrimination legislation of the civil rights era.

Within this narrative, race discrimination is the problem, and it is an individual character defect. Applying methodological individualism consonant with law and economics analysis, racism is defined as an irrational preference, or “taste,” an individual sin of commission. But we have all had the light revealed to us. And slowly, the old ways are said to be dying away. Continuing racial inequality is seen as a dwindling vestige of this tainted past. As race discrimination fades, racial inequality will surely follow. This is the hopeful sentiment expressed by Justice O’Connor in upholding a narrowly tailored race-conscious law school admissions program: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

But we are living through the fifty-year anniversaries of many of the landmark events of the civil rights movement, and by many convincing analyses, deep and pervasive racial inequality persists. How can such inequality persist in the modern, enlightened era?

The exhausted contestants in this arena are racism and merit. Although color-blindness has clearly prevailed as the dominant cultural paradigm, people of color continue to sense that the equal

“retains its fullest reputational value”).

5. President Abraham Lincoln, THE EMANCIPATION PROCLAMATION (Jan. 1, 1863) (“[A]ll persons held as slaves within [the rebellious] States . . . are, and henceforward shall be free . . . .”).

6. U.S. Const. amends. XIII (prohibiting slavery), XIV (guaranteeing equal protection and due process), and XV (protecting the right to vote).


10. Id.


opportunity\textsuperscript{14} that color-blindness was supposed to deliver has never arrived.\textsuperscript{15} With the limited vocabulary that the mainstream narrative offers, however, racial equality advocates have had to theorize increasingly subtle forms of unconscious or hidden racism.\textsuperscript{16} Whatever the substantive merit of these theories, they have come up against a mainstream public mindset in which the majority of people, unsurprisingly, are convinced that they are not the evil racists of legend.\textsuperscript{17} Rather than confronting whatever forms of racism remain, this majority has instead adopted the philosophy, grounded in the rhetoric of classical economic theory, that impartial markets determine outcomes based on merit.

A. Agency in Evolution and Economics: The Blind Watchmaker and the Invisible Hand

The goal of this article is to loosen the stranglehold that the above dominant paradigm has on our collective imagination. It examines the mainstream philosophy of merit and impartial markets by raising the seemingly incongruous comparison of such philosophy to the public debate over Intelligent Design and evolution. The two debates (racism versus impartial markets, and Intelligent Design versus evolution) turn out to have much in common. Each debate stems from the effort to understand observed complexity, be it racial inequality or biological systems. At a superficial level, the analogy is clear: in each debate, one side appeals to causation by a person or agent of some kind.\textsuperscript{18} We struggle to understand what we observe in the world, and we think, “somebody must be behind this.”

\textsuperscript{16} See Charles R. Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 STAN. L. REV. 317 (1987); Jerry Kang & Mahzarin R. Banaji, \textit{Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”} 94 CAL. L. REV. 1063 (2006). I do not dispute that significant hidden or unconscious racial discrimination occurs. To my mind, these and other advocates have persuasively set out convincing explanations of how actual racial bias continues to be a cause of racial inequality. This essay, however, proceeds along a different line of thinking. Hidden and unconscious racism does not explain all of what is happening.
\textsuperscript{18} See infra Part II.
Intelligent Design advocates thus search for evidence of an agent, a Divine Creator who brought into being the Universe and all of its creatures.\(^{19}\) William Paley famously argued that when one finds a fully functioning watch on the sidewalk, one reasonably assumes a watchmaker.\(^{20}\) Modern Intelligent Design proponents continue to argue in this vein, that the complexity and precision of the biological world cannot be explained without reference to the direct intervention of a Divine Watchmaker, or God. There is often a nostalgic quality to this search,\(^{21}\) as though, not long ago, God was physically present for all to see. Many believe that we are still blessed (or judged), so it must still be God at work.

In contrast, some surveyors of the racial landscape attest that the Devil was here in the flesh, in living memory—we watched him on TV, aiming fire hoses at school children.\(^{22}\) Some observe oppression, or consider themselves oppressed, and conclude that it must still be the Devil at work. With regard to racial inequality, the search for an agent—here, a racist—also continues. One form of this quest takes the form of racial conspiracy theories holding the White Man or the Ku Klux Klan responsible for racial inequality.\(^{23}\) A more mainstream version of this agenda is the search for evidence of hidden or unconscious bias.\(^{24}\)

And in each case, respondents scoff, arguing that there is no evidence of a person or agent at work. They claim that with regard to biological life, the ordinary evolutionary process of natural selection dispassionately creates complex organisms out of simpler ones.\(^{25}\) It is not God who designs, but Darwin’s survival algorithm\(^{26}\) that winnows and shapes life. They assert that if there is a Watchmaker, it is a Blind

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19. See infra Part II.B.
21. This is a persistent theme in Protestant theology, that somehow we have lost our way, whether it has been since the fall from Eden, or merely since the 1960s. *THE OXFORD COMPANION TO THE BIBLE* 223 (Bruce M. Metzger & Michael D. Coogan, eds., 1993) (defining “The Fall”).
22. *CARTER*, supra note 3, at 124 (describing how the Birmingham Police Department sprayed fire water on civil rights demonstrators, pursuant to the order given by then Commissioner Eugene “Bull” Connor).
23. See infra Part II.C.1
25. See discussion infra pp. 69-72.
Watchmaker. Similarly, with regard to racial inequality, respondents maintain that ordinary economic rules of supply and demand distribute market goods unevenly based on objective measures of value. They argue that life, or at least the market, is not fair. It is not The Man, but the Invisible Hand that creates racial inequality.

At this level, the analogy seems to merely set up a conflict between science and superstition, and one might smugly conclude in each case that science prevails. But I want to say more.

1. Agency or Simple Materialism

In each case, the response to complexity is viewed as a dichotomy, agreed to by some advocates on each side. With regard to evolution, the antagonists often seem to agree that either there is an active, intervening God, or there is nothing but matter. Similarly, with regard to racial equality, disputants on both sides seem to presume that either racial minorities are oppressed by racists, or there are only impersonal, unbiased markets making rational choices based on merit.

2. The Ideological Misuse of Science

In each case, the side of “science” has historically been subject to ideological misuse. The general themes of evolution and economic theory have been expropriated and deployed dogmatically and ideologically rather than carefully and objectively, and they have been extended to support conclusions beyond what careful scientists would endorse. This misuse of science follows certain patterns: first, the intellectual framework, whether it be natural selection or supply and demand, is presented as “natural.” With this presentation comes the suggestion of both linear simplicity and inevitability.

The framework is then fitted into a modernist and progressivist...
ideology: following simple rules of nature, biological and economic life moves ever forward, producing ever more advanced or efficient results.\textsuperscript{31} The progress is not only inevitable but desirable, in the nature of Providence.\textsuperscript{32} The losses suffered in the winnowing process are perhaps to be mourned, but not opposed, lest the mechanism of progress be interrupted.\textsuperscript{33} Human interference in these delicately arranged affairs threatens to bring down retribution in the form of unintended natural consequences or market disruptions.\textsuperscript{34} It seems it is not only the religious fundamentalists who fear the wrath of God!

3. \textit{A Theology of Whiteness}

Certain kinds of evolutionary and economic beliefs thus serve the same function as agency does, and in doing so they represent not science but faith. This is a manifestation of the essential and very human search for meaning in life. A secular biologist might reason that if the purpose of life is not God’s purpose, then perhaps it is the achievement of evolutionary progress. Thus, life has meaning so long as evolution continues its work. Similarly, a mainstream economist might conclude that if the inequality experienced by racial minorities is not the work of racists, then perhaps it is an unfortunate byproduct of the market efficiently working to create the greatest amount of wealth or welfare for all.

This kind of ideological scientific progressivism can be dangerously and temptingly self-serving. The claim that evolution causes some species to develop qualities that allow them to dominate their environmental niche is especially seductive to the dominant.\textsuperscript{35} The claim that the market is an accurate judge of merit must be especially compelling for those who have fared well economically.\textsuperscript{36} Thus, it

\begin{itemize}
\item \textsuperscript{31} See infra Part III.A.
\item \textsuperscript{32} “Providence” is “[t]he preordaining and regulative agency of God in the world as distinguished from his creative and sustaining activities. . . . [I]t is an essential feature of the notion of the divine government, and implies not only power, but conscious care and solicitude.” 2 DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 373 (James Mark Baldwin, ed., 1960).
\item \textsuperscript{33} See MICHAEL RUSE, THE EVOLUTION WARS: A GUIDE TO THE DEBATES 73-76 (2000) (discussing Social Darwinism).
\item \textsuperscript{34} See discussion infra pp. 92-94.
\item \textsuperscript{36} Certainly, the position of those who believe in a divine or racial agent is perhaps no less self-serving: surely God will stand by the believers; surely racists are the cause of one’s
\end{itemize}
comes as no surprise that in each case, arguments in the name of science have been brought to bear in support of one of the principal dominant categories in America, Whiteness.

By giving nature and markets a purpose, whether it be evolutionary progress or economic efficiency, the scientists have essentially created an agent as well. Evolution reigns. The market is God. And just as some of the religiously pious once saw fit to defend slavery, the new secular faith can serve to rationalize racial inequality in support of the status quo. Religious theology in explicit support of Whiteness has faded, and evolutionary rhetoric regarding racial difference has fallen out of favor, but these have been replaced by the new secular theology of economics.37 The functional support of Whiteness remains.

B. Getting Religion

I hope it is clear by this point that my quarrel is not at all with science itself. That genetic natural selection occurs and is the source of the abundant variety of life that we see in the biological world, I take to be clearly settled. That the cumulative effect of supply and demand gives us insight into the operation of large and complex economies is to be accepted. But rhetorical styles and themes have a way of reaching beyond the careful observations and conclusions of scientists.

I draw three principal conclusions. First, the history of the misuse of science calls for caution and moderation in the broad application of scientific themes to particular situations. Evolutionary or economic arguments that are presented as natural, simple, inevitable, and desired, often represent self-serving “just so” stories rather than careful analysis. When taken up in ways that support the position of the powerful, they can too easily become instruments of continuing oppression.

Second, a fundamentalist clash is not preordained, but the nature of the various agencies at issue will need to be examined. Intelligent Design fundamentalists and ardent atheist evolutionists often seem to be insisting on the same narrow definition of God, 38 just as the antagonists

failure to succeed. But this does not redeem the cause of ideological evolutionists or economists.

37. See discussion infra pp. 90-94.
38. See, e.g., David Van Biema, God vs. Science, TIME, Nov. 13, 2006, at 48 (discussing “debate” between “Science and God,” with renowned evolutionary theorist Richard Dawkins claiming that God, and religion generally, is a delusion, and renowned genetic biologist Frances Collins claiming that science leaves room for an interventionist God).
in the race dispute sometimes seem to be wielding the same simplistic image of the evil racist. Perhaps a debate over the existence of a supernatural and omnipotent God misses the point, just as the debates over the existence of racist conspiracies do.

In my view, thoughtful religious scholars understand that forms of religious belief beyond simple theism can address both the existential despair and the experience of the sacred that appear to be components of human nature; I think sophisticated evolutionists know that understanding evolutionary processes does not easily yield conclusions about the purpose or meaning of life.

Similarly, I think thoughtful observers of race can conclude that complex interconnected factors beyond simple racism contribute to systems of persistent racial inequality. Thoughtful economists understand that complex market phenomena can produce outcomes that do not correlate with simple merit, and that the science of economics does not answer the question of what law should do.

Finally, with regard to neoclassical economics as the secular theology of Whiteness, it is not that a secular theology has no place in the understanding of racial inequality. Rather, it is important to understand that the theological issues cannot be avoided. Ultimately, the fundamental questions are theological ones: is our purpose given to us, either divinely or by the nature of markets? Or, is our purpose lived out existentially in the choices we make? Is it the place of humanity to actively intervene in the market to achieve moral ends? Or, is it our place to accept “natural” market outcomes as our materialistic destiny? In more explicitly religious terms, does God (whether it be the God of the heavens or the God of the market) act through our conscious intent and action, or through impersonal market mechanisms? Where does our salvation lie? Forming these arguments in terms of optimal economic growth or welfarism does not transform them into objective science. There will be no scientific resolution to these questions any more than the delivered Word of God has settled them in the religious arena. No attainable level of technical efficiency will scientifically erase racial inequality any more than will the last wisp of intentional racism ever be identified and eradicated. As Maurice Merleau-Ponty said, “[b]ecause we are present to a world, we are condemned to meaning.”

But we cannot start to address these questions until the rigid opposition of agency and science is examined, and its hold on our collective imagination loosened.
II. FOUNDATIONS—AGENCY AND SIMPLE MATERIALISM

A. Preface—the Prisoner’s Dilemma

A fundamentalist and a Darwinist walk into a bar . . . and are presented with the Prisoner’s Dilemma. If they cooperate with each other, they both do moderately well. But if one cooperates and the other selfishly defects, the defector wins big, and the cooperator loses everything. If both defect, both do poorly, although not as poorly as a duped cooperator.

Game theory is an approach that takes as its starting point many of the same implicit premises of neoclassical economic analysis. In the basic set-up, the focus is on individual atomistic decision-making rather than on historical or cultural context. Outcomes are presented in quantifiable terms along a single axis. A basic premise is that rational individuals will want to maximize their outcomes. The implicit goal of the game theorist is to maximize the overall outcome. The dilemma is that a self-interested calculation reveals that regardless of what the other party chooses to do, it is always in one’s self-interest to defect. The societally optimal result, mutual cooperation, fails.

Assume that the Darwinist cooperates with his co-conspirator by refusing to turn him in, and the fundamentalist defects and wins the contest. “This proves the existence and power of God,” says the fundamentalist. Alternatively, assume that the fundamentalist

39. The choice of somewhat crude labels is intentional, in keeping with the provocative nature of the caricature I have presented to begin the discussion. It is not my intent to banter over precise definitions of these terms. I mean each term in the sense that it is commonly used—to denote those who oversimplify and use religious or evolutionary rhetoric in ways that careful theologians and evolutionary biologists would not. In this essay I do not mean to be critical of religion, science, or economics, nor even of believers, scientists, or economists. I mean instead to focus on a particular kind of usage of religious, scientific, and economic rhetoric.


41. In its original form, the two players are co-conspirators who have been arrested, giving the game its name. If they stick together, each serves little time, as the serious crime cannot be proved. If one rats on the other, the rat goes free and the faithful conspirator receives a long sentence. But if both turn state’s evidence, both receive a moderately long sentence.

42. AXELROD, supra note 40, at 6.

43. Id.

44. Indeed, in Axelrod’s presentation, the outcomes are depicted on a grid, and valued at 0, 1, 3, or 5 points. Id. at 8.

45. The points are arranged so that the value of both prisoners cooperating (3+3) is greater than the value of one prisoner defecting (5). Id.
cooperates, refusing to turn in his co-conspirator, and the Darwinist defects and wins the contest. “This proves that I am more evolved,” says the Darwinist, “it also proves the futility of altruism.”

These scenarios are striking because the participants clearly bring historical and cultural context with them. They have goals other than maximizing their individual outcomes, they draw conclusions from the game’s outcomes that reach far beyond the parameters of the game, and they frame those conclusions in terms that reflect their philosophical foundation.

Axelrod’s work on the prisoner’s dilemma explores various strategies through which rational (that is to say, materially self-interested) individual behavior might lead to patterns of mutual cooperation. Whether self-interested calculation provides the actual sustainable motivation for people in the real world to cooperate remains less clear. The conscious meaning that people ascribe to events in their lives matters to them, and may motivate them to act in ways that seem economically irrational.

Consider this variation: White and Black are presented with the Prisoner’s Dilemma. Assume that each refuses to cooperate (i.e. they each give up their co-conspirator), and both receive a poor outcome from the interaction. Each leaves the game with what that person brought into it: White has more educational, financial, and social resources. “See, I play the game better,” concludes White. “I knew it. This game is rigged,” mutters Black.

This section simply traces how the presumed dichotomy between agency and simple materialism manifests itself in the creation/evolution context and in the race/economic context. The search for meaning emerges as a central theme.

B. Evolution and Intelligent Design

*God is in the details.*

46. The Darwinist’s addendum regarding the futility of altruism is meant to be ironic, given the critical role that game theory has played in helping to solve the problem of how altruism might have evolved out of self-interested behavior.

47. AXELROD, supra note 40, at 3-5.

How can we look at the complexity of the human brain . . . and just think that this kind of deep complexity just occurred randomly?\footnote{49} 

It has been clear since Darwin that the theory of evolution raises a challenge to a particular conception of the human search for meaning. \textit{Kitzmiller v. Dover}\footnote{50} is only the most recent manifestation of the ensuing struggle.

On October 18, 2004, the School Board of Dover, Pennsylvania, passed a resolution requiring that “[s]tudents . . . be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design.”\footnote{51} On November 19, 2004, the Dover School District announced by press release that teachers would be required to read a statement to ninth grade biology students that included the following:

Because Darwin’s theory is a theory, it continues to be tested as new evidence is discovered. The theory is not a fact. Gaps in the theory exist for which there is no evidence. . . . Intelligent Design is an explanation of the origin of life that differs from Darwin’s view. The reference book, \textit{Of Pandas and People}, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.\footnote{52}

After a notorious six-week trial, Judge John E. Jones III issued a decision on December 20, 2005. In a carefully crafted, lengthy opinion, Judge Jones concluded that the Dover School District Intelligent Design policy violated the Establishment Clause.\footnote{53} With regard to the endorsement test,\footnote{54} Judge Jones concluded both that an objective observer would know that the Intelligent Design policy was intended by its proponents to promote religious creationism,\footnote{55} and that objective students\footnote{56} and citizens\footnote{57} would have perceived it as such. Applying the

\footnote{50. \textit{Kitzmiller v. Dover Area Sch. Dist.}, 400 F. Supp. 2d 707 (M.D. Pa. 2005).}
\footnote{51. \textit{Id.} at 708.}
\footnote{52. \textit{Id.} at 708-09.}
\footnote{53. \textit{Id.} at 765-66.}
\footnote{54. In \textit{Lynch v. Donnelly}, 465 U.S. 668 (1984), the Supreme Court asked whether the government has endorsed religion by its actions. The test includes both what message was intended and what message was actually conveyed.}
\footnote{55. \textit{Kitzmiller}, 400 F. Supp. 2d at 748-63.}
\footnote{56. \textit{Id.} at 724.}
\footnote{57. \textit{Id.} at 729.
somewhat overlapping Lemon test, the court concluded that the board was motivated by a religious purpose rather than the proffered secular purpose, and that the effect of the board’s actions was to impose a religious view of biological origins.

Here we review not the constitutional Establishment Clause question of whether the school board’s actions were constitutionally permissible, but the reasoning of Intelligent Design theory more directly. The basic logic of the Intelligent Design argument is not novel. One key iteration was made in 1802 by the Anglican theologian William Paley, who famously argued that if one found a watch on the street, one would infer a watchmaker, and that if the watch were capable of reproducing itself, one would be even more impressed by the ingenuity of the device. However, one would not, by adding the miraculous fact of reproduction, then conclude that there was no art or skill involved in creating the item. “Can this be maintained without absurdity? Yet this is atheism.”

In Kitzmiller, the argument was brought up to date. The court found itself treated to a detailed, cell-level description of the bacterial flagellum, a kind of microbiological propeller that moves bacteria toward their targets. The microbial flagellum is the specialty of Michael Behe, one of the leading proponents of Intelligent Design theory, and a key witness for the Dover School Board. His basic argument is that certain biological features of cells are “irreducibly complex,” and therefore demonstrate Intelligent Design.

Behe defines an irreducibly complex system as “a single system composed of several well-matched, interacting parts that contribute to the basic function, wherein removal of any one of the parts causes the

58. Id. at 746 (“[A] government-sponsored message violates the Establishment Clause of the First Amendment if: (1) it does not have a secular purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it creates an excessive entanglement of the government with religion.” (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).
60. Id. at 874.
62. William Paley, Natural Theology, in PHILOSOPHY OF BIOLOGY 36, 36-39 (Michael Ruse ed., 1998). Other forms of this argument date even further back, to Aristotle and Aquinas, but this image captures the reasoning nicely.
63. Id.
64. Id.
65. Kitzmiller, 400 F. Supp. 2d at 739.
66. Id. at 718-22.
67. Id. at 739.
system to effectively cease functioning. 68 He reasons that random incremental mutation could not account for the appearance of such parts, which often not only function well together, but are very finely calibrated to work together in very precise ways. 69 If there is no evolutionary reason for the constituent parts to spontaneously appear in nature independently, then neither could the whole mechanism have evolved. 70 Intervention by an intelligent agent is called for, Behe concludes. 71 The dichotomy is clearly and starkly presented. Either the simple, natural processes of evolution brought about the existence of bacterial flagellum, or an intelligent agent working beyond the powers of the laws of nature was involved.

Similarly, William Dembski has applied information science, with considerable apparent mathematical sophistication, to produce what he calls “the Law of Small Probability,” under which “specified events of small probability do not occur by chance.” 72 According to Dembski, one can apply an explanatory filter to any observation in order to assess whether the best explanation is the Regularity explanation, the Chance explanation, or the Design explanation. 73 These explanations are mutually exclusive and collectively exhaustive. 74 Here we again see explicitly that the reasoning is that unguided events involve either the application of known rules of nature (Regularity) or pure randomness (Chance). Our only alternative to these kinds of explanation is an intelligent agent.

The persuasive force of these arguments relies on an appeal to a kind of common sense, in which enormous complexity is contrasted with simple, natural processes, presenting a puzzle. How can one follow from the other? An appeal to an “intelligence,” or an active agent, is

69. Id.
73. Id. at 36-38.
offered as an alternative to mere science. It is an alternative with an existential advantage for believers though, because the scientific answer to the puzzle is seen as undermining the very conception of the self that some observers bring to the puzzle. Are we human beings creatures of God? Do we live in a world in which God is present and active? We will see this same confrontation with complexity, the same appeal to an active agent, and the same threat to selfhood when we discuss the issue of race, below. But first, a little more exploration of 1) the perception of nature that helps produce the puzzle, and 2) the character of the threat to selfhood.

In particular, Intelligent Design theory is essentially a judgment that a certain kind of complexity cannot be achieved through any entirely natural process such as evolution.\(^{75}\) Typically this argument involves an unstated premise about the character of evolutionary processes, which is that evolution progresses gradually, at a steady rate, through a simple, straight-line process of competition and adaptation.\(^{76}\) Intelligent Design proponents then set about identifying outcomes that could not be the product of that version of evolution, such as the geologically sudden appearance of multiple new species, or the human eye, or Behe’s flagellum.

Images and rhetoric about the character of “nature” play a key role in this argument. Natural processes are seen as simple, straightforward, and gradual. The state of nature connotes wilderness, the absence of design or purpose.\(^{77}\) Dembski means to invoke all rules of nature under the category of “Regularity”;\(^{78}\) and yet complex systems often produce results not expected from simple rules.

Confronted with evidence of complexity in nature, ordinary people

\(^{75}\) WILLIAM A. DEMBSKI, NO FREE LUNCH: WHY SPECIFIED COMPLEXITY CANNOT BE PURCHASED WITHOUT INTELLIGENCE 31-41 (2002).

\(^{76}\) See infra pp. 69-72.

\(^{77}\) Of course, the mystical sense of wonder that the natural world often evokes can also suggest a larger design or purpose. A magnificent sunset, serene landscape, or other mountaintop experience often leads to a feeling of contentment, a sense that all is right in the world, a feeling which can be articulated in religious terms as the presence of God. It is in fact this common mystical experience that Intelligent Design exploits. The connection between the Intelligent Design theory and the mystical experience of nature depends on the outcome of a theological debate about the nature of God. The issue is whether that essentially aesthetic mystical experience denotes the presence of an external, supernatural, conscious entity beyond the experience itself, or whether nature or the experience of nature itself is constitutive of some kind of non-theistic version of God. This is an old theological debate. Modern theologians posit a contemporary redefinition of God in terms like this.

\(^{78}\) See DEMBSKI, supra note 75.
without a detailed understanding of the workings of evolutionary biology must find a response. Intelligent Design proponents see complex biology and find evidence of God. Their proof is essentially that simple natural rules of selective adaptation cannot account for such complexities.

On these terms, these arguments are coherent. A simplistic understanding of, for instance, how finch beaks adapted over time to allow the ingestion of either seeds or insects (some creationists agree that this kind of “micro-evolution” occurs\(^\text{79}\)), cannot explain certain kinds of biological complexity. In each instance, the response to these challenges lies in an elaboration of the more complex aspects of the evolutionary process. The cursory summary of evolutionary theory that responds to this argument is that evolution is not gradual and steady, not simple, and does not occur in a straight line.

A few brief examples will suffice. Phillip Johnson argues that, faced with the ‘general pattern in the fossil record of sudden appearance of new forms followed by ‘stasis’ (i.e., absence of basic evolutionary change),’\(^\text{80}\) scientists nonetheless refuse to “open the door to creationism . . . [or] any invocation of a creative intelligence or purpose outside the natural order.”\(^\text{81}\) The point is that the sudden appearance of new species belies any steady, gradual process. Evolutionary theory, however, has moved beyond the depiction of a steady, gradual process to encompass the idea of “punctuated equilibria.”\(^\text{82}\) “The history of evolution is not one of stately unfolding, but a story of equilibria, disturbed only ‘rarely’ (i.e., rather often in the fullness of time) by rapid and episodic events of speciation.”\(^\text{83}\) In other words, evolution theory has a perfectly plausible

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\(^\text{81}\) Id. at 63 (emphasis added).


\(^\text{83}\) RUSE, supra note 33, at 234.
Nor does evolution progress in a straight line. Michael Behe details various complex features of molecular structures in cells and writes, “[a]s the number of required parts increases, the difficulty of gradually putting the system together skyrockets, and the likelihood of indirect scenarios plummets. Darwin looks more and more forlorn.”84 The essence of the argument is that there is no logical way that gradual adaptation could produce a system of precisely calibrated interconnected parts.

Philip Kitcher responds that “it’s a common theme of evolutionary biology that constituents of a cell, a tissue, or an organism, are put to new uses because of some modification of the genotype.”85 The story of how the giant panda developed an elongated wrist bone spur to use as a kind of thumb, opposite the “other” five digits in its paw, is a celebrated example of this kind of evolution.86 The point is that the evolutionary process makes use of available features in unpredictable, haphazard, and not apparently designated ways.

One might even reverse the reasoning and reexamine the nature of intelligence itself. Consider Paley’s notorious watch. A watchmaker does not invent out of nothing. The evolutionary precursor of a functioning watch with a hundred interconnected parts is not an implausible non-functioning watch with ninety-nine parts, waiting for the hundredth part to be divinely inspired. If this were the necessary route of progress, then no watch would ever have come into being. Rather, I presume, without exploring the history of watchmaking, that the required cogs, gears, and springs were independently created and combined for other purposes. First large clocks were invented, and later fine manufacturing processes were developed for the production of jewelry and small clocks. At some point the desire to tell time accurately and portably likely intersected with the technological capacity to form a working watch. Where is the unique creative spark that

84. B EHE, supra note 68, at 73.
86. “Odd arrangements and funny solutions are the proof of evolution—paths that a sensible God would never tread, but that a natural process, constrained by history, follows perforce.” STEPHEN JAY GOULD, THE PANDA’S THUMB: MORE REFLECTIONS IN NATURAL HISTORY 20-21 (1992) “[T]he panda must use parts on hand and settle for an enlarged wrist bone and a somewhat clumsy, but quite workable, solution. The sesamoid thumb wins no prize in an engineer’s derby. It is, to use Michael Ghiselin’s phrase, a contraption, not a lovely contrivance.” Id. at 24.
constitutes the Intelligent Design of the watch? It seems that even the proverbial watch can be said to have evolved.

At any rate, the evolutionary theory that defeats Intelligent Design theory goes beyond the relatively straightforward demise of the flightless dodo. There are vestigial organs that once evolved but no longer serve any purpose. Sometimes biological features come into being to serve one purpose (or perhaps merely as the collateral effects of some other feature), but over time come to serve another entirely different function. Sometimes adaptation leads to the development of features that cause the organism ultimately to fail. Evolution is not a finely-tuned system which always leads to greater perfection and survivability. There are evolutionary dead-ends and wrong turns; we human beings may be one of them. But the point here is that Intelligent Design arguments often turn on a simplistic conception of evolution that does not reflect the current state of evolutionary science.

Why do Intelligent Design proponents who cloak themselves in the language of scientific objectivity, many of whom have academic

87. The dodo's demise is seemingly straightforward. That a large, trusting, flightless bird might not be destined for evolutionary success may seem intuitively clear in retrospect. The dodo, however, had survived very well for thousands of years on the island of Mauritius, which did not have human inhabitants or other serious predators of the dodo. The first record of the killing of dodos by humans for their meat dates from 1601. By the late 1660s they were extinct. David Quammen, The Song of the Dodo 261-75 (1996). The extinction of the dodo arguably signifies "the first time in the whole of man's history that he actually realized he had caused the disappearance of a species." Id. at 277.


90. Ruse describes how Gould and Lewontin made the argument "that much to be found in the organic world bears little or no direct connection to adaptive advantage." Ruse, supra note 33, at 236. Natural constraints on biological development produce "a great many nonadaptive byproducts, [that exist] for no end-related reason whatsoever." Id.

91. Indeed, the odds are not good. "[99.99] percent of all biological species which have ever existed are now extinct. . . . [and] more than 10 percent of all the companies in America disappear each year." Ormerod, supra note 89, at ix.

92. Indeed, in order to meet the Establishment Clause test, proponents have been required to present Intelligent Design theory as science, and to conceal any religious motivations or connections. In Kitzmiller, Judge Jones noted, 

[i]the citizens of the Dover area were poorly served by the members of the Board who voted for the ID Policy. It is ironic that several of these individuals, who so staunchly and proudly touted their religious convictions in public, would time and again lie to cover their tracks and disguise the real purpose behind the ID Policy.

Kitzmiller v. Dover Area Sch. Dist, 400 F. Supp. 2d 707, 765 (M.D. Pa. 1995). Judge Jones recognized that the scholars involved had "bona fide and deeply held beliefs which drive their
credentials themselves, resist these careful scientific explanations offered by the scientific establishment? Their position appears to be that the particular explanations offered are not true, and that they cannot be true.\textsuperscript{93} What drives this imperative?

Intelligent Design proponents are motivated by their belief that evolution is inconsistent with their faith in God.\textsuperscript{94} The basic rationale is that if all of nature—and in particular the development of the human being—can be explained by natural processes, there is no space for divine intervention into the universe.

Moreover, with regard to the evolution of the human being, this absence of divinity is claimed to prevail at precisely the point at which divine intervention is most called for—the anointment of humanity as being made in God’s image, and as having been given dominion over the earth.\textsuperscript{95} Thus, the battle over evolution is, for Christians of a certain theological stripe, a cosmological battle over the place of humanity in God’s universe.

Thus, at bottom, Intelligent Design reflects a commitment to the theological position that mere nature—the absence of a supernatural interventionist deity\textsuperscript{96}—renders life meaningless. The possibility that evolution presents is that there really is nothing sacred.

\textit{C. Economic Analysis and Race}

\textit{Satan also dwells with God in the details.}\textsuperscript{97}

With regard to racial discrimination, the focus in law and in popular culture has been racist intent. The Supreme Court established in \textit{Washington v. Davis} that discriminatory intent is a necessary component of scholarly endeavors." \textit{Kitzmiller}, 400 F. Supp. 2d at 765.

\textsuperscript{93} Had Intelligent Design proponents prevailed in \textit{Kitzmiller}, one suspects that they would have concluded that the directly interventionist God was showing His favor. Having failed, they do not conclude either that God has failed them or that there is no God, only that they must continue to do God’s work and will be rewarded later.


\textsuperscript{96} There are of course well-regarded theological traditions that define God differently. \textit{See} Haught, \textit{supra} note 94, at 340. The theological debate over the nature of God is implicated by, but goes well beyond the scope of, this essay.

\textsuperscript{97} \textit{STEPHEN JAY GOULD, THE MISMEASURE OF MAN} 26 (1981).
of an Equal Protection claim. While academic commentary has raged on, even the most recent Supreme Court discrimination decision maintains the sharp focus on the malicious intent needed to render an employer’s decisions discriminatory. In the mainstream narrative, racist intent is racism; “innocent” conduct, even conduct that causes inequality, cannot comprise discrimination. Even “natural” color consciousness, if not based on racial disdain, is not blameworthy. Theorists are looking for evil, and understandably do not casually infer its existence in everyday affairs. So antidiscrimination law has become a search for an evil agent, and this quest is just as critical as the search for sacred agency in evolution.

Of course it bears noting that the agency sought in the race context is malign rather than divine. Where Intelligent Design theorists examine the details and see God, in the contemporary race debate observers pore over the details in search of the Devil. Some insist that he is in plain sight, while others see no proof. One nonetheless finds the same pattern, although this requires some explication. In the context of the biological world, the natural explanation that contended with agency was evolution. In the context of racial inequality, the primary contemporary intellectual source of a “natural” explanation has been economic analysis. Here, I mean not the economic analysis as practiced by economists, but the general narrative of economic analysis that permeates mainstream thought. In particular, explanations given by the Chicago school of neoclassical economic theory hold that, over time, equal merit should yield equality. This mirrors the general evolutionary line of thinking that natural selection favors the fittest.

The invisible hand achieves efficiency in the marketplace through the discrete acts of self-interested individuals. The argument is ostensibly that without intervention, over time, irrational employment discrimination will be punished in the marketplace. “Even the most racist owner of a professional basketball team could not refuse to hire blacks, unless he were willing to face bankruptcy—and thereby cease to be a basketball owner.” Thus irrational race discrimination will

102. Id. at 30-33.
103. THOMAS SOWELL, STEREOTYPES VERSUS THE MARKET, IN IS REALITY OPTIONAL? 167,
eventually become extinct. O’Connor’s expectation that affirmative action efforts will no longer be necessary twenty-five years from now is implicitly grounded in this kind of reasoning.

In marked opposition to this view of the world, we find (among other moderate positions) racial conspiracy theories.

1. Racial Conspiracy Theory: The Other Intelligent Design

We have a Congress, a Senate and a president working for the destruction of black people.\(^{104}\)

Intelligent Design is an inference from observed complexity. Note especially two particular aspects of the inference. First, no explanation of the precise causal mechanism by which the proposed Intelligent Designer carried out its work is offered.\(^{105}\) Second, the general benign intent of this supernatural designer in bringing about all that delicate complexity is presumed.\(^{106}\)

Now consider the analysis of another mode of reasoning in which there is “an eagerness to find purposefulness where others might see only coincidence . . . to see personal motivation at work rather than impersonal forces.”\(^{107}\) This language is a definition not of Intelligent Design theory, but of conspiracy theory.\(^{108}\)

Indeed, in making the case for the design inference, Intelligent Design theorist William Dembski uses the case of Nicholas Caputo as a principal example.\(^{109}\) Caputo was the Essex County Clerk and a democrat who conducted supposedly random drawings for decades that gave democrats the top ballot line in forty out of forty-one county elections.\(^{110}\) Dembski abstracts general principles from the court’s inference that this outcome was not due entirely to chance.\(^{111}\) Thus, the showcase demonstration of Intelligent Design theory, a case in which we are clearly meant to infer intelligent agency, is an actual political

\(^{105}\) Behe, supra note 71, at 701-03.
\(^{106}\) Id.
\(^{108}\) Id.
\(^{109}\) DEMBSKI, supra note 72, at 9.
\(^{110}\) Id.
\(^{111}\) Id. 9-12.
A particular kind of conspiracy theory is the “conviction of socially oppressed or disadvantaged groups that they are victims of an organized effort,” and a prevalent current example of this occurs in African American communities. On the premise that systems of persistent racial inequality are no less complex than biological systems, I raise the idea of racial conspiracy theory as another example of searching for meaning in complexity, and finding agency as the explanation.

The classic general treatment of conspiracy theory is Richard Hofstader’s essay, *The Paranoid Style in American Politics*. He describes a style in which “the feeling of persecution is central, and it is indeed systematized in grandiose theories of conspiracy,” and he notes that one place where the paranoid style can be found is “on both sides of the race conspiracy today, among White Citizens Councils and Black Muslims.”

Patricia Turner has collected rumors of anti-Black conspiracies that have circulated in African American communities since the earliest contact between white Europeans and black Africans. They range from the belief of captured Africans that White people were cannibals, to the rumor that Church’s Fried Chicken is owned by the Ku Klux Klan and is systematically contaminating the chicken to sterilize African Americans.

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112. *Id.*
113. McArthur, *Id.* note 107, at 40. Anita Waters is careful to point out that White Americans are also susceptible to conspiracy theories. *But see* ROBERT C. SMITH & RICHARD SLEZER, CONTEMPORARY CONTROVERSIES AND THE AMERICAN RACIAL DIVIDE 95 (2000) (“African Americans are more likely to distrust and be suspicious of the government.”). Indeed, the historical examples discussed by Hofstader and Davis are primarily of conspiracy theories adopted by mainstream, White movements. Many conspiracy theories adopted in White organizations and communities are also race-related or anti-Semitic. *See generally* Angela P. Harris, *Vultures in Legal Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 MICH. J. RACE & L. 269 (2005). *See, e.g.*, FRANK P. MINTZ, THE LIBERTY LOBBY AND THE AMERICAN RIGHT 6-7, 198-202 (1985); GLENN FELDMAN, FROM DEMAGOGUE TO DIXIECRAT 169-73 (1995).
116. *Id.* at 4.
117. *Id.* at 9. Where Hofstader clearly means to depict the paranoid style in derogatory terms, I do not mean to follow him here.
118. TURNER, *Id.* note 114, at 3.
119. *Id.* at 9-16.
American men; to the belief that the FBI or the CIA were behind the assassinations of both Martin Luther King, Jr., and Malcolm X, to the assertion that the AIDS virus was created by the government and intentionally targeted at communities of color. They include the assertion that “they” are responsible for inflicting crack cocaine on the African American community, because “they will do anything to keep the black race down.” Another more recent claim is that the U.S. government deliberately compromised levees in New Orleans to flood African American neighborhoods in the wake of Hurricane Katrina.

Of course, the historical context provides some foundation for these seemingly paranoid rumors. Even Hofstadter notes that “there are conspiratorial acts in history, and there is nothing paranoid about taking note of them.” Consider the progression of affairs, starting with the open and legal system of slavery, through the fictional “separate but equal” required by the Fourteenth Amendment. Consider also the barely concealed participation of White politicians and law enforcement officials in lynching and Klan activities, and follow this path all the way up to the current legal requirements in civil rights laws that in effect encourage concealment of racially discriminatory intent. Together, these epochs combine to lend these rumors an air of plausibility.

120. Id. at 84-92.
121. Id. 117-122.
123. TURNER, supra note 114, at 180-201; SMITH & SELZER, supra note 113, at 83-87.
125. HOFSTADER, supra note 115, at 29 (emphasis added).
127. In fact, the activities and publications of organizations like the Ku Klux Klan that espouse anti-White racial conspiracy theories serve to support the worst fears of anti-Black
Slavery, Jim Crow, and the Ku Klux Klan were actual anti-Black conspiracies\textsuperscript{128} that historically have undeniably operated to achieve precisely the effects that racial conspiracy theorists seek to explain. Indeed, many scholars do place at least some responsibility for many ills in the African American community at the feet of the White-dominated government or business institutions. They usually do so, however, not in terms of intention or agency, but in terms of neglect, be it benign or criminal.\textsuperscript{129} The primary differences between respected theories and rumors of racial conspiracy are: 1) the rumors often fail to describe any precise mechanism of causation, and 2) the conspiracy theories ascribe malicious intent to the evildoers. These characteristics precisely mirror Intelligent Design theory, except that the proposed agency is the White Devil\textsuperscript{130} rather than God.

The plight of African Americans in the modern economy is indeed confounding. No rehearsal of dismal statistics is necessary.\textsuperscript{131} As the explicitly racist laws of the past fade into history, how are African conspiracy theorists. See MINTZ, supra note 113, at 73-75, 90-95. Singh points out that more Black Americans “have directly encountered adverse experiences with the putative agents” of anti-Black conspiracies, such as law enforcement officers. SINGH, supra note 104, at 245. Hofstader suggests some of the psychological dynamics at work:

\textquote[The paranoid tendency is aroused by a confrontation of opposed interests which are (or are felt to be) totally irreconcilable, and thus by nature not susceptible to the normal political process of bargain and compromise. The situation becomes worse when the representatives of a particular political interest—perhaps because of the very unrealistic and unrealizable nature of their demands—cannot make themselves felt in the political process. Feeling that they have no access to political bargaining or the making of decisions, they find their original conception of the world of power as omnipotent, sinister, and malicious fully confirmed. They see only the consequences of power—and this through distorting lenses—and have little chance to observe its actual machinery.]{HOFSTADER, supra note 115, at 40}.

\textsuperscript{128} Less broadly, Waters points out that specific “documented conspiracies of the past, from the covert Federal Bureau of Investigation (FBI) operations against civil rights workers to the Tuskegee, Alabama, syphilis study in which treatment was withheld from 400 sick Black men[,]” make later conspiracy theories more believable. Waters, supra note 114, at 122.

\textsuperscript{129} Waters notes that “theorists who attempt to explain ethnic inequalities still focus on unintended consequences” rather than intentionality or agency. Waters, supra note 114, at 114.

\textsuperscript{130} Hofstader himself uses similar language when he explains that to practitioners of the paranoid style, “history is a conspiracy, set in motion by demonic forces of almost transcendent power . . . .” HOFSTADER, supra note 115, at 29 (emphasis added).

\textsuperscript{131} See, e.g., SINGH, supra note 104, at 241-44 (reviewing statistics and concluding that “claims of an antiblack conspiracy that Farrakhan regularly advances are thus neither outlandish nor preposterous” to Blacks).
Americans to make sense of the perception that economic progress is not proceeding apace? Here I argue that the same understanding by Intelligent Design theorists—that nature consists of simple rules and random events which, unguided, could not produce the complexity they find in the natural world—applies in the race context to explain the acceptance of racial conspiracy theories.132

Simple explanations of racial inequality have eroded. The formal race discrimination that used to prevail in law and in the private economy has been largely rendered illegal. Even informal social forms of discrimination have become publicly unpopular and distasteful. In the wake of the removal or erosion of these artificial barriers to full market participation, the simple rules of the microeconomic analytic lens that frames much of common economic understanding should produce greater Black success in the market. Yet this does not appear to be happening.

Conspiracy theory forms a coherent response to the market liberalism that is a prime constituent of modernity.133 Daniel Hellinger argues that, like hypernationalism and religious fundamentalism, conspiracy theories “introduce subjectivity and individualized forms of accountability into the otherwise impersonal, structural forces that . . . move our world.”134 In particular, Hellinger notes:

> the more we are told that power is “transparent” and open, the more people feel the need to say that it is not. Conspiracy theories link structural and historical forces to subjective political action by elites who prefer to confer and operate out of the glare of transparent daylight, in the opaque twilight of deep politics.

132. It is not my contention that racial conspiracy theories or intelligent design are the product of ignorance. Note that the tendency to believe racial conspiracy theories in fact increases with education level. It may be that increased education brings increased awareness of the actual racial conspiracies prevalent through much of U.S. history. But see Robert Singh, The Farrakhan Phenomenon 244-45 (1997) (arguing that it is the ravaged inner-city environment that confirms the plausibility of conspiracy claims).

133. Harry G. West & Todd Sanders, Power Revealed and Concealed in the New World Order, in TRANSPARENCY AND CONSPIRACY 1, 1-4 (Harry G. West and Todd Sanders eds., 2003).

134. D. Hellinger, Paranoia, Conspiracy, and Hegemony in American Politics, in TRANSPARENCY AND CONSPIRACY 204, 204-08 (Harry G. West & Todd Sanders eds., 2003).

135. Id. at 227. Similarly, anthropologist Todd Sanders analyzes the discourse on witchcraft in Tanzania and argues that “[t]he powers that ensure the circulation of modern goods remain . . . entirely hidden from view.” Todd Sanders, Invisible Hands and Visible Goods: Revealed and Concealed Economies in Millennial Tanzania, in TRANSPARENCY AND
African Americans who work hard, stay straight, and live right, do not feel they get the same market rewards that White people do. Something other than the straightforward operation of markets appears to be at work. The breaks do not come, the security never arrives, and education does not provide the same return. Their protest echoes Intelligent Design supporters: “This can’t just be chance. Something else is going on here.” They are both right. It is the nature of the “something else” that is at issue.

Much of this rests on the presumption that markets are operating according to the rational behavior of individuals and straightforward supply and demand curves. But of course these often do not pertain. The case has been well made elsewhere. In brief, individual choices are formed and individuals often behave in ways that are not economically rational. Insights from social psychology show that various self-serving biases affect perception, memory and behavior.

Like the more sophisticated understanding of evolution, sophisticated economic analysis shows that markets do not function in a straightforward manner, delivering efficiency and rewarding merit at every turn. Like the biological world, markets stumble along, and

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As the Ihanzu [of northern Tanzania] are increasingly drawn into broader regional, national, and international markets and political structures, a process that has been ongoing for well over a century, the operation of powers in their world has been made not more rational, clear, or comprehensible but less so . . . . Today, we find somewhat unexpectedly, one of the clearest Ihanzu statements on modernity in local discourses on witchcraft.

Id. at 150-51. See also Laurel Kendall, Gods, Markets and the IMF in the Korean Spirit World, in TRANSPARENCY AND CONSPIRACY 38, 38-40 (Harry G. West & Todd Sanders eds., 2003) (“[T]he story of Korean modernity is also a story about tremendous risk, potential ruin, ambition, envy, and disappointment. The emotional consequences of this story are set at play in contemporary Korean shamanic rituals where healing takes place through a language of casting off ominous forces and bringing auspicious potential into the home.”).


139. Id. at 308-11.


particular economic actors, like dinosaurs, can have their reign for long eras before any final judgment from history arrives.

2. Looking for Intent in Discrimination Law

The agency/nature dichotomy is in some ways reflected in the burden-shifting analysis that courts undertake when considering statutory discrimination cases. Because the standard disparate treatment case requires a showing of discriminatory intent, the search for a racist agent is built into discrimination law. The *McDonnell Douglas* employment discrimination analysis, first developed and applied by courts familiar with entrenched racism, allows an inference of discriminatory intent where a plaintiff establishes a prima facie case—simply that the plaintiff is a member of the group against which bias is alleged, applied and was qualified for a position for which the employer was seeking applicants, was denied employment, and the position remained open and the employer still sought applications from persons of plaintiff’s qualifications.142

The inference of discriminatory intent is allowed because courts are mindful of the invidious discriminatory intent that was widespread and more public not long ago.143 Not only is the discriminatory attitude seen in *McDonnell Douglas* no longer socially acceptable, but it carries with it liability.144 Thus, defendants have every incentive to hide any racial animus they might have, and a procedural step to require employers to explain their actions was created.

The defendant’s task of rebutting this presumption, however, has grown lighter over the years. Stereotypes, derogatory jokes, and racial epithets may not suffice if perceived by a court as “stray remarks” not directly linked to an adverse employment action.145 The presumption of innocence resumes at every causal step, perversely strengthened by the demonization of racist intent. Because ordinary people sometimes stereotype and make racial assumptions, judges and juries conclude, not unreasonably, that these must not be the demons we are looking for.146

143. *Id.* at 800-01.
146. Gregory Mitchell and Philip E. Tetlock exemplify this reluctance when they criticize recent research regarding widespread implicit bias as “setting thresholds of proof for calling people prejudiced so low that the vast majority of the population qualifies as prejudiced.” Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of*
Thus, even evidence of racial animus may not suffice if not close in time to the adverse action or otherwise connected to the adverse decision. Courts in effect require plaintiffs to imagine a conspiracy, and then to prove it.

In comparison to Intelligent Design, it is as though the inquiry were not whether God exists, but whether God, who all acknowledge to have openly reigned less than two generations ago, is dead. Despite our long history with slavery, one hundred years with Jim Crow, and our failure ever to achieve lasting integration, the presumption of a rationality that preempts racism has gained sway, and that entire historical context has been deemed irrelevant to the detection of evil.

In contrast, consider the court’s approach to discerning religious motivation, where courts are much less constrained. That the Intelligent Design movement is but the latest of a series of strategies intentionally adopted by religious creationists has been well established by a number of scholars147 as well as recognized by the court in Kitzmiller.148 In so finding, the court relied heavily on the larger context, accepting expert testimony on the history and development of creationism, reviewing the stated strategies of creationist leaders and institutions not directly before the court, and linking this broader movement to the relative amateurs on the Dover School Board who actually adopted the policy.149 In doing so, the Kitzmiller court echoed previous court rulings tracing the evolution of creationism.150

In both instances, we are in search of agency, whether it be racist intent or religious motivation. But racist intent has become the equivalent of evil, and courts are understandably reluctant to casually infer guilt of this magnitude. Religious motivation, on the other hand, is

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147. For a thorough review of the history of creationism, particularly the growth and institutionalization in the latter half of the twentieth century toward “scientific creationism” and the exploitation of the language of science, see RONALD NUMBERS, THE CREATIONISTS (Alfred A. Knopf ed., 1992).
149. Id.
generally respected, and not commonly thought to be a character defect. It is only in the context of Establishment Clause analysis that religious intent is not permitted. Although the concealment of religious intent can give rise to charges of hypocrisy, or at least to deep irony, that hypocrisy is considered to pertain in spite of, rather than because of, religious conviction. Thus, ordinary inferences from indirect context evidence raise no eyebrows.

III. RACE AND THE MISUSE OF SCIENCE

We have seen how the banners of agency and science are wielded in similar fashion, and how the dichotomy of conscious agency and simple rules underlies conflicts in both evolution and economics. We now explore the patterns of how both evolution and economics have been misused in the race context. The misuse in each case tends toward a kind of secular theology in which history is seen as having a direction toward perfection, through the mechanisms of the relevant scientific doctrine. Characteristics associated with Whiteness are seen as the culmination of history, and the dominant position of Western culture is held up as evidence of deserved status. Finally, there is in each case a history in which the early influence of religious beliefs and institutions had a powerful impact on the development of scientific thought. Explicit reliance on religious doctrine has fallen away, leaving a structure in which religion appears irrelevant or even opposed to science, but its hidden influence remains.

A. Secular Salvation: Progress, Human Exceptionalism, and Whiteness

“First, Darwin argues that evolution has no purpose. Individuals struggle to increase the representation of their genes in future generations, and that is all. . . . Second, Darwin maintained that evolution has no direction; it does not lead inevitably to higher things. Organisms become better adapted to their local environments, and that is all. [The “degeneracy” of a parasite is as

151. “It is ironic that several of [the Dover School Board members], who so staunchly and proudly touted their religious convictions in public, would time and again lie to cover their tracks and disguise the real purpose behind the ID Policy.” Kitzmiller, 400 F. Supp. 2d at 765.

152. See David Quammen, Planet of Weeds: Tallying the Losses of Earth’s Animals and Plants, HARPER’S MAGAZINE, Oct., 1998, at 57 (suggesting that human beings are an evolutionarily “weedy” species: prolific, exploitative and avaricious rather than elegant or beautiful).
perfect as the gait of a gazelle.] Third, Darwin applied a consistent philosophy of materialism to his interpretation of nature. Matter is the ground of all existence; mind spirit and God as well, are just words that express the wondrous results of neuronal complexity."

A pure scientist might be said not to have a legitimate interest in such matters as the purpose or meaning of life. The study of the mechanisms and paths by which evolution functions reveals no moral claims. Yet the human search for meaning is a strong impulse, and evolution itself has been brought to bear to support a kind of secular salvation. Philosopher and evolution scholar Michael Ruse notes that in the late 19th century, Herbert Spencer saw in evolution a “law of progress” by which ever-increasing complexity and heterogeneity produces, at its culmination, humanity. Spencer and his friend Thomas Huxley saw evolution as a secular substitute for Christianity. Seeing struggle as a source of tension that induces successful evolutionary change, Spencer thought it a moral obligation to support the natural progress of evolution by promoting fair competition and allowing “good-for-nothings” to pass away. Spencer’s “ultimate source of value,” writes Ruse, was “the progressive upward climb of the course of evolution.” If Providence (“[t]he belief that over all the vicissitudes of mankind and the evolution of the universe there is a conscious purpose of God for good. . . . and history is a process moving ever onwards towards an end, which God foresees”) can provide comfort to the Christian, then Spencer showed that evolution can provide the same comfort.

Social Darwinism completed the transition of evolutionary science into human ethical rules. Ruse cites as a “paradigmatic” Social Darwinist sociologist William Graham Sumner, who championed “liberty, inequality, [and] survival of the fittest” as qualities carrying

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155. Id. at 75.
156. Ruse, supra note 33, at 72.
157. Id. at 73-74.
158. Spencer thought that evolution produced improved brain power at the cost of reduced reproductive capacity, leading him to support cooperation to advance the progress of evolution. Id. at 74-75. Spencer’s premise about complexity and reproduction reappears in modern defenses of White evolutionary superiority.
159. Id. at 74.
160. Id.
162. Ruse, supra note 33, at 73.
society forward, and equality as among the qualities that carries society downward.\textsuperscript{163} To go against Social Darwinism by coddling the unfit is, by this reasoning, rendered immoral, and unfairly burdensome on the working class.\textsuperscript{164} One of the themes of Social Darwinism is that human intervention necessarily makes things worse.\textsuperscript{165}

Stephen Jay Gould has carefully documented how scientists who were focused on identifying and ranking racial differences repeatedly mismeasured, miscalculated, and otherwise botched their analysis in favor of outcomes favoring White superiority.\textsuperscript{166} Whether in the measuring of brain cavities or the testing of general intelligence, Gould traces the errors in horrific detail.\textsuperscript{167} Gould concludes that “determinist arguments for ranking people according to a single scale of intelligence, no matter how numerically sophisticated, have recorded little more than social prejudice.”\textsuperscript{168}

Still, the power of the idea of scientific objectivity is wielded over and over again. Eminent Harvard scientist Louis Aggasiz, assigning Blacks to a separate species, claimed to be considering “merely scientific questions . . . without reference to either politics or religion.”\textsuperscript{169} Carl C. Brigham, excluding southern and eastern European immigrants based on intelligence tests, spouted that “[t]he steps that should be taken to preserve or increase our present intellectual capacity must of course be dictated by science and not by political expediency.”\textsuperscript{170} Gould cites Condorcet in remarking that biological and medical arguments about human nature “make nature herself an accomplice in the crime of political inequality.”\textsuperscript{171} The temptation remains powerful, and although no longer well respected, straightforward advocates of evolutionary racial differences in intelligence survive.\textsuperscript{172}

It is not that evolution is a religion rather than a science. The race example merely demonstrates that some misuses of evolutionary rhetoric

\begin{thebibliography}{9}
\bibitem{163} RUSE, supra note 154, at 79.
\bibitem{164} \textit{Id.} at 80.
\bibitem{165} \textit{Id.} at 81. This foreshadows laissez-faire economics and the preference against regulation in neoclassical economics.
\bibitem{167} \textit{Id.} at 73-112, 146-233.
\bibitem{168} \textit{Id.} at 28.
\bibitem{169} \textit{Id.} at 20.
\bibitem{170} GOULD, supra note 166, at 20.
\bibitem{171} \textit{Id.} at 21.
\bibitem{172} See, \textit{e.g.}, J. PHILLIPPE RUSHTON, RACE, EVOLUTION, AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE (3d ed., 1995).
\end{thebibliography}
follow the same rubric as the Intelligent Design theorists. A dichotomy is again established, this time between chance and evolutionary forces. Statistics are again wielded or manipulated to show that chance cannot explain observed differences between racial groups. Rather than God, evolution is presented as the explanation.173

This approach makes the same fundamental error that the Intelligent Design proponents make—oversimplifying the science of evolution to reach conclusions that scientists themselves insist are unwarranted. We saw that in the case of Intelligent Design, advocates were motivated by a commitment to a theological position intrinsically linked to their concept of the meaning of life; that is, they simplified evolution in order to maintain a definition of God consistent with their concept of salvation.174 What motivates the nontheological misuses of evolution rhetoric?

Sometimes simplifications and misuses of theory reflect no more than ordinary failure to understand complexity, combined with the ordinary human impulse to exploit arguments to support one’s position. But there is a more general dynamic at work here. The concept of “nature” is again brought into play. However, the invocation of the natural by Darwinists carries a different appeal. Natural outcomes are seen as both desired and inevitable. As a corollary, efforts to resist outcomes deemed natural are considered futile and idealistically wrongheaded. Individuals struggle in vain to withstand the inexorable tide of the evolutionary process.

Evolution rhetoric harnesses the themes of objective justification and inevitability to the campaign of its users. By objective justification, I mean that evolution rhetoric relies heavily on the idea that nature does not take sides among human partisans. Nature does not care which party, church, tribe, or country is in power, and does not identify with any special interest. Nature simply rewards the fittest with survival and punishes the unfit with extinction, causing certain evolved characteristics to flourish. It is difficult to make the case coherently that it was unfair or wrong for the dinosaurs to have expired, or for men generally to be taller than women. Thus, by evoking evolution as the explanation for some current condition or circumstance, moral and

173. Id. at 59-72.
174. See discussion supra pp. 69-72.
178. RUSE, supra note 154, at 72.
political objections are effectively neutralized.

Of course, one might see this point and still bemoan the results. Perhaps civilization is meant to calm the ravages of nature. Perhaps the human spirit is meant to soften the violent edges of evolution. Arguments like these are not contemplated by many of those who use the rhetoric of evolution. There is an implicit ideology, a kind of secular theology, at play, in which evolution is not only what happens but what ought to happen. Call it scientific progressivism. Evolution is presented as part of a general progression towards some ideal. Proponents of this theory maintain humanity is not just the current iteration of evolutionary meandering, but the apex of a long evolutionary path. Current features of human behavior that can be linked to this path are, therefore, anointed as part of the ascendancy of humanity, and beyond reasonable criticism. We human beings do not just happen to be capable of determining the environment of other creatures. The belief is that we deserve to be in that position; we are justified. And so evolution functions as an alternative to God in the explanation of how humanity has been granted dominion over the earth.

Similar to this justification function is the idea that evolutionary forces are inevitable. Evolutionarily-derived characteristics, or those defended as such, are depicted as being deeply embedded in our genes. We are “hard-wired” to behave as we do; nature trumps culture. Thus, evolutionary rhetoric works to present the status quo as both justified and inevitable.

Consider recent efforts to apply evolutionary theory to law. The basic argument is that at least some behavioral dispositions can be

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179. As Ruse notes, for Darwin, coming out on top is precisely a matter of being, like everything else, part of the organic world: there was a race and we won. In this sense, the Darwinian picture is very much part of that progressivist world vision, set off against the Christian providentialist world vision, which latter judges us to have won because we were never part of the race in the first place. For the believer, we humans are the top because God made us that way, in His image. RUSE, supra note 33, at 207.

181. RUSHTON, supra note 172, at 59.

shown to have genetic or biological origins, and that understanding these origins can help policy makers deal with these behaviors more effectively. For instance, Owen Jones suggests that research regarding the tendency of parents, as an evolutionary strategy, to favor biological children over adopted children might be brought to bear in policymaking regarding adoptive parents charged with neglect or violence against their adopted children. In a similar vein, Kingsley Browne suggests that inherent dispositional differences between men and women, rather than discrimination or internalized patriarchy, can be responsible for gender disparities in the executive suites. “Those individuals, whether male or female, who are inclined toward competition, risk-taking, and status-seeking are more likely to reach the pinnacle of career success than those who are not.”

While these scholars recognize the damaging historical precedent of Social Darwinism and the ease with which facile explanations for behavioral causes sounding in evolutionary rhetoric can be constructed and misused, they alternatively ask that the baby not be thrown out with the bathwater, and insist that the genie is out of the bottle. Brian Leiter and Michael Weisberg have undertaken a more direct rebuttal of these arguments, pointing out that evolutionary

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183. See generally, LAWRENCE A. FROLIK, LAW & EVOLUTIONARY BIOLOGY (1999).
184. Jones, supra note 182.
185. Browne, supra note 182.
187. Kuklin acknowledges the valid criticism of historical applications of evolutionary analysis “particularly after the eugenically-justified atrocities of World War II.” Kuklin, supra note 182, at 1130. Elliott observes that the association with Social Darwinism and Sociobiology has rendered evolutionary analysis “politically incorrect.” E. Donald Elliott, Evolutionary Models in Law, in LAW & EVOLUTIONARY BIOLOGY 111, 121-22 (1999). Browne merely notes that in associating his work with explicitly sexist and racist science of the 19th century, his critics do not cite any error in his work, and do not credit his own insistence that his own evolutionary analysis does not justify gender discrimination. Browne, supra note 186, at 82-85.
188. Owen Jones concludes that “evolutionary analysis is an exceptionally powerful but easily misunderstood tool for legal policymakers,” and urges its careful use. Jones, supra note 182, at 1125. Kuklin acknowledges that flawed moral reasoning “has never halted, or even perceptibly slowed, faulty political or demagogic contentions.” Kuklin, supra note 182, at 1222.
189. Kuklin, supra note 182, at 1241.
190. Id. at 1246.
explanations of behavior are neither logically necessary nor scientifically sufficient to identify the extent that behavior is susceptible to modification, which is the principal way evolutionary analysis might be relevant to law and policy.

B. Evolution and Economics

The histories of economics and evolution have been intertwined all along. Spencer himself made the transition to economics easily, endorsing laissez-faire policies as the market equivalent of evolutionary struggle and progress. Their parallel courses have been ably traced. The similarities in logic are such that their rhetoric commonly overlap. Business and market commentators often speak in terms of extinction, adaptation, and “the survival of the fittest,” while biologists find themselves describing species competing in markets for mates.

Economic rhetoric often serves the same function as evolution rhetoric. Individuals acting in their own self-interest determine both the allocation of resources and the constitution of the gene pool. That is, the simple application of supply and demand would not result in disparate outcomes unless the market value of the inputs was different. Market valuation provides the same veneer of objective justification that evolutionary success does. Absent a market intervention, such as the historic coercive application of racist intent through the power of the state, equal merit should yield equal results. Unequal outcomes indicate unequal merit. Further interventions are counterproductive.

Like evolution, economic language presents a powerful, objective justification for the status quo. Wealthier individuals and groups are wealthier, some say, because they deserve to be, and the wealth maximization function of free markets would be imperiled were we to try to make it otherwise. Indeed, Ruse notes that following the Civil

192. Id.
193. Ruse, supra note 33, at 73.
195. Kuklin cites E. Donald Elliot, “one of the founders of the law and biology movement,” writing “[t]here are many areas in which ‘Law and Biology’ and ‘Law and Economics’ overlap and would reach exactly the same results in analyzing human motivations.” Kuklin, supra note 182, at 1213-14. Kuklin notes that “law and economics scholars often see parallels between efficiency and the theory of evolution, as well as do biologists.” Id. at 1214.
196. See, e.g., Jones, supra note 182, at 1144-46.
197. Kuklin, supra note 182, at 1213.
War, American industrialists preferred to attribute their successes to their own merits rather than to the struggles of others, thereby endorsing the Spencerian moral emphasis on fair competition. And, also like evolution, economic rhetoric serves to imbue its analysis with a sense of inevitability.

Thus, in the modern race debate we see the same patterns in economics that we see in evolution. Blacks see complex racial disadvantage and find evidence of racism. Whites see the same complex racial economics and find simple and natural economic explanations. The complex systems of racial advantage identified by many economists (as well as by critical race theorists) are bypassed, or oversimplified, in the popular understanding as reflecting the simple conclusions that either the system is racist or that unequal merit is the cause of inequality.

Currently it is not politically acceptable to express the view that Blacks are inferior, although it might seem corollary to the claim that White domination is the result of merit. This position is somewhat masked by expressions of optimism regarding the future. O’Connor’s prediction of the demise of affirmative action is not only unsupported, but it conveniently sidesteps the familiar conflict between equal opportunity and equal outcomes. There is no need to choose between the two so long as one insists that equal opportunity will eventually lead to equal outcomes. But the concomitant commitment to the idea that malicious intent is the principal barrier to equal opportunity only solidifies the intense focus on racist agency, which is increasingly hard to find. The looming inference of Black inferiority remains unstated.

C. Secular Salvation Redux: The Market as God

Many people are skeptical that any significant racial unfairness in the market persists. Some of these skeptics display the same relatively simple understanding of economic analysis that racial conspiracy theorists do. The powerful instinct that underlies the neoclassical market narrative includes two simple premises: that people generally behave rationally, in their own self-interest, and that markets

198. RUSE, supra note 154, at 74.
199. See Alan Krueger, Jesse Rothstein & Sarah Turner, Race, Income, and College in 25 Years: Evaluating Justice O’Connor’s Conjecture, 8 AM. LAW ECON. REV. 282 (2006) (concluding that economic progress alone is unlikely to narrow the racial test-score achievement gap enough in twenty-five years to produce today’s racial diversity levels with race-blind admissions).
200. See BONILLA-SILVA, supra note 101, at 43-47.
act neutrally to collect this behavior, producing wealth (or welfare, or some other utilitarian form of measured benefit) and rewarding merit.\textsuperscript{201}

These premises work against the inference of unfair racial disparity. As racial discrimination has gained in disrepute, becoming characterized not only as irrational but also evil, ordinary people self-assess and find no such malice.\textsuperscript{202} They find only the desire to better themselves and their interests, making the best choices they can. “Most people are like me,” we reason, and are reluctant to attribute mischief without clear warrant.

So when other explanations are available, they are preferred over racism. Perhaps the applicant was not qualified. Perhaps the employee was not capable. Why would individuals act against their economic self-interest?\textsuperscript{203} Perhaps the police officer reasonably perceived danger. Perhaps the assailant was poor, or drunk, or simply in a bad mood, rather than racist. Perhaps that community simply is not working very hard.\textsuperscript{204}

The rhetoric and image of the “natural” that was set in opposition to divine agency in the context of Intelligent Design comes back into play when considering evidence of racial separation or inequality. Again, the “natural” is set against agency. The first line of defense against any charge of racist intent is to claim to be color-blind. The insistence on color-blindness counters the charge of racism, which is equated with intentional discrimination. Under our current construction of racism, there can be no responsibility for inequality so long as a color-blind stance can be maintained.\textsuperscript{205} However, the evidence of many behavioral studies proves that color-blindness does not prevail.\textsuperscript{206}

A prevalent second line of defense is to defend color-conscious behavior as “natural” behavior.\textsuperscript{207} Particularly with regard to social and

\begin{itemize}
\item \textsuperscript{201} Id. at 30-36.
\item \textsuperscript{202} See discussion supra note 146.
\item \textsuperscript{203} Discrimination law recognizes this preference by asking employment discrimination defendants to respond to a prima facie case of discrimination by providing a legitimate, nondiscriminatory reason for their actions. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Even where the reason proffered is found to be a false pretext, no inference of discriminatory intent is necessary. St. Mary Honor’s Center v. Hicks, 509 U.S. 502 (1993).
\item \textsuperscript{204} See Bonilla-Silva, supra note 101, at 39-43.
\item \textsuperscript{205} Id. at 1. See also Neil Gotanda, A Critique of “Our Constitution is Color-Blind,” 44 Stan. L. Rev. 1, 5-6 (1991).
\item \textsuperscript{207} See Bonilla-Silva, supra note 101, at 36-39; see also Jody David Armour, Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in
residential segregation, one encounters the explanation that it is “only natural” to want to associate, live, and even work with others who are most like oneself, or with whom one shares particular interests or preferences. All people seek their own kind to some extent, so this behavior is natural, and the segregation that results is not caused by unfair discrimination.

This is not meant as a confession of guilt. Race discrimination has become understood only as malicious intent, and ordinary and natural behavior does not rise to the level of such malice. Thus, race-conscious behavior is presented as innocent behavior, so long as it is widespread. One could then generate the following story: Natural social separation results in natural residential segregation. Natural preferences lead to natural differences in employment choices. Natural cultural differences reinforce naturally different interests and beliefs, and different choices about investment of resources. Businesses naturally cater to larger markets. Just as with Intelligent Design theory, observations that follow ordinary, natural patterns are deemed to constitute “regularity,” and no agent can be inferred. The resulting inequality is thus rendered unobjectionable.

Thus far I have explored how economic language, like evolution language, acts to powerfully buttress arguments supporting the status quo as both objectively justified and inevitable. I have yet, however, to lay out the ideological commitment that motivates these uses of rhetoric in the same way that a concept of God motivates Intelligent Design proponents. Let me make the comparison more explicit.

Economics has always had at its heart an agency analogy, straight from Adam Smith:

[Every individual] intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it.

By pursuing his own interest he frequently promotes that of the society more

\[\text{AMERICA (2000).} \]


effectually than when he really intends to promote it.  

Now consider the reaction of Harvey Cox, the Hollis Professor of Divinity at the Harvard Divinity School, upon undertaking a review of “the business pages”:

Expiring a terra incognita, I found myself instead in the land of déjà vu . . . . Behind descriptions of market reforms, monetary policy, and the convolutions of the Dow, I gradually made out the pieces of a grand narrative about the inner meaning of human history, why things had gone wrong, and how to put them right. Theologians call these myths of origin, legends of the fall, and doctrines of sin and redemption. But here they were again, and in only thin disguise: chronicles about the creation of wealth, the seductive temptations of statism, captivity to faceless economic cycles, and, ultimately, salvation through the advent of free markets, with a small dose of ascetic belt tightening along the way . . . .  

Cox’s article proceeded to delineate the contours of “the business theology” including, in particular, assessing the role of “the market as God” along traditional Christian criteria of omnipotence, omniscience, and omnipresence.  

Economist Robert Nelson has developed a compelling comparison of economic and religious intellectual history. In Reaching for Heaven on Earth, Nelson connects modern economic thought to the history of Western theology, laying out how the redeeming power of economic progress has become an article of faith. That is, the belief that the world and human nature are essentially rational underlies an economic model in which self-interested behavior leads to “greater future rationality and, in its perfection, a future heavenly peace and harmony on earth.”  

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214.  REACHING, supra note 213, at 5.
competing strands of Christian theology, emphasizing on the one hand “faith in the role of human reason in shaping events for human betterment,” and on the other hand the weakness of human reasoning and the corruptibility of human nature. Nelson reviews the faith tenets of key figures in economic thought, and exposes the unacknowledged theological foundations that permeate their work.

In *Economics as Religion*, Nelson extends this analysis to contemporary economic disputes, and demonstrates that interconnected themes pertain. Chicago school economists rebelled against the prevailing Cambridge school optimism about the scientific management of economic progress in the same way that Protestants reacted to Catholic progressivism, and both rebellions were based on similar judgments about the corruptibility of human nature. Nelson’s thorough historical review diagrams economists’ reliance on basic texts and their function as a secular priesthood of modern secular values.

Thus, Nelson compellingly demonstrates that “[t]he most vital religion of the modern age has been economic progress.” The principal factual precepts of economics—that incentives matter and that markets work—are not the main function of the discipline. Rather, economists function to defend the market against moral or ethical objections, in support of economic salvation. Nelson’s view is that “the faith in the redeeming power of material progress is fading,” and the shape of the theological future cannot yet be discerned.

D. Meme Complex

Economics, religion, evolution, and race have intersected in complex ways throughout history. Together, I argue, they function as a meme complex in support of Whiteness. Here I rely on the work of evolutionist Richard Dawkins who gave us the lasting concept of a selfish gene, a biological characteristic that adapts for its own survival rather than for the survival of the individual organism that happens to

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215. Id. at 19.
217. Id. at 8-11.
218. Id. at 329.
219. Id. at 330-31.
carry the characteristic. For instance, the instinct to protect one’s offspring does not benefit the individual’s survival, but it ensures the survival of the individual’s genes, including the protective instinct itself. A broader instinct to protect strangers might prove a relative failure. Applied to behavior and culture rather than to biology, this idea tells us that certain “memes” in human society have the capacity, if not the will, to sustain themselves. 222 So, an idea, a fad, or a cultural practice might spread among individuals who hear of it, thus propagating. A meme for celibacy might survive, where a gene for celibacy never would. 223

A meme complex is a group of characteristics that function together in the same way that gene complexes do. 224 Thus, a meme for celibacy might function well only in combination with a meme for priestly conduct. Evangelism might combine more easily with certainty and universalism than with questioning and individualism. Evolution and economics provide mutual thematic support in this way. Progress, Providence, evolution, merit, free markets, Western civilization, and Whiteness might be seen as interdependent concepts that are tightly woven together in the same way that “mutually suitable teeth, claws, guts, and sense organs evolved in carnivore gene pools.” 225 Whiteness is a meme complex.

Thus, it is not the case that evolution, religion, race, and economics each developed independently in isolation, only to emerge and do battle with each other. Instead, all are interdependent. Ubiquitous societal and personal religious beliefs and institutions formed the backdrop against which both evolution and economics emerged. Attitudes about race both informed, and were informed by, religion. In turn, attitudes about race influenced, and were influenced by, evolutionary and economic theory.

For example, Paul Harvey examines how race itself has been constructed by Christianity in America. “For many Christians, Whiteness simply became woven into the very fabric of Christianity itself.” 226 Harvey traces how the interpretation of Biblical text merged with the scientific argument that nonwhite people were not descendants of Adam—not of the same origin as White people—and functioned to

222. Id. at 189.
223. Id. at 198.
224. Id. at 197.
225. Dawkins, supra note 221, at 197.
justify Black slavery.\textsuperscript{227} Similarly, race contributed to some religious creationists’ adoption of certain concessions to evolution. For example, Frank Lewis Marsh conceded that there might have been limited variations among the original smaller set of created “kinds,” which resulted in the current multitude of species, while maintaining that hybridization among God’s original creations was the work of Satan, resulting in such “abnormalities” as the black skin of Negroes.\textsuperscript{228}

In contrast, historian Christine Leigh Heyrman has explored how “almost a century elapsed between the 1740s, when evangelicals started actively proselytizing in the South, and the middle of the nineteenth century, when they may have won the attention, if not the allegiance, of a majority of southern whites.”\textsuperscript{229} Heyrman’s account includes many factors of culture, theology, and spiritual experience. But among the shifts that allowed the evangelical movement to succeed was a shift from anti-slavery\textsuperscript{230} to acquiescence of slavery\textsuperscript{231} and suppression of African American evangelical preachers,\textsuperscript{232} and from the support of spiritual intimacy across racial lines\textsuperscript{233} to increasing barriers to racial mixing.\textsuperscript{234} Rather than religion being the source of racism, it was Black slavery that caused evangelicalism to change.

Social Darwinism and laissez-faire economics were inextricably entwined, and again, religious motivations influenced their development. Ruse notes that

\begin{quote}
Spencer (rightly) saw establishment Christianity as serving the ends of the rich and powerful (represented by the Anglican Church), who inherit their wealth and status and who have no fear of the threat of competition from the more gifted and industrious . . . . It was as much a question of one branch of Christianity set against another branch as it was a question of science set against all of Christianity.\textsuperscript{235}
\end{quote}

Similarly, Boyd Hilton has explored the theological shift in Britain at the

\begin{thebibliography}{99}
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\item \textsuperscript{227} Id. at 23.
\item \textsuperscript{228} RONALD NUMBERS, THE CREATIONISTS 129-30 (1992). Here, Marsh follows committed creationist George McCready Price, the originator of “flood geology.” \textit{Id.} at 81, 85.
\item \textsuperscript{229} CHRISTINE LEIGH HEYRMAN, SOUTHERN CROSS: THE BEGINNING OF THE BIBLE BELT 6 (1997).
\item \textsuperscript{230} Id. at 92-94, 138.
\item \textsuperscript{231} Id. at 155.
\item \textsuperscript{232} Id. at 222-25.
\item \textsuperscript{233} HEYRMAN, supra note 229, at 45-48
\item \textsuperscript{234} Id. at 67-69.
\item \textsuperscript{235} RUSE, supra note 33, at 75.
\end{thebibliography}
end of the 18th century into an “atonement” mode, which arose as a practical reaction to a difficult period in which depravity and moral corruption seemed endemic, and which emphasized stark doctrines of eternal punishment.\textsuperscript{236} It was a shift in moral perspective brought about by the evangelical movement, Hilton argues, that contributed more to the development of laissez-faire individualism in the early 19th century than did classical economics or utilitarianism.\textsuperscript{237} He claims that “religious belief was important in shaping, as well as rationalizing the economic philosophy of the period.”\textsuperscript{238}

That some Christians today embrace neoclassical economic theory as the instrument of their reward for faithful belief\textsuperscript{239} is merely the reiteration of an historical pattern,\textsuperscript{240} only this time without the emphasis on suffering and restraint.\textsuperscript{241} Hilton’s \textit{Age of Atonement} ends with a theological transformation into an “incarnation” mode, characterized by compassion, inspired by the life of Jesus the man, and “connected with the growth of Christian social action during the second half of the nineteenth century.”\textsuperscript{242}

Some secular economists, in turn, are returning the favor. Economist Benjamin Friedman explores the concededly optimistic\textsuperscript{243} hypothesis that “economic growth . . . more often than not fosters greater opportunity, tolerance of diversity, social mobility, commitment to fairness, and dedication to democracy.”\textsuperscript{244} Friedman also traces how theologians adapted religious doctrine to “the idea that progress, including worldly progress, not only existed but was inevitable . . . but, even though divinely ordained . . .[,] the active mechanism . . . was not

\begin{itemize}
\item \textsuperscript{236} BOYD HILTON, THE AGE OF ATONEMENT 3-5 (1988).
\item \textsuperscript{237} \textit{Id}. at viii-ix, 6-7.
\item \textsuperscript{238} \textit{Id}. at 6 (emphasis in original). Rodney Stark goes even further back in history to argue that Christian theological commitment to reason and to progress laid the foundation for the development of capitalism. ROYD STARK, THE VICTORY OF REASON: HOW CHRISTIANITY LED TO FREEDOM, CAPITALISM, AND WESTERN SUCCESS (2005).
\item \textsuperscript{239} See, e.g., David Van Biema & Jeff Chu, Does God Want You to be Rich?, TIME, Sept. 18, 2006, at 48; KENNETH COPELAND, THE LAWS OF PROSPERITY (1974).
\item \textsuperscript{240} Cf. Stephen M. Bainbridge, Law and Economics: An Apologia, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella, eds., 2001) (defending law and economics analysis as consistent with Christian belief).
\item \textsuperscript{241} HILTON, supra note 236, at 374.
\item \textsuperscript{242} \textit{Id}. at 5.
\item \textsuperscript{243} BENJAMIN FRIEDMAN, THE MORAL CONSEQUENCE OF ECONOMIC GROWTH x (2005).
\item \textsuperscript{244} \textit{Id}. at 4.
\end{itemize}
divine intervention but ‘nature.’”

For their part, some apostles of evolution have recently taken high-profile stances against God, by aiming the tools of evolutionary analysis at religion itself. They argue that religion is itself the result of evolution, that there is nothing but matter, and that delusional religious fantasies to the contrary are not only false but dangerous and harmful. Their claim is most strongly made with regard to a particular kind of religion, that is, strong theism, or the belief in a God who is personal and who intervenes in the world by supervening laws of nature. The clear implication is that the time has come to evolve our way out of religious belief. There is the paradox, of course, that the books seem designed to persuade, while it seems unlikely that these eminent evolutionists would generally argue that individuals can, if persuaded, choose to evolve.

I do not mean to take a position on the existence of God, on the theological necessity of refuting evolution in order to maintain religious beliefs, or on the scientific necessity of refuting God in order to maintain scientific realism. I only note that these arguments ironically echo the dichotomy exercised by Intelligent Design advocates. Either random matter or intelligent God, say the creationists. While evolutionists reply, “agreed!”

Finally, there is irony in the fact that some economists, disenchanted with the classical model, are turning back to evolution as a way out. The science of evolution, chastened into humility by the Social Darwinism episode, is now cautious and sophisticated. Broad and careless conjectures are avoided. “Once one entertains an evolutionary approach to economics . . . it becomes difficult, if not impossible, to retain neoclassical positivism as a methodology.” An evolutionary

245. Id. at 34-35.


247. See, e.g., Dawkins, supra note 246, at 281-308.

248. Dennett, supra note 246, at 9; Dawkins, supra note 246, at 20.

249. Many people, of course, do not find it inconsistent to believe in some form of both.

theory that is “inevitably jumpy, non-smooth, and generally deeply uneven in character”\footnote{Stephen A. Resnick & Richard D. Wolff, Rethinking Complexity in Economic Theory: The Challenge of Overdetermination, in Evolutionary Concepts in Contemporary Economics 39, 44 (2005).} is inconsistent with the autonomous, independent individuals and institutions favored by classical economists that ignore fifty years of postmodern theory and science regarding the nature of the self.\footnote{Id. at 41, 49-53.}

IV. CONCLUSION

A. The Prisoner’s Dilemma, Revisited

Eddie Jr. handled the summing up. “So the point is, when reasoning separately, they drag themselves down. But what about reasoning from above?”

“Good man, I like that. Reasoning from above.” Dad sat triumphantly at the table, gratified by the response from his brood. “But how can they get there? What does it mean?”

Ailene ignored his question, even more distressingly hypothetical than the original problem. “Never mind above. They’re both in it. They both know what they need to do.”\footnote{Richard Powers, Prisoner’s Dilemma 71-72 (1988).}

The contemporary difficulty with race is fundamentally a secular theological mistake based on a false and rigid dichotomy. Letting go of the primacy of simple market explanations does not reduce the intrinsic value of any White person or of Western civilization, any more than accepting evolution portends the death of God. Conversely, relinquishing a fixation on the villainy of White people does not mean that Black people deserve what they get.

Perhaps the fixation on agency has diverted us from attention to the nature of intelligence. I would like to briefly reiterate a suggestion for further exploration that I made previously.\footnote{Brant T. Lee, The Network Economic Effects of Whiteness, 53 Amer. U. L. Rev. 1259, 1303 (2004).} Scientists in a wide variety of technical fields are finding that natural complex systems exhibit classical science is disrupted by the “arrow of time” presented in evolutionary biology and other sciences.
spontaneous intelligence and self-organization.  “Swarm intelligence” and feedback effects show how complex patterns can be the result of a multitude of independent individual actors following relatively simple rules. Ants responding to simple chemical markers can discern the shortest route to a food source through a system that no ant designed. Ignorant mold spores detect the optimal moment to coalesce as an organic mass on the forest floor in “search” of food. Thomas Schelling demonstrated long ago that relatively open-minded and nonracist individuals make independent decisions that collectively result in stark segregation. It is perhaps possible to imagine that individual humans, acting without malice or broader design, can consummate a system of oppression to rival the most Machiavellian plot, just as the variety of biological life, in the fullness of time, can develop beauty and function that surpasses the most sophisticated artifice. Whether to call the uncoordinated collective actions “intelligent” or “intentional” is semantic.

B. Theological Resolution

While Behe, Dembski, and other Intelligent Design proponents claim not to be attached to any particular religious concept or definition of the intelligent agent they have in mind, nonetheless they are clearly making an argument, both in terms of the function of this intelligent agent and their personal motivation for appealing to it, for the existence not only of God, but of the Christian God of popular interpretation. I do not mean to undertake a thorough discourse on the existence or definition of God. As the tempest swells, and the loud voices batter, I suspect that many, if not most, people have found a way to accommodate both science and some form of spirituality in their lives. For some, that includes maintaining a somewhat traditional image of a theistic God who can and does intervene in the material world in patterns

256. See generally James F. Kennedy, Russell C. Eberhart, Yuhui Shi, Swarm Intelligence (2001).
258. Steven Johnson, Emergence 11-17 (2001).
that are not possible to define, and whose existence neither is threatened by nor inconsistent with the general progress of evolution and science.\textsuperscript{261} Others are finding their way both forward and backward to a non-theistic version of God that focuses inwardly, on consciousness and meaning, and which shares features with some Eastern religious practices.\textsuperscript{262} Many, for whom spirituality is not a primary focus, acknowledge an important purpose served by religious practices and beliefs. Indeed, one senses that we all share a mystical and sacred experience of nature that inspires and motivates; only our ideas and our language get in our way.

So while there is conflict between certain religious beliefs and certain scientific beliefs, an accommodation can be made. In fact, many theologians find the progress of scientific understanding a helpful challenge that forces us to adopt more mature visions of the nature of God.\textsuperscript{263} “This kind of theology does require a move away from the strong theism that is the underpinning of Intelligent Design, just as it requires relinquishing the materialistic reductionism that some scientists propound. Those who have not fully confronted or closely examined the potential conflicts between the various things they believe may find they are more motivated to do so by high-profile conflicts like the \textit{Kitzmiller} case. If this kind of examination is not welcome, it will likely prompt a call to action to defend core beliefs. But if the examination is undertaken in good conscience, it can lead to progress.

C. Racial Resolution

In the racial arena, I sense a different energy. Americans, in my view, are both tired of struggling with racial issues and tired of accommodating their positions and beliefs in hopes of peace and progress. But I believe that the intellectual dynamic is the same as it is in the realm of theology. I think most Americans have made an uneasy peace with race. My sense is that most White Americans understand at various levels that they are not in fact color-blind, and resolve to do better. While they believe in the justice and utility of the free market, I think they understand that the economic system does not reward merit

\textsuperscript{261} Haught, \textit{supra} note 94, at 342-346.
\textsuperscript{262} See, e.g., M\textsc{ar}cus B\textsc{org}, \textsc{The} Heart of \textsc{Christianity} (2004).
\textsuperscript{263} “As the Roman Catholic theologian Hans K\textsc{ing} puts it, evolutionary theory now makes possible: 1) a deeper understanding of God—not above or outside the world but in the midst of evolution; 2) a deeper understanding of creation—not as contrary to but as making evolution possible; and 3) a deeper understanding of humans as organically related to the entire cosmos.” Haught, \textit{supra} note 94, at 346-47.
perfectly, and that our society has treated Black people particularly poorly. But they are defensive about charges of evil, and in being defensive, their vision about what can be done about the system remains impaired.

Similarly, it is my belief that most Black Americans, while suspicious of various forms of racism, understand that White people are not evil. While they know that the economic system does not treat them fairly, they also understand that they can make some progress working within its constraints. But there is an abiding resentment that their struggles are not recognized and acknowledged, and that the unfairness persists. This manifests itself in charges of racism, which is only intensified when the charge is repeatedly denied.

So this is an uneasy, conflict-ridden accommodation, and the dispute over agency is the primary stumbling block. What the study of complexity in race and economics promises is a more mature vision of the nature of racism. Just as scientific developments require believers to imagine a God “not above or outside the world but in the midst of evolution,” complex economic analysis requires Americans to understand a racial inequality that is not evil and irrational but that emerges in the midst of the market. The Devil really is in the details. It is there not because it was planted there by a wily conspirator, but because that is the mindless, purposeless, undirected but inexorable nature of the complex systems that comprise racial inequality today.

When racial conflicts flare, they can spur activism in the form of a call to arms, resulting in fully staffed ramparts, or they can cause retreat as the angry combatants nurse their wounds. Or, perhaps they can inspire engagement and mutual exploration. So, in the end, we really are Prisoners facing a Dilemma, too often tempted by the greater payouts of defecting, even when cooperation is offered. It turns out that if you send a computer-programmed strategy out into a virtual tournament world to play the Prisoner’s Dilemma game repeatedly against other strategies designed by other programmers, and then tally up the scores, the most successful long-term strategies are remarkably simple: one should initially trust others, with all of the vulnerability that cooperation exposes. If betrayed, one should respond in kind, but one should return trust with trust. “Tit for tat,” if you will, but starting with cooperation.264 And so we see in the end the merger of spirituality and race relations. For what is the source of a world view that says to trust and forgive, not

always, but persistently and repeatedly? Whether grounded in a religious tradition or in science, this is faith.265

D. Common Ground

Columnist David Brooks recently wrote that, in about the last thirty years,

the belief in natural human goodness . . . has been discarded. It began to lose favor because of the failure of just about every social program that was inspired by it . . . . But the big blow came at the hands of science. From the content of our genes, the nature of our neurons and the lessons of evolutionary biology, it has become clear that nature is filled with competition and conflicts of interest.266

In this passage, Brooks demonstrates the rhetoric of science and natural inevitability that characterize the deployment of evolutionary and economic themes in policy debates, and combines them with a calculated suggestion that the battle is over. However, Brooks does get to the theological heart of the matter. One opposed to the policy prescriptions that flow from the assessment of essential human nature as sinful267 must take the position that there is always hope, that we need not live in a world that assumes and, therefore, encourages only self-interest, and that human beings can overcome sin by grace, whether perceived within or granted by God.

Perhaps it is foolish to hope that a pragmatic compromise can be reached between beliefs and positions so strongly held and so intertwined with deep personal commitments. Each side feels that much is at stake. Historian David A. Bell, writing recently of the Napoleonic Wars, argues that modern “total” wars are the result of deep ideological commitments by which one sees oneself at the apex of a linear narrative of progress,268 and the fate of civilization appears to be at stake.269 Or

265. Note that it helps not at all to know that altruistic behavior based on religious practices or beliefs is an efficient strategy for evolutionary success. Strategizing to achieve success by following the compassion rule is less effective when carried out as an effort to manipulate matters to one’s own advantage than when carried out through faith in compassion as a way of life. Religion helps consciousness carry out the evolved program.


267. See Bainbridge, supra note 240, at 222 (behavior of economically rational actor consistent with fallen state of humanity under Christianity).

268. Consider in the political realm “the all-too-common notion that there is a smooth and even inevitable path that countries follow from dictatorship to democracy . . . .” Posting of Bill Emmott to http://www.slate.com/id/2150811/entry/2150841/#b (Oct. 16, 2006, 6:51
consider a recent adaptation of Aeschylus’ *The Persians*, the earliest surviving play in Western literature, in which the great Persian Empire is defeated:

All those years we spent jubilant, seeing the trifling, cowering world from the height of our shining saddles, brawling our might across the earth as we forged an empire, I never questioned. Surely we were doing the right thing because it was the thing we could do. Surely anything we found a way to make possible was what we were destined to accomplish. It seemed so clear—our fate was to rule. That’s what I thought at the time. But perhaps we were merely deafened for years by the din of our own empire-building, the shouts of battle, the clanging of swords, the cries of victory.270

The aspiration of this essay, as I stated at the outset, is to loosen frameworks of perception regarding race that have ossified into permanently belligerent attitudes. I have deliberately hitched one impossible and controversial topic to another. Perhaps unusual cross-fertilization can occur for audiences surprised to find beliefs and arguments like theirs reflected in those with whom they are unaccustomed to being lumped. If religion can serve to give false certainty and simple answers, so too can a certain brand of economic analysis. If evolution can support a linear narrative arc for the universe, so too can racial conspiracy theory. Perhaps there are other ways.

Both fundamentalists and Darwinists define God narrowly—as a supernatural, interventionist, conscious being with humanity as its focus.271 Both see religion as belief in this kind of God. Both see science as requiring entirely natural explanations. Both, therefore, conclude that religion is inconsistent with science. Fundamentalists rightly charge that evolution threatens the core of their belief, and flies

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271. See Haught, supra note 94, at 340-42.
in the face of their lived experience. They argue that the moral balance of the world hangs on defeating this challenge. Darwinists rightly counter that belief in God is contrary to the nature of the observed universe, and that the progress of science depends on beating back the advance of superstition.

Both race conspiracy theorists and neoclassical economists define evil narrowly—as an irrational, intentional intervention in the market, with Blackness as its focus. Both see racism as an expression of this kind of evil. Both see economics as requiring the exercise of rational self-interest. Both, therefore, conclude that racism is inconsistent with economic analysis. Race theorists rightly charge that neoclassical economic analysis denies the existence of racism, and flies in the face of their lived experience. (Indeed, they claim it flies in the face of universal experience, only denied by Whites seduced by self-interest and guilt.) The moral balance of the world hangs on defeating this onslaught. Economists rightly counter that intentional racism is clearly in decline in human behavior. Efficiency depends on moving beyond the morass of historical racial conflict.

But as I hope this essay has shown, both God and Race require more subtle understandings. Even Dawkins would acknowledge—indeed, would insist—that the entirely natural processes of the blind watchmaker called evolution produce design that evokes wonder and awe. That the nature of God lies in the fact of this marvel seems to me to be common ground.

My hope is that even the most committed neoclassical economist, objectively reviewing the world of race, would concede that the entirely natural and unintended processes of a complex market can produce oppression on a tragic scale. That we might all then be better able to confront the tragedy that is racial inequality is my prayer.