Desautels-Stein on Race as a Legal Concept

Justin Desautels-Stein (University of Colorado Law School) has published Race as a Legal Concept in the last issue of the *Columbia Journal of Race and Law* (it is also available on SSRN here). The paper proposes to use a conflict of laws approach to address a problem which has traditionally been considered as beyond the scope of conflict of laws. It builds on the article of Knop, Michaels and Riles which did the same with respect to feminism and culture.

> *Race is a legal concept, and like all legal concepts, it is a matrix of rules. Although the legal conception of race has shifted over time, up from slavery and to the present, one element in the matrix has remained the same: the background rules of race have always taken a view of racial identity as a natural aspect of human biology. To be sure, characterizations of the rule have oftentimes kept pace with developments in race science, and the original invention of race as a rationale for the subordination of certain human populations is now a rationale with little currency. The departure from this "classic liberal" conception of race, and its attendant and disturbing view of the function of race, did not, however, depart from the idea that race is a natural and organic part of being a human being. As this Article argues, this seminal background rule—that race is natural, neutral, and necessary—is deeply problematic and a substantial obstacle in the fight against the Supreme Court's ascending anticlassification jurisprudence. Not to mention, it is also false. In an effort to make some headway against the idea that race is a natural idea, as opposed to a legal concept, the Article attacks the background rules of race via the unlikely field of Conflict of Laws. Taking the Supreme Court's decision in Parents Involved in Community Schools v. Seattle School District No. 1 as a benchmark, the discussion first suggests an early functionalist view of voluntary school integration by way of an analogy to the early twentieth-century transformations occurring in Conflicts of Laws. Second, and in the alternative, the discussion then situates the facts of Parents Involved as literally a problem of Conflict of Laws. In both instances, the hope is to focus legal discourse on the background rules of race so as to empower a new and emancipatory anti-subordination jurisprudence.*