

## The Legal Weaponization of Racialized DNA

Jonathan Kahn, JD, PhD  
Professor of Law and Biology  
Northeastern University

### Abstract

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

Understandings of race in relation to genetics are far from settled. This article explores how actors from both the political left and the political right have resorted to weaponizing racialized DNA to achieve their goals. This indicates that articulating race as a social construct in itself is no guarantee of a racially progressive agenda; and employing genetic data to pursue what seem to be racially progressive goals is no guarantee against reinforcing the dangerous idea that the human races are genetically distinct entities.

This article unfolds as a diagnostic exploration of this problem situated in the context of the post-genomic era since the completion of the Human Genome Project in 2003. It aims less to suggest specific policies or legal solutions than to describe and analyze this emergent phenomenon and thereby equip others in diverse areas of law, policy, and scholarship to engage and respond to it better informed and with, perhaps, deeper insight into the dynamics they might need to address in their own distinct realms of analysis and practice. New genetic technologies do not resolve these legal and political issues. They become, rather, a terrain upon which long standing debates are carried out in new ways. Or perhaps they are better understood as both already shaped by and in turn shaping these arguments. The scientific impetus to explore the relation between race and genetics cannot be understood apart from evolving understandings of race itself as a means to order social relations and allocate power. These stories are the latest iteration of this long-standing process. It behooves us to pay heed to the new forms these old arguments may be taking.