for Bernstein demonstrates the extent to which the adoption of racial (or, more commonly 'ethnic') classifications has been responsive far more to systematic political pressures rather than the application of a coherent overarching theory. Even (or especially) supporters of 'affirmative action,' as I ambivalently continue to be, will benefit enormously from confronting the material that Bernstein carefully presents. It truly deserves a wide readership and, just as importantly, respectful discussion."

–Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair, University of Texas Law School, and author of *Wrestling with Diversity*

"We mock the racial-classifications schemes of the Jim Crow south, of Nazi Germany, and of Apartheid South Africa. But as David Bernstein ably demonstrates, our own racial classification system is just as risible, and no more scientific."

–Glenn Reynolds, Beauchamp Brogan Distinguished Professor of Law, University of Tennessee, founder of Instapundit.com

"David E. Bernstein proves ably and conclusively that the familiar legal classifications for racial and ethnic groups used by the federal and state governments, census-takers, medical regulators, racial-preference dispensers, and others are arbitrary to an extreme."

–Stuart Taylor, contributing editor, *National Journal*, and coauthor, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*

☑ Classified

☐ The Untold Story of Racial ☐ Classification in America

David E. Bernstein

BOMBARDIER BOOKS

singles out Indians for...special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," the statute "will not be disturbed."

A vigorous dissent argued that under Supreme Court precedent, it was unclear whether the ICWA Indian child classification should be understood as based on race. Regardless, the dissenters argued, the law was unconstitutional because "it did not rationally further federal obligations to tribes."

The dissenters gave three reasons for their conclusion. First, ICWA creates separate standards for Indian children that extend beyond internal tribal affairs and intrude into state proceedings. Second, the law applies to children who are only eligible for tribal membership but are not and may never become tribal members. The Indian tribes have no special interest in who has custody of such children, so the federal government can have no related obligations. Finally, the ICWA was intended to help Indian parents who did not want their children adopted outside their tribe. In practice, however, the ICWA allows tribes to intervene in custody proceedings against the parents' explicit wishes.

The *en banc* court, meanwhile, divided evenly on the question of whether the ICWA was unconstitutional to the extent it gives a custody preference to Indians who are members of a different tribe than the child whose custody is being determined. The federal government argued that many tribes have deep historical connections with each other. The plaintiffs rejoined that many tribes are entirely culturally distinct. Moreover, tribes that do have historical ties, such as the Hopi and Navajo, were often enemies.

The Supreme Court may very well decide to review this case. If it does so, its ruling not only will determine the constitutionality of the ICWA but also will give the court an opportunity to reconsider its holding in *Mancari*.

CHAPTER SIX
The Strange Career of Government-Mandated Racial Categories in Scientific and Medical Research

The standardized racial and ethnic categories developed in Statistical Directive No. 15 in 1977 (see Chapter One), came with an explicit warning these "classifications should not be interpreted as being scientific or anthropological in nature."[1] And indeed, the classifications have no valid scientific or anthropological basis. Yet the Food and Drug Administration (FDA) and the National Institutes of Health (NIH) require medical researchers to classify study participants by Directive 15 categories.

Participants are classified as Hispanic or non-Hispanic, and then "American Indian or Alaska Native," "Asian," "Black or African American," "Native Hawaiian or Other Pacific Islander," or "White." The researchers must then report study results sorted by those categories. Scientists have grown accustomed to using these classifications despite their lack of scientific validity.[2]

Directive 15 categories have unique problems, but scientists have pointed out a range of more general problems with using common racial categories in scientific and medical research. First, the phenotypes we associate with the different races, such as skin color and facial features,

1. Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260 (1978).
2. Braun, Lundy et. al. September 2007. "Racial Categories in Medical Practice: How Useful are They?" *PLOS Medicine* 4, no. 9: 1425.

"simply do not correlate with data from the whole genome."[3] They also "do not correlate well with biochemical or other genetic characteristics."[4]

Variations in genetic differences between populations are roughly proportional to geographic distances among them.[5] Race is correlated with geographic distance among groups but is not coextensive with it. As one geneticist explains, "The take-home message is that [genetic] variation is continuous," and "is discordant with race."[6]

Additionally, there is no known example of polymorphism (genetic variation) found exclusively in any particular "racial" group.[7] An editorial in *Nature Biotechnology* drolly comments, "Pooling people in race silos is akin to zoologists grouping raccoons, tigers, and okapis on the basis that they are all stripey." [8]

Biomedical studies do occasionally show that race is correlated with a particular medical outcome. But these studies may be picking up the results of sociological differences, such as socioeconomic status, cultural habits, and diet, not genetic differences.

These studies, moreover, do not start from neutral premises. Rather, the "crucial failing of all biomedical research dealing with race" is that it begins with the presumption that race is relevant and then looks for information to corroborate this presumption.[9]

In the past, race may have been more useful as a crude proxy for genetic heterogeneity.[10] However, as DNA testing has become more

3. Garte, Seymour. Sept.-Oct. 2002. "The Racial Genetics Paradox in Biomedical Research and Public Health," *Public Health Reports* 117, no. 5: 221; Cooper, Richard S. et al. March 20, 2003. "Race and Genomics," *New England Journal of Medicine* 348: 1166-70.
4. Williams, D.R. 1997. "Race and Health: Basic Questions, Emerging Directions," *Annals of Epidemiology* 7, no. 5: 333.
5. Kittles, Rick A. and Weiss, Kenneth M. September 2003. "Race, Ancestry and Genes: Implications for Defining Disease Risk," *Annual Review of Genomics and Human Genetics* 4: 38.
6. Rotimi, Charles N. 2004. "Are Medical and Nonmedical Uses of Large-Scale Genomic Markers Conflating Genetics and 'Race'?," *Nature Genetics* 36, no. 11: S43-47.
7. Kittles and Weiss, "Race, Ancestry, and Genes," 38.
8. Editorial. 2005."Illuminating BiDil," *Nature Biotechnology* 23 (2005): 903.
9. Perez-Rodriguez, Javier and de la Fuente, Alejandro. 2017. "Now Is the Time for a Postracial Medicine: Biomedical Research, The National Institutes of Health, and the Perpetuation of Scientific Racism," *American Journal of Bioethics* 17, no. 1: 41.
10. Kahn, Jonathan. 2012. *Race in a Bottle: The Story of BiDil and Racialized Medicine in a Post-Genomic Age* (New York: Columbia University Press), 18 (noting that some supporters of using race in biomedical research acknowledge that it's a "crude surrogate," but claim that it's a stepping-stone to a future in which medical treatment will be individualized based on genomic factors).

available and much less expensive, race is a poor substitute for looking at discernible human genetic differences.[11] Rather than focusing on race, critics argue, researchers should look for the genetic markers that cause a treatment to be more effective or dangerous in certain populations. Those insights can then be applied on an individual rather than group basis.

Meanwhile, predictions that using racial data in biomedical research would be a temporary expedient until DNA testing became cheaper and better have been proven wrong. Since the NIH and FDA mandates began, the presence of racial data in medical studies has skyrocketed, despite major advances in DNA technology.[12]

Only a dwindling minority of scientists believe that race as popularly understood has medical salience.[13] But even if those dissenters were correct, the specific Directive 15 classifications mandated by the FDA and NIH are too arbitrary and indeterminate to be useful.[14]

First, researchers using the Directive 15 classifications have no consistent, reliable way of identifying subjects' race or ethnicity. Researchers rely primarily on self-identification, but self-identification is notoriously unreliable and variable. One-third of people report a different ethnicity or race a year after an initial interview.[15] Americans' self-identified race on census forms often varies from decade to decade.

When research subjects choose not to self-identify, some laboratories assign them a race based on surname and residence.[16] Some researchers classify anyone with a Spanish surname as Hispanic "until proven otherwise."[17] To say the least, this does not produce consistently reliable results.

11. Kittles and Weiss, "Race, Ancestry, and Genes."
12. Kahn, *Race in a Bottle*, 38.
13. For example, Burchard, E. G. et al. 2003. "The Importance of Race and Ethnic Background in Biomedical Research and Practice," *New England Journal of Medicine* 348: 1170-1175. Risch, Neil et al. 2002. "Categorization of Humans in Biomedical Research: Genes, Race and Disease," *Genome Biology* 3, No. 7: 1-12.
14. Osborne, Norman G. and Feit, Martin. 1992. "The Use of Race in Medical Research," *Journal of the American Medical Association* 267, no. 2: 275.
15. Polednak, A.P. 1989. *Racial and Ethnic Differences in Disease* (New York: Oxford University Press, 1989).
16. Janet K. Shim, et al. 2014. "Race and Ancestry in the Age of Inclusion: Technique and Meaning in Post-Genomic Science," *Journal of Health and Social Behavior* 54, No. 4: 504-18.
17. Hun, M. and Megyesi, Mary S. 2008. "The Ambiguous Meaning of the Racial/Ethnic Categories Routinely Used in Human Genetics Research," *Social Science Medicine* 66, No. 2: 349.

CONCLUSION
Where Do We Go from Here:
The Separation of Race and State?

Government bureaucrats operating with little public scrutiny created the familiar legal classifications for American racial and ethnic groups. The categories often draw arbitrary and inconsistent distinctions among groups and sometimes verge on incoherence.

Office of Management and Budget Statistical Directive No. 15, which dates to 1977 with only minor subsequent amendments, is by far the most important government classification scheme. Directive 15 categories came with the official, explicit caveats that the classifications "should not be interpreted as being scientific or anthropological in nature" and should not be "viewed as determinants of eligibility for participation in any Federal program."[1] Those caveats were ignored, and the Directive 15 classifications became entrenched in American law and culture.

Official and racial ethnic classifications in the United States are self-fulfilling. The classifications encourage people to think of themselves as members of racial and ethnic categories that were invented or at least officially established and promoted by the government.[2]

For example, fifty years ago few Americans thought of themselves as Hispanic or Asian American; neither term was in common use, nor

1. Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260 (May 4, 1978).
2. Wright, Lawrence. "One Drop of Blood," *New Yorker*, July 25, 1994.

was there much intergroup solidarity among the national origin groups within those categories.[3] The fact that many Americans self-identify with those categories is mostly a result of the government officially adopting these classifications in Directive 15.

Government-endorsed and imposed racial and ethnic categories encourage people to organize themselves politically by those categories.[4] This can help disfavored minority groups find a political voice to express valid concerns. It also, however, can also lead to gratuitous societal divisions. Such divisions pose special risk to the long-term welfare of minorities; after all, they are *minorities* in a democracy in which majority sentiment typically prevails.

In a country in which white supremacy was a governing ideology for most of its history, one should not be blasé about the risks inherent in identity politics. The horrendous history of racial classifications in places like Nazi Germany and South Africa should give further pause.

And yet Americans do tend to be blasé. The "white" classification should be much more controversial than it is. The United States classifies over two hundred million people with wildly diverse national origins and ethnicities, as white, part of "a single government-created pseudo-race."[5] The groups encompassed within the white label differ dramatically in ethnicity, socioeconomic status, geographic concentration, religious beliefs, appearance, and so on.

Despite this internal diversity, the white classification is based on the implicit assumption that people classified as white have common interests distinct from those of their fellow Americans. People who may otherwise have primarily self-identified as Greek, Irish, mixed, Catholic, gay, Texan, "just American," and so on are frequently requested to check a box identifying themselves as white and are therefore encouraged to think of themselves as white. The result is increased racial

3. Even today, most people classified as Asian American reject that label, and most Hispanics prefer a national origin designation, such as Mexican American. Mora, G. Cristina. 2014. *Making Hispanics: How Activists, Bureaucrats & Media Constructed a New American Identity* (Chicago: University of Chicago Press), 7–8; Pew Research Center, The Rise of Asian Americans. http://www.pewsocialtrends.org/2012/06/19/the-rise-of-asian-americans; McGowan, Miranda Oshige. 1996. "Diversity of What?" *Representations* 55: 133.
4. Ibid.
5. Lind, Michael. "The Future of Whiteness," *Salon*, May 29, 2012.

consciousness among Americans classified as white. This development has, ironically, occurred at the same time Americans are intermixing more than ever.

Many progressive social theorists applaud increasing white racial consciousness. They believe that there will be a progression from increased white racial consciousness, to getting white Americans to acknowledge their "white privilege," to white Americans developing a "collective critical consciousness" that will make them allies in eradicating racism.[6] After all, what could go wrong with encouraging white racial identity? A lot, though the theorists in question are generally oblivious to the risks. Contrary to their optimistic projections, increased white racial consciousness encourages ethnonationalism, nativism, and other manifestations of intolerance, adding fuel to ideological fires that are increasingly threatening liberal democracy worldwide.[7]

There is an especially significant risk of a chauvinistic backlash in the US because the government combines assigning people an official white identity with the exclusion of those classified as white from benefits provided to those without legal whiteness. And indeed, rising white identity consciousness has already had significant, and broadly negative, political consequences in the United States.[8] Not surprisingly, though contrary to the predictions of the social theorists mentioned above, racially conscious whites are much more likely than other whites to believe themselves to the victims of minority groups' political gains. They are also much more likely to support racist political action, that is, political action meant to specifically advance white people's interests.[9]

So, what should be done about racial classifications by the government in the United States? One option would be to follow the example

6. For an example of the vast literature with this theme, see Collins, Christopher S. and Jun, Alexander. 2020. *White Evolution: The Constant Struggle for Racial Consciousness* (New York: Peter Lang).
7. Kaufmann, Eric. 2019. *Whiteshift: Populism, Immigration, and the Future of White Majorities* (New York: Henry N. Abrams).
8. Sides, John and Tesle, Michael and Vavreck, Lynn. 2018. *Identity Crisis: The 2016 Presidential Campaign and the Battle for the Meaning of America* (Princeton, NJ: Princeton University Press); Thompson, Jack. "What It Means to Be a 'True American': Ethnonationalism and Voting in the 2016 U.S. Presidential Election, *Nations and Nationalism* 27, No. 1 (January 2021): 279–297.
9. Jardina, Ashley. 2019. *White Identity Politics* (New York: Cambridge University Press).

of some countries with multiethnic populations, most famously France, that outright refuse to classify their citizens by race or ethnicity. The prevailing wisdom in such countries is that official race or ethnic classifications are divisive and undermine common national identity. Common national identity, meanwhile, is seen as a key to social solidarity and societal stability.

The argument in favor of a French-style solution is buttressed by the "almost comically arbitrary" nature of America's official racial categories when they are used in ways not intended or anticipated by those who created them.[10] Given, for example, that the categories came with the caveat that they are not based on science or anthropology, one could hardly expect them to be anything but arbitrary when used in biomedical research.

There would, however, be an important downside to totally failing to officially distinguish among racial and ethnic groups in the United States. Without such classifications, it would be much more difficult for the government to detect and try to redress discrimination.

While highly imperfect, the standard racial and ethnic categories are generally good enough for their original intended main purpose: monitoring discrimination by the government, government contractors, mortgage lenders, educational institutions, employers, and so on against minority groups that have been subject to the most severe and pervasive discrimination. Controversy over the salience of statistical disparities for showing discrimination is well beyond this book's scope. But to the extent it's useful and proper for the government to monitor and try to remedy such disparities, using the current categories is broadly defensible.

The categories would be even sounder for discrimination-monitoring if a few glaring anomalies were eliminated. For example, South Asians should not be in the same category—Asian American—as East Asians. One can easily imagine an institution with an ingrained bias

10. Schuck, Peter H. 2003. *Diversity in America: Keeping Government at a Safe Distance* (Cambridge, MA: Harvard University Press), 164; Omi, Michael. 1997. "Racial Identity and the State: The Dilemmas of Classification," *Law & Inequality* 15: 16; Wright, Lawrence. "One Drop of Blood."

against people of Asian Indian descent but not, for example, Chinese descent, or vice versa. Classifying groups that are so different in the same category will tend to obscure discriminatory patterns more than illuminate them.

Beyond discrimination-monitoring, just as the United States has managed religious diversity via the separation of church and state, it could similarly manage ethnic diversity via the separation of race and state. The late Justice Antonin Scalia argued for this rule, constitutionally enforced. Scalia declared in one judicial opinion that "in the eyes of government, we are just one race here. It is American."[11]

Scalia's proclamation has been extremely controversial because he made it while arguing that government affirmative action preferences based on race are unconstitutional. However, as we shall see, the government can pursue the most prominent goal of affirmative action, redressing the present effects of historical discrimination against African Americans, without resorting to racial classification.

Below, I discuss four major areas in which government-imposed racial classifications are used: biomedical research, sociological research, minority business enterprise preferences, and higher education preferences. In each area, the current racial classification scheme is a poor match for achieving the government's underlying goals, and indeed using the categories is often counterproductive. Between that and the inherent dangers of dividing the country by race and ethnicity, use of racial and ethnic classification should be abandoned in these contexts.

Biomedical Research

For the reasons discussed in Chapter Six, the FDA and NIH should stop requiring biomedical researchers to classify research participants by scientifically unjustifiable government-dictated racial and ethnic classifications. At best, requiring the use of these classifications in biomedical research is a wasteful distraction and has inhibited researchers from discovering and using much more productive ways of classifying research subjects. At worst, using these classifications promotes an

11. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

unsound racialism in science and medicine. This creates a high risk of encouraging junk science and expert quackery (or "quackspertise") about race and its scientific salience, with potentially disastrous consequences. Vital research is already being slowed by researchers' need to satisfy the FDA by having "enough" members of official minority groups as research subjects. This is happening even though the official racial and ethnic classifications have no valid scientific basis, and the FDA has never tried to show otherwise.

Sociological Research

Doing away with racial categories in favor of more precise classifications would also be appropriate in the context of monitoring the economic, social, and educational progress of various groups. The government's categories are too broad and internally disparate to provide sufficiently granular data to be very useful. Nevertheless, the government, most prominently the Census Bureau, uses the official classifications in its studies of the American population.

Consider the widely disparate national origin groups that make up the Asian American category. Chinese, Japanese, and Indian Americans, all relatively large groups, on average are thriving economically. Burmese, Laotian, and Bangladeshi Americans, all relatively small groups, on average are not. In the aggregate, data for Asian Americans looks positive. The needs of the less successful groups therefore tend to be ignored.

Similarly, the growing population of African and Caribbean immigrants and their descendants—10 percent of the black population of the United States was born abroad—distorts statistics for the African American category. The immigrant-derived black population has substantially higher average income and educational achievement than black descendants of American slaves. African Americans with one white parent also are socioeconomically advantaged relative to the overall African American cohort.[12] Grouping all people of African

12. Brown, Kevin. 2014. *Because of Our Success: The Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action* (Durham, NC: Carolina Academic Press).

descent together gives a misleading impression of socioeconomic conditions across the entire African American population.

The Hispanic category presents additional complexities for researchers. Not only do Hispanics come from many different countries and have varying degrees of European, African, indigenous, and even Asian ancestry, but many people with Hispanic ancestry do not identify as Hispanic. According to one study, only 21.4 percent of individuals with Mexican ancestry on only one side of their family check the Hispanic box on the census; only 5.6 percent of individuals whose most recent ancestor from a Spanish-speaking country immigrated five generations ago self-identity as Hispanic.[13]

Better educated and wealthier people of Hispanic descent are more likely to assimilate out of Hispanic identity. They are therefore less likely than other people of Hispanic descent to check the Hispanic box on the census and other forms. Statistics based on self-reported Hispanic identity therefore will understate the socioeconomic progress of the Hispanic-origin population.

The white category, as noted above, also includes people from a wide range of ethnicities, religions, and cultures. Sixty years ago, mass poverty among white Appalachians was an issue of great national concern.[14] Appalachians still struggle with low median incomes and widespread unemployment, and the opioid epidemic hit their region particularly hard. The scope of their problems is obscured, however, because government statistics place them within the much broader non-Hispanic white category.

For the same reason, we have relatively little data on the collective welfare of other "white" groups considered marginalized before official racial and ethnic classifications took root in the late 1970s. This includes, for example, Hasidic Jews, Cajuns in the Southeast, and French Canadians and Portuguese in New England. Government entities such as the federal departments of Education, Justice, and Labor do not distinguish these groups from other whites in the statistics they collect.

13. Duncan, Brian and Trejo, Stephan J. *Ethnic Identification, Intermarriage, and Unmeasured Progress by Mexican Americans*, http://www.nber.org/chapters/c0104, 235.
14. Harrington, Michael. 1962. *The Other America* (New York: MacMillan).

Minority Business Enterprise Preferences

Businesses owned by African American descendants of slaves (ADOS) were the original primary intended beneficiaries of minority business enterprise (MBE) preferences. Nevertheless, members of all minority groups became equally eligible for these preferences, even though the Directive 15 classifications came with the specific warning that they should not be used to determine eligibility for government programs.[15] Those eligible for MBE preferences include people whose ancestors did not suffer from generations of discrimination in the US. Rather, they "arrived in the United States after passage of the Civil Rights Act of 1964—Sri Lankans, Vietnamese, Colombians, to name only a few."[16]

Most MBE preferences now go to businesses owned by members of official minority groups who are not descendants of enslaved Americans. The ADOS population is dwarfed demographically by the combined population of Hispanics, Asian Americans, Native Americans, and black immigrants from Africa and the Caribbean and their descendants.[17] The non-ADOS groups not only outnumber black Americans but on average have more of the economic, educational, and social capital needed to obtain government contracts.

The gap between the primary original intention to help ADOS and the actual beneficiaries of MBE preferences is destined to grow. Immigration from Africa, Asia, and Latin America continues. Meanwhile, intergroup marriage rates among Hispanics, Asian Americans, and Native Americans are much higher than among African Americans. Under current rules and norms, anyone with partial Asian or Hispanic ancestry going back at least to one's grandparents and perhaps indefinitely can claim membership in those groups. Americans of mixed

15. Graham, Hugh Davis. 2002. *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America* (New York: Oxford University Press), 289.
16. Skrentny, John D. "Affirmative Action and New Demographic Realities," *Chronicle of Higher Education,* Feb. 26, 2001.
17. Skerry, Peter. 1989. "Borders and Quotas: Immigration and the Affirmative-Action State," *Public Interest* 96: 88–89.

ancestry are generally willing to shift their self-identified racial or ethnic status to whatever currently benefits them.[18]

Within a generation or two, a large majority of Americans will be eligible for MBE preferences. If almost everyone is eligible for affirmative action preferences, they cease being meaningful. Limiting MBE preferences to fewer people may be the only way the preferences can be saved.[19]

All this suggests that to the extent MBE preferences continue, the government should limit them primarily to the original intended beneficiaries, ADOS. Members of recognized Indian tribes who live on and perhaps very close to reservations, a much smaller demographic, should also be included.

Such a limitation would have several advantages. First, ADOS and residents of Indian reservations are the two American groups whose ancestors suffered the most by far from state and private violence, oppression, and exclusion, with continuing reverberations today.[20]

Second, the categories of African American descendants of slaves and Native American residents of reservations have objective, definable boundaries, limiting the arbitrariness of the categories. Using these categories would also limit, though admittedly not eliminate, opportunities for fraud and misrepresentation.

Finally, government-granted preferences to people based on their racial or ethnic category raise constitutional, ethical, and practical concerns. But neither descent from American slaves nor membership in an Indian tribe and residence on an Indian reservation is a racial category, as such. Black Americans born in Africa would no longer qualify for MBE preferences, nor would a Los Angeles resident who has one Native American great-grandparent.

Americans rarely police (or desire to police) their fellow citizens who self-identify as members of a racial or ethnic minority group.

18. Lee, Jennifer and Bean, Frank D. 2010. *The Diversity Paradox: Immigration and the Color Line in 21st Century America* (New York: Russell Sage Foundation), 191.
19. Ibid., 193 ("if all groups are subject to discrimination, then in effect none are, at least when it comes to finding practical policy solutions").
20. Prewitt, Kenneth. 2013. *What Is Your Race?: The Census and Our Flawed Efforts to Classify Americans* (Princeton: Princeton University Press), 102.

Limiting MBE preferences to ADOS and residents of Indian reservations would get the government out of the business of determining and sometimes rewarding individuals' racial identity. The government could be largely "color-blind" while retaining the ability to redress the lingering harms from state-sponsored racism.[21]

With a limited pool of affirmative action benefits, and an ever-increasing percentage of Americans potentially eligible for such benefits, another option would be to screen Americans for specific racial characteristics that leave people vulnerable to discrimination. The cautionary model in this context is Brazil. Brazil has set up race tribunals to determine the race of every applicant for a government job. One Brazilian state, looking for objective measures of race, issued guidelines about how to measure lip size, hair texture, and nose width to determine African descent.[22] Few Americans want official race tribunals, much less ones that work like that.

Affirmative Action in Higher Education

The only purpose for which the Supreme Court permits university-level affirmative action is to enhance the "diversity" of a school's student body for the benefit of all concerned. In inventing this doctrine in the *Bakke* case in 1978, Justice Lewis Powell had in mind a college admissions office that wanted to admit applicants who would add racial and ethnic diversity to the crop of musicians, athletes, scholars, artists, actors, and other groups colleges recruit.

Yet the way colleges go about achieving racial and ethnic diversity makes little sense if diversity per se is the objective, as opposed to using diversity as a subterfuge while pursuing other objectives. First, many elite schools try to match their percentage of minority students from various groups with their respective percentages of the applicant pool or other demographic baseline. Approximately one-half of 1 percent of the American population identifies as Native American, compared to 18 percent as Hispanic. In an entering class of, say, one thousand, the one hundred and eightieth Hispanic student surely does not make the class more ethnically diverse than would the sixth Native American.

Moreover, universities often give little or no consideration to the fact that members of official minority groups "may have no interest whatsoever in the culture popularly associated with the group."[23] An applicant who checks the Hispanic box and inherited the name Lopez via her Mexican great-grandfather, but otherwise has no cultural connection to Mexico or to Mexican Americans, does not add to a school's cultural diversity simply because she meets the official definition of Hispanic.

Meanwhile, the relevant official minority categories are themselves internally ethnically diverse, often radically so. A small college with ten Indian, ten Chinese, four Korean, three Pakistani, three Vietnamese, two Thai, two Nepalese, two Japanese, and two Filipino American students is surely more ethnically diverse than its same-sized counterpart with twenty Chinese and eighteen Indian American students. Current classification norms, however, would tell us only that both schools have thirty-eight Asian American students and are equally diverse.[24]

The white category, like the Asian American category, covers a tremendous amount of ethnic, cultural, linguistic, and religious diversity. A Yemeni Muslim student may add significant religious, ethnic, and cultural diversity to a campus. For campus affirmative action purposes, however, admissions offices classify her as just another white student. The same is true of an Egyptian Copt, a Hungarian

21. On opposition to color-blindness as an appropriate goal, see Gotanda, Neil. 1991. "A Critique of 'Our Constitution is Color-Blind,'" *Stanford Law Review* 44: 1-67; Lopez, Ian F. Haney. 2011. "Is the 'Post' in Post-Racial the 'Blind' in Colorblind?" *Cardozo Law Review* 32: 822, 831.
22. "For Affirmative Action, Brazil Sets Up Controversial Boards to Determine Race," *NPR*, Sept. 29, 2016.
23. Hollinger, David A. 2000. *Postethnic America: Beyond Multiculturalism* (New York: Basic Books, Second edition), 180.
24. It "would be ludicrous to suggest that all [students classified as 'Asian'] have similar backgrounds and similar ideas and experiences to share." Such a "crude" and "overly simplistic" racial category cannot possibly capture how "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population" would contribute to diversity on a college campus. Fisher v. University of Texas, 136 S. Ct. 2198, 2229 (2016).(Alito, J., dissenting) (quoting Brief for Asian American Legal Foundation et al. as Amici Curiae).

Roma, a Bosnian refugee, a Scandinavian Laplander, a Siberian Tatar, a Bobover Hasid, and their descendants. The only exception arises if a white applicant has Spanish-speaking ancestors and therefore qualifies as Hispanic. This seems entirely arbitrary if a student body with diverse backgrounds is the goal.

Those who qualify for the African American category also are not culturally uniform. A descendant of American slaves who grew up in a working-class, majority-black neighborhood in Milwaukee does not contribute to diversity in the same way as a child of an African diplomat who grew up in toney DC suburb, nor as a black-identified applicant with multiracial ancestry who grew up in a small town in Montana. Yet they all fall into the same diversity category.

The Native American category is also extremely internally diverse. This classification includes everyone from a resident of the impoverished Hopi reservation with an unbroken line of Hopi ancestry to an applicant who grew up with no Native American cultural knowledge or experience, has fair skin, blond hair, and blue eyes, but inherited Cherokee tribal membership via a distant Cherokee ancestor. Surely, these applicants would make very distinct contributions to a campus' ethnic diversity. Classifying them both as generic Native Americans obscures those distinctions.

Fraudulent and exaggerated claims of Native American identity have been rampant in law school admissions, which suggests they are also rampant in admission to other university programs. Researchers discovered that for a given cohort of law school graduates, there was a massive disparity between those who listed themselves as Native American lawyers on the census (228) and the number of self-identified Native Americans who graduated law school over that same time period (2,610).[25] In other words, over ten times as many people claimed to be Native American when they applied to law school than identified themselves as Native American lawyers once they graduated.

In response, the American Bar Association urged law schools to require applicants claiming American Indian status to provide proof

25. Clarke, Jessica A. 2015. "Identity and Form," *California Law Review* 103: 805.

of tribal citizenship or other evidence of Native American identity.[26] The Coalition of Bar Associations of Color passed a broader resolution demanding that law schools crack down on "academic ethnic fraud."[27]

The best way forward for schools truly interested in attracting a diverse group of students would be to cease relying on crude government-imposed racial and ethnic classifications as a proxy for genuine diversity. As in the MBE context, affirmative action preferences, if pursued, should be limited to African American descendants of slaves and members of American Indian tribes who live on reservations. The goal of such preferences would not be diversity, but the righting historical injustices that have modern reverberations, and helping to bring marginalized groups into the American mainstream.[28] There is a risk, however, that the Supreme Court would hold that the ADOS and Indian reservation resident categories are proxies for racial classifications and therefore presumptively unconstitutional.

The Judicial Role:
Is the Current Classification Regime Constitutional?

The default response by the government to questions raised about the arbitrariness of the current classification regime and its enforcement has been almost total inertia. The relevant racial and ethnic categories have barely changed over the decades.

I am not optimistic about the prospect of legislative or administrative reform, especially in the context of affirmative action preferences. Experience around the world shows that affirmative action categories almost always expand rather than contract, as more and more groups

26. House of Delegates Resolution No. 102, ABA (Aug. 7–8, 2011), perma.cc/PGY4-NXM7.
27. Hu, Elise "Minority Rules: Who Gets to Claim Status as a Person of Color?" *NPR*, May 16, 2012. https://perma.cc/YZY7-N53P.
28. Ford, Richard Thompson. 2005. *Racial Culture: A Critique* (Princeton: Princeton University Press), 97–98 (policies "should focus on eliminating status hierarchies, while generally leaving questions of cultural difference to the more fluid institutions of popular politics and the market"); Rubenfeld, Jed. "Affirmative Action," *Yale Law Journal* 107 (Nov. 1997): 472. ("In fact, the true, core objective of race-based affirmative action is nothing other than helping blacks. Friends of affirmative action, if there are any left, should acknowledge this objective, and they should embrace it–in the name of justice.").

lobby to be get affirmative action preferences and then lobby to protect those preferences.

Courts, however, may intervene by finding the current classification scheme, or at least elements of it, unconstitutional. No case has yet addressed the question of whether Americans have a right to choose their racial and ethnic identity, regardless of official government classifications and definitions. Americans increasingly have the right to choose their gender identity, raising the question of whether the government may lawfully refuse to recognize someone's racial and ethnic self-identity.

Meanwhile, arbitrary racial classification is traditionally treated very suspiciously by the Supreme Court. So far, only a few lawsuits have raised challenges to the arbitrariness of the official racial and ethnic categories and, in those cases, lower courts have mostly been deferential and upheld the categories. The categories have not, however, been immune from judicial criticism. Most recently, Judge Amul Thapar of the United States Court of Appeals for the Sixth Circuit, writing about a federal small business program, noted that "individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not.... It is indeed 'a sordid business' to divide 'us up by race.'"[29]

The Supreme Court and lower courts of the vast majority of jurisdictions have not weighed in on whether official racial categories are unconstitutionally arbitrary, in whole or in part. We lack firm judicial precedent, for example, on whether in pursuing affirmative action the government may include Filipinos, Bangladeshis, and Mongolians in the same category despite their vast differences, or whether the government may arbitrarily draw the lines for the Asian American category at the western borders of Pakistan and China.

In future cases, courts might be especially troubled that the Asian American classification is disfavored by most people who come within the category. The category also matches the pseudoracial and anthropological category used to exclude Asians from immigration and citizens earlier in United States history.

29. Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2021).

There is, admittedly, something to be said for using past discriminatory policies as a baseline for current categorization. But many of the nationality groups currently classified as Asian American had little or no interaction with American law until well after discriminatory immigration and citizenship laws had been reformed or repealed. And there is a strong argument that we should not encourage the persistence of the racist classifications of a bygone era, even for remedial purposes. The argument becomes even stronger in the context of well-documented allegations that some universities discriminate against applicants classified as Asian American because members of that group are deemed overrepresented in the student body.

Meanwhile, there is no consensus on how to define the Hispanic/Latino classification or whether there is any non-arbitrary, constitutionally proper way to do so. As one court has noted, "There is no agreed working definition of Hispanic persons since they may be of different races and may have very different cultural, religious and geographic origins."[30]

As discussed in Chapter Two, some decisionmakers have relied on the literal official definition of Hispanic to conclude that anyone with Spanish-speaking ancestry can properly assert a Hispanic identity. Other courts and agencies have concluded that for affirmative action purposes, only individuals who likely suffered discrimination due to their Hispanic background qualify. Hispanic status therefore depends on factors such as Spanish fluency, appearance, surname, and community ties. Meanwhile, two federal appellate courts have issued opposing rulings on whether the government may provide preferences to white Americans of European descent who have Spanish-speaking ancestry but not to any other demographic group the government deems white.[31]

30. Concrete Works of Colo., Inc. v. City and County of Denver, Colo., 86 F. Supp. 2d 1042, 1069 (D. Colo. 2000), *rev'd*, 321 F.3d 950 (10th Cir. 2003).
31. Builders Association of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001) (unconstitutional); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) (constitutional).

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The internal American struggle between the desire to maintain official racial classifications to redress harm from racism and wanting to eliminate them as unconstitutional and antiliberal continues. My fellow law professors, particularly those writing from a Critical Race Theory perspective, often start with the presumption that racial division inevitably will be a permanent part of the American landscape.[32] I disagree.

Many American interethnic conflicts have faded into distant memory. This includes relatively obscure intergroup friction, such as Germans versus Scandinavians in the Upper Midwest and clashes between Basque shepherds and ranchers of other ethnicities. It also includes better-known antipathies, such as anti-Chinese agitation in the American West and tensions between ascendant Irish Americans and the Anglo establishment in East Coast cities.

Bitter and sometimes violent hostility to non-Protestant religious groups that once marked American life has also faded.[33] This includes anti-Mormon violence in the 1800s and the hostility toward Catholics that led to a vigorous rebirth of the Ku Klux Klan in the 1920s. These conflicts have only faint echoes today and seem faintly ridiculous to most Americans.

Hopefully, Americans also will one day look back on today's racial divisions and accompanying tensions as a faintly ridiculous vestige of a less sophisticated, enlightened, and tolerant past. How the US government handles racial classification will be a decisive factor in whether that outcome comes to pass. Law played a significant role in establishing racial divisions in the United States, and law (or its absence) can play a significant role in either maintaining or abolishing, or at least severely mitigating, those divisions.

32. Bell, Derrick. 1992. *Faces at the Bottom of the Well: The Permanence of Racism* (New Yor Basic Books).
33. Moore, R. Laurence. 1987. *Religious Outsiders and the Making of Americans* (New Yor Oxford University Press).