THE MODERN AMERICAN LAW OF RACE

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INTRODUCTION

Most Americans believe that a person’s ethnic or racial identity is currently a matter of self-identification in the United States, but that is not entirely true. Government agencies and courts have established rules for what makes someone African American, Asian, Hispanic, Native American, or white, and for how one proves that one meets the relevant criteria. One can get a sense of the scope of these rules by considering how authorities would resolve some recent public controversies over individuals’ racial and ethnic identities.

For example, is golf star Tiger Woods, who calls himself “Cablinasian,” legally classified as Asian based on his predominant ethnic origin, African

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1. See infra Parts I–III. These rules originated in the context of data collection for civil rights enforcement and eventually migrated to affirmative action programs that provide for racial and ethnic preferences in employment and procurement. See infra Parts I–III. The Census Bureau also uses racial and ethnic categories for data collection. See infra note 34 and accompanying text. Census rules and attendant controversies are well-documented in the relevant academic literature and are beyond the scope of this Article.

2. Brent Kelley, What Is Tiger Woods’ Ethnicity? He Calls It ‘Cablinasian,’ LIVEABOUTDOTCOM, https://www.liveabout.com/tiger-woods-ethnicity-1566365 [https://perma.cc/Q9FB-LVSS]. Woods’ mother is half-Thai, one-quarter Chinese, and one-quarter European, while his father has described himself as half-Black, one-quarter American Indian, and one-quarter Chinese. Id.
American based on his appearance and the principle of hypo-descent,\(^3\) or something else? Until 2019, in Washington State, a government employee would have determined Woods’ ethnic status by looking at his picture.\(^4\) Under federal law, Woods could claim Asian American or African American status based on his partial Asian and African ancestry, but he would need to affirm that he holds himself out as a member of the group.\(^5\) Whether identifying as “Cablinasian” counts as holding oneself out as Black or Asian is not clear. To successfully claim Native American status based on his Native American great-grandparent, Woods would generally need to show membership in a federally recognized tribe.\(^6\) There is, of course, no official Cablinasian category, nor could Woods claim a Thai or Chinese identity separate from the general Asian category.

Is George Zimmerman, charged with murder—and ultimately acquitted by a jury—in the controversial shooting of Trayvon Martin, best described as Hispanic, half-Hispanic, mixed-race, white Hispanic, or something else?\(^7\) With a Peruvian mother, assuming he self-identifies as Hispanic, Zimmerman likely qualifies as Hispanic under every extant relevant federal and state law, unless, perhaps, his mother’s ancestors immigrated to Peru from a non-Spanish-speaking country.\(^8\) Some government agencies might also question Zimmerman’s Hispanic-ness based on his German-sounding last name and his (arguably) white appearance;\(^9\) some agencies would require him to present affirmative evidence that he considers himself, and is considered by others, to be Hispanic.\(^10\)

\(^3\) MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICANS 56 (1964) (describing this as the principle under which anyone known to have had a Black ancestor is classified as Black); see Roberto Rodriguez, Ethnic Fraud: A Threat to Affirmative Action, 7 BLACK ISSUES IN HIGHER EDUC. 8, 9 (1991) (“[I]n a cultural sense, one drop of Black blood equals Black in the United States.”) (quoting sociologist David Williams)). The United States is the only country to apply “the one-drop rule” to race, and Americans only apply it to African Americans. Lawrence Wright, One Drop of Blood, NEW YORKER, July 25, 1994, at 48.


\(^6\) See infra note 21 and accompanying text (discussing Elizabeth Warren’s status, or lack thereof, as a Native American).

\(^7\) Zimmerman has a father of European origin and a Peruvian mother who is reportedly of partial African origin. See Jefferson M. Fish, What Race Is George Zimmerman?, PSYCHOL. TODAY (Aug. 6, 2013), https://www.psychologytoday.com/us/blog/looking-in-the-cultural-mirror/201308/what-race-is-george-zimmerman [https://perma.cc/8DUW-45XL] (“George Zimmerman has been described as white, a white Hispanic, mixed-race, and perhaps by other racial terms.”).


\(^9\) See infra Section I.D.

\(^10\) See DCS Elec., Inc., SBA No. 399 (May 8, 1992) (denying Hispanic status in part based on the
Whether Zimmerman could successfully claim African American status based on his mother’s purported partial African ancestry is less clear. Federal law suggests that any amount of African ancestry is sufficient to qualify someone as African American, but there is recent judicial precedent to the contrary. Some states rely on the National Minority Supplier Development Council (“NMSDC”) for racial and ethnic classification, and the NMSDC requires that a person be one-quarter African American to claim that status. Federal agencies would likely accept Zimmerman’s claim of African American status based on an affidavit from him, though he would have to affirm that he holds himself out as African American. The NMSDC would demand documentation, such as a driver’s license or birth certificate, listing Zimmerman’s race as African American. California, meanwhile, would require birth certificates specifying race from either Zimmerman, his parents, or his grandparents, or three letters from certified ethnic organizations attesting to Zimmerman’s group membership. There is no official mixed-race status to claim in any jurisdiction, though the Department of Education now has a category in its statistics for children whose parents say the children belong in two or more racial categories.

Was former NAACP official Rachel Dolezal, the offspring of two parents of European origin, pretending to be Black by identifying as an African American woman? Or was it acceptable for her to adopt an African American identity, given that race is a socially constructed concept and she


11. According to Zimmerman’s lawyers, his great-grandfather was Afro-Peruvian. See Rachel Quigley, Is This the Photo that Proves George Zimmerman’s Great-Grandfather Was Black?, DAILY MAIL (May 11, 2012, 8:25 PM), https://www.dailymail.co.uk/news/article-2143303 [https://perma.cc/MF7K-KLS7].

12. The standard federal definition of African American is someone “having origins in any of the [B]lack racial groups of Africa.” See infra notes 152–54 and accompanying text.


14. MBE Certification, NAT’L MINORITY SUPPLIER DEV. COUNCIL, http://www.nmsdc.org/mbes/mbe-certification [https://perma.cc/2RE4-P4K2]. Zimmerman claimed an Afro-Peruvian great-grandfather, so he would seemingly fail the one-quarter test. However, it’s unclear what NMSDC’s policy would be if Zimmerman’s grandparent, though only half-African by ancestry, identified as Afro-Peruvian. Would that make Zimmerman one-quarter African American, or one-eighth?


16. Id.

sincerely adopted an African American identity?\textsuperscript{18} Under federal and the vast majority of state laws, Dolezal’s lack of African ancestry means that she would be classified as white.\textsuperscript{19} In Massachusetts, however, the fact that she held herself out as a Black woman and others treated her as such would allow her to classify herself as Black in some contexts.\textsuperscript{20}

Was Senator Elizabeth Warren justified in identifying herself as Native American based on family lore that she has Native American ancestry,\textsuperscript{21} or was she engaging in “ethnic fraud”?\textsuperscript{22} Under federal law, Warren’s lack of membership in a recognized tribe means that she is not Native American for most purposes.\textsuperscript{23} Warren also likely does not come within the definition of “Indian” in statutes that don’t require tribal membership.\textsuperscript{24} For statistical purposes, including for enforcement of antidiscrimination legislation, the

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\textsuperscript{19} See infra Parts II–III.
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\textsuperscript{22} E.g., C. Matthew Snipp, American Indians: Clues to the Future Other Racial Groups, in THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS 189, 201 (Joel Perlmann & Mary C. Waters eds., 2002) ("Questions about the authenticity of American Indian identity are especially problematic for persons with limited contact with a reservation community, limited knowledge about tribal culture, and few visible markers of cultural or phenotypic qualities associated with American Indians.").
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\textsuperscript{24} For exceptions to the requirement of tribal membership, see, for example, Indian Child Welfare Act, 25 U.S.C. § 1903(4) (defining an Indian child to include those who are eligible for tribal membership and have at least one Indian parent); Native American Programs Act of 1974, 45 C.F.R. § 1336.10 (1989) (defining the relevant category as “any individual who claims to be an Indian and who is regarded as such by the Indian . . . community of which he or she claims to be a member”); Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(13)(C) (applying to a member of a tribe, including those terminated and those recognized in the future; a descendent in first or second degree of a member; and anyone “determined to be an Indian under regulations promulgated by the Secretary”); Indian Arts and Crafts Act of 1990, 18 U.S.C. § 1159(c)(1) (1994) (defining “Indian” as “any individual who is a member of an Indian tribe, or for the purposes of this section is certified as an Indian artisan by an Indian tribe”); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (defining “Indian” to include first or second degree descendants of members of tribes).
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government includes individuals with Native American ancestry who “maintain[] cultural identification through . . . community recognition.” In some states, family lore plus self-identification is likely enough for the government to recognize someone as Native American.

Some of Vice President Kamala Harris’s political opponents have questioned her Black identity. Harris, the child of an Indian immigrant mother and a father of mixed-race heritage from Jamaica, has identified as Black her entire adult life (including attending a historically Black university, Howard University), is identified by others as such, and has African ancestry. Given those facts, legal authorities throughout the United States would recognize her as Black and/or African American.

The controversies discussed above were debated in the court of public opinion; no courts or regulatory bodies were asked to rule on the ethnic or racial identity of any of these individuals. Most Americans undoubtedly prefer it that way, understandably tending to blanch at the idea of having the government, at any level, dictate the boundaries of ethnic identity. Such determinations are reminiscent not only of Nazi Germany’s and South


26. CONN. GEN. STAT. ANN. § 32-9n(a), (b) (2010); MD. STATE FIN. & PROC. CODE ANN. § 14–301 (LexisNexis 2016); VA. CODE. ANN. § 2.2–1604 (West 2016); Minority Business Information, W. VA. PURCHASING DIV., http://www.state.wv.us/admin/purchase/minority.html [https://perma.cc/Z6S4-MN5D].

27. See, e.g., Christopher Cadelago, Why Kamala Harris Is Glad People Are Asking if She’s Black Enough, POLITICO (Feb. 12, 2019), https://www.politico.com/story/2019/02/12/kamala-harris-2020-black-race-1167030 [https://perma.cc/Y57E-3D9A] (attributing such questions to “Trump backers or supporters aligned with other Democrats”).


Africa’s racial obsessions, but of America’s sordid past. Not long ago, Southern states divided mixed-race individuals into categories such as “octoroons” and “quadroons” to determine whether they were “white” or “colored” by law. The U.S. government, meanwhile, engaged in pseudoscience and pseudo-anthropology to determine which people from Asia counted as “Asians” and were thus not legally eligible to immigrate to the United States or become naturalized citizens, and which people from Asia were sufficiently “white” or “Caucasian” to be classified as such.

Despite Americans’ understandable modern squeamishness at official racial categorization, racial and ethnic classifications are ubiquitous in American life. Applying for a job, a mortgage, university admission, citizenship, government contracts, and much more involves checking a box stating whether one is white, Hispanic, Asian, African American, or Native American, among other extant classifications.

Those seeking information about individuals’ ethnicity typically rely on


31. See Grutter v. Bollinger, 288 F.3d 732, 792–93 (6th Cir. 2002) (Boggs, J., dissenting) (“The Law School gives no explanation of how it defines the groups to be favored. This means that ultimately it must make, on some basis, a decision on who is, and is not, an ‘African-American, Hispanic, or Native American.’ Such judgments, of course, have a long and sordid history. The classic Southern Rule was that any African ancestry, or ‘one drop’ of African blood, made one black.” (citations omitted)), aff’d, 539 U.S. 306 (2003).

32. For a comprehensive overview of American race law at the height of such racial classifications, see GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1911).

33. E.g., Ozawa v. United States, 260 U.S. 178, 198 (1922) (concluding that Japanese people, despite being light skinned, were not Caucasian and therefore were not eligible for naturalization); United States v. Thiend, 261 U.S. 204, 210, 215 (1923) (concluding that Asian Indians, despite being anthropologically Caucasian, were legally non-white as they were not white in the “common understanding,” and therefore were not eligible for naturalization). See generally IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

34. The U.S. Census Bureau, for example, relies on self-reporting in collecting its data. About, CENSUS.GOV, http://www.census.gov/topics/population/race/about.html [https://perma.cc/B8A9-N3YN] (“The data on race were derived from answers to the question on race that was asked of individuals in the United States.”). Moreover, institutions eager to trumpet their success at achieving diversity have little incentive to police self-identification. See Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting) (quoting a former dean of admissions at Michigan Law School as remarking that “faculty members were ‘breathtakingly cynical’ in deciding who would qualify as a member of underrepresented minorities”).
self-identification and voluntary compliance with general norms regarding such identification.\footnote{See generally Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, \textit{Who Is Hispanic?}, PEW RES. CTR. (Sep. 15, 2020), https://www.pewresearch.org/fact-tank/2019/11/11/who-is-hispanic [https://perma.cc/L7B3-GGN2] ("The most common approach to answering these questions is straightforward: Who is Hispanic? Anyone who says they are. And nobody who says they aren’t.").}

As noted, however, legal rules dictate whether someone may claim “minority” status in some contexts. This should not be surprising, given that concrete benefits sometimes accompany one’s identification as a member of a racial or ethnic minority group. In the past, given Jim Crow laws, immigration and naturalization restrictions, and other forms of de jure and de facto race discrimination, it was generally considered beneficial to claim a white identity. Today, while invidious discrimination still presents impediments to minorities, claiming a non-white identity can make one eligible for affirmative action preferences.\footnote{One scholar refers to an individual who intentionally leverages her out-group identity to derive social or economic benefit as an “identity entrepreneur[].” Nancy Leong, \textit{Identity Entrepreneurs}, 104 CALIF. L. REV. 1333, 1334 (2016). “Today, some people have flipped the ‘one-drop rule’ to claim minority status to try to gain perceived advantages in scholarships, college admission and in the workplace.” Elise Hu, \textit{Minority Rules: Who Gets to Claim Status as a Person of Color?}, NPR (May 16, 2012, 12:41 PM), http://www.npr.org/sections/itsallpolitics/2012/05/16/152822762 [https://perma.cc/HX3S-WV86]. See generally Khaled A. Beydoun & Erika K. Wilson, \textit{Reverse Passing}, 64 UCLA L. REV. 282, 289 (2017) (“This Article suggests that there has been a shift in the valuation scheme within the racial hierarchy caused in part by modern affirmative action jurisprudence. The shift is a situational one in which—at certain times and in certain spaces—racial diversity is perceived as a valuable commodity.” (citing Nancy Leong, \textit{Racial Capitalism}, 126 HARV. L. REV. 2151 (2013))).} While university affirmative action policies receive far more public attention, there is a strong incentive to claim minority status to be eligible for racial and ethnic preferences that influence the award of hundreds of billions of dollars annually in government contracts.\footnote{The U.S. government alone purchases more than $500 billion worth of goods and services annually. \textit{SBA’s Federal Contracting Guide}, U.S. SMALL BUS. ADMIN., https://www.sba.gov/contracting/what-government-contracting/sbas-role-government-contracting [https://perma.cc/9M7S-TQEWW]. Despite the \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 509–11 (1989) and \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 237–39 (1995), Supreme Court decisions that seemed to severely limit the use of racial and ethnic preferences in awarding government contracts, the Small Business Administration, the Federal Department of Transportation, all state departments of transportation, and other federal, state, and local agencies continue to use racial and ethnic criteria to determine presumptive preferential categories for the awarding of government contracts. For a detailed discussion of how government at various levels evaded \textit{Croson} and \textit{Adarand}, see MARTIN J. SWEET, \textit{MERELY JUDGMENT: IGNORING, EVADING, AND TRUMPING THE SUPREME COURT} (2010). At least 23% of all government contracts are awarded to small, disadvantaged businesses, historically underutilized businesses, women-owned small businesses, and service-disabled veteran-owned small businesses. \textit{SBA’s Federal Contracting Guide}, supra.}

More public attention is paid to university admissions preferences, but contracting preferences diverge from affirmative action in university admissions in important ways. Most importantly, in university admissions, African Americans typically get a greater preference than Hispanics, and Asians get no preference. See \textit{William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM
This Article addresses two distinct but related issues. This Article first discusses the categories that federal and state governments use to define the “official” racial and ethnic minorities in the United States for data gathering, civil rights enforcement, and affirmative action purposes; the boundaries of those categories; and how those categories came to be. The second issue addressed by this Article is what evidence individuals must provide to demonstrate membership in these categories, and how modern courts and agencies have adjudicated questions of racial or ethnic identity when an individual’s claim to minority status has been contested.

Most Americans take the categories of “African American,” “Native American,” “Asian American,” and “Hispanic” for granted. Yet there is no inherent logic to using these categories, nor to their precise scope, and the

CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998). Government contracting preferences, by contrast, give members of all eligible minority groups the exact same preferences. In other words, an individual with a grandparent from Spain who successfully claims Hispanic status gets the exact same contracting preference as an African American descendant of enslaved Americans.

In theory, under extant Supreme Court precedent, government contracting preferences should be limited at most to groups that have been identified as suffering from past and present discrimination in “disparity studies,” and a few local jurisdictions do so limit their preferences, usually as a result of litigation. E.g., Contractors Ass’n of E. Pa. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) (finding no empirical basis for extending preferences to firms owned by Asian Americans, Hispanics, Native Americans, and women, but remanding for trial on the issue of whether preferences for African American-owned firms were justified by past and present discrimination). This author’s research, however, suggests that this requirement is often ignored, and the vast majority of contracting preferences are available to African Americans, Asian Americans, Hispanic Americans, and Native Americans regardless of supportive disparity studies. Moreover, as discussed below, so far courts that have addressed the issue have reviewed the scope of individual affirmative action categories under a very deferential rational basis standard. See infra notes 61–62 and accompanying text.


39. See DVORA YANOW, CONSTRUCTING “RACE” AND “ETHNICITY” IN AMERICA: CATEGORY-MAKING IN PUBLIC POLICY AND ADMINISTRATION 5 (2003) (“[T]here is nothing ‘natural’ about how Americans think, talk, or practice the race-ethnic discourse most commonly in use in the United States today.”); Pager, supra note 38, at 303 (“Examined more closely, however, the categories . . . appear far more anomalous and arbitrary.”).

Justice John Paul Stevens, dissenting in Fullilove v. Klutznick, 448 U.S. 448 (1980), which upheld Congress’s first minority “set-aside” program for federal construction contracts, wrote:

The statutory definition of the preferred class includes “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.” All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical, or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share.

Id. at 535 (Stevens, J., dissenting).
same, for that matter, is true of the category “[w]hite.” As a federal judge has pointed out, the categories are not consistent with one another: “one group [African Americans] is defined by race, another [Hispanics] by culture, another [Asians] by country of origin and another [Native Americans] by blood.”

The Hispanic category generally includes everyone from Spanish immigrants (including people whose first language is Basque or Catalan, but not Spanish) to Cuban Americans of mixed European extraction to Puerto Ricans of mixed African, European, and indigenous heritage to individuals fully descended from indigenous Mexicans. Members of the disparate groups that fall into the “Hispanic” or “Latino” category often self-identify as white, often feel more connected to the general white population than to

40. YANOW, supra note 39, at 66 (“‘White’ is also a lumpy category. It is no more fixed or stable than the others. It includes a few dozen different Eastern and Western European groups, plus Turks, Iranians, Iraqis and other Arab groups, and so on.”); Michael Lind, The Future of Whiteness, SALON (May 29, 2012, 7:33 PM), https://www.salon.com/2012/05/29/the_future_of_whiteness [https://perma.cc/FT5C-WWBS] (“In the 1970s, the federal government came up with the bizarre ‘non-Hispanic white’ label, lumping together Arab-Americans, Norwegian-Americans and Irish-Americans into a single government-created pseudo-race.”). See generally YANOW, supra note 39, at 70 (noting that many Jews and Arabs do not see themselves as white, whether “white” is defined as a race or as being of European descent).

41. Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1069 (D. Colo. 2000), rev’d, 321 F.3d 950 (10th Cir. 2003); see also VICTORIA HATTAM, IN THE SHADOW OF RACE: JEWS, LATINOS, AND IMMIGRANT POLITICS IN THE UNITED STATES 113 (2007) (noting that groups are defined by origin, geography, nationality, culture, and cultural identification); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 122 (3d ed. 2015) (“These racial categories are rife with inconsistencies and lack parallel construction. Only one category is specifically racial, only one is cultural, and only one relies on a notion of affiliation or community recognition.”).

42. See UNIF. DATA STANDARDS COMM., N. AM. ASS’N OF CENT. CANCER REGISTRIES, FINAL REPORT OF ATLANTA SYMPOSIUM 9 (1996) (calling Hispanic “an artificial rubric for a set of diverse populations that resulted from the mixture of indigenous American peoples, African slaves, and Europeans”); David E. Hayes-Bautista, On Comparing Studies of Different Raza Populations, 73 AM. J. PUB. HEALTH 274, 275 (1983) (“[T]he bald fact is that Latinos are racially quite heterogeneous upon an Indian substrate ranging from pure Indian to pure White to pure Black, to pure Asian, with nearly every conceivable combination . . . .”); Martha E. Gimenez, Latino/“Hispanic”—Who Needs a Name? The Case Against a Standardized Terminology, 19 INT’L J. HEALTH SERVICES 557, 558, 568 (1989) (“[T]he ‘Hispanic’ label fulfills primarily ideological and political functions. . . . [I]t identifies neither an ethnic group nor a minority group. It is the temporary outcome of political struggles between the major parties to win elections . . . .”); Lind, supra note 40 (“The artificial ‘Hispanic’ category is even more preposterous than the ‘non-Hispanic white’ category, including blond, blue-eyed South Americans of German descent as well as Mexican-American mestizos and Puerto Ricans of predominantly African descent.”); Jack D. Forbes, The Hispanic Spin: Party Politics and Governmental Manipulation of Ethnic Identity, 19 LATIN AM. PERSP. 59, 64 (1992) (“The concept of Hispanic . . . is especially absurd as applied to Maya, Mixtec, Zapotec, or other American peoples who often do not even speak Spanish (except perhaps as a second, foreign language), whose surnames are often not of Spanish origin, and whose racial and cultural backgrounds are First American or African or mixed.”).

43. As of the 2010 census, the percentage of Hispanics who identified themselves as white ranged from 82% among Cubans to 22% of Dominicans. Ruben Rumbaut, Pigments of Our Imagination: The
other Spanish-language national-origin groups, and sometimes diverge from members of other Hispanic demographic groups in political outlook as much or more than from the general white population. Moreover, “census data show substantial differences in levels of income and educational attainment among the national origin groups in which data about ‘Hispanics’ are usually classified.” Not all Hispanics, meanwhile, consider themselves to be part of a minority group, and “some who claim minority status for themselves would reject [that status] for . . . others” (for example, they might “reject it for well-educated professionals who immigrate from South American countries” and who are considered white in their home countries). People of Portuguese or Brazilian ancestry, who are not of Spanish culture or origin, are nevertheless sometimes defined as Hispanic by legislative or administrative fiat.

Racialization of the Hispanic-Latino Category, MIGRATION POL’Y INST. (April 27, 2011), https://www.migrationpolicy.org/article/pigments-our-imagination-racialization-hispanic-latino-category [https://perma.cc/A9B4-XR3V]. There are also many Americans with partial Hispanic ancestry who do not identify as ethnically Hispanic. See Kim Parker, Juliana Menasce Horowitz, Rich Morin & Mark Hugo Lopez, The Many Dimensions of Hispanic Racial Identity, PWS RES. CTR. (June 11, 2015), https://www.pewsocialtrends.org/2015/06/11/chapter-7-the-many-dimensions-of-hispanic-racial-identity [https://perma.cc/3FYK-AKYQ]. It should be noted, however, that many Hispanics who self-identify as white when given the choice of white, African American, or other (along with most of those who check “other”) consider themselves to be mixed-race—usually part Indian. Id. Indian heritage outside the United States, however, does not come within the census definition of “Native American.” Id.

44. Cf. Miranda Oshige McGowan, Diversity of What?, 55 REPRESENTATIONS 129, 133 (1996); Ellen K. Coughlin, Political Survey Notes Differences Among Latinos, CHRON. OF HIGHER EDUC. (Sept. 11, 1991), https://www.chronicle.com/article/political-survey-notes-differences-among-latinos [https://perma.cc/DMD8-QK77]; see Pager, supra note 38, at 312 (“The Mexican Americans of the southwest, the northeast’s Puerto Ricans, and Florida’s Cubans had rarely thought of themselves, or been thought of by others, as constituting a single group until somebody decided to lump them into a single statistical category of ‘Spanish Americans.’ ”); Gimenez, supra note 42, at 568 (“The differences among ‘Hispanics’ are greater than their imputed commonalities . . . .”).

45. Gimenez, supra note 42, at 562. As of 2010, of the ten largest Hispanic groups in the United States (outside of Puerto Rico), “Colombians are the most likely to have a college degree (32%) while Salvadorans are the least likely (7%). Ecuadorians have the highest annual median household income ($50,000) while Dominicans have the lowest ($34,000). Half of Hondurans do not have health insurance—the highest share among Hispanic origin groups. By contrast, just 15% of Puerto Ricans do not have health insurance.” Seth Motel & Eileen Patten, The 10 Largest Hispanic Origin Groups: Characteristics, Rankings, Top Counties, PWS RES. CTR. (June 27, 2012), https://www.pewresearch.org/hispanic/2012/06/27/the-10-largest-hispanic-origin-groups-characteristics-rankings-top-counties [https://perma.cc/3VB4-KBBW]; see also Seth Motel & Eileen Patten, Hispanic Origin Profiles, 2010, PWS RES. CTR. (June 27, 2012), https://www.pewresearch.org/hispanic/2012/06/27/country-of-origin-profiles [https://perma.cc/P88B-DBRJ] (“There are differences across these ten population groups in the share of each that is foreign born, holds citizenship (by birth or naturalization) and is proficient in English. They are also of varying age, tend to live in different areas within the U.S. and have varying levels of education, homeownership, income and poverty.”).

46. Gimenez, supra note 42, at 567 (quoting T. A. Sullivan, A Demographic Portrait, in HISPANICS IN THE UNITED STATES 7, 10 (P. S. J. Cafferty & W. C. McCready eds., 1988)).
The Asian American category includes people descended from wildly disparate national groups, who have dissimilar physical features, practice different religions, speak different languages, vary dramatically in culture, and sometimes have long histories of conflict with one another. Various subgroups of Asian Americans have differing levels of average socioeconomic success in the United States—Indian Americans, for example, on average have significantly higher-than-average incomes and levels of education, while on average the incomes of Hmong and Burmese Americans are well-below the American mean. Korean Americans have the highest rate of business formation for any ethnic group in the United States, while Laotians have the lowest. The Asian category meanwhile

47. See Raj S. Bhopal, MIGRATION, ETHNICITY, RACE AND HEALTH IN MULTICULTURAL SOCIETIES 18 (2d ed. 2014) (“The term Asian . . . is extremely broad and masks important variations by country of origin, religion, language, diet, and other factors . . . ”).

48. Yanow, supra note 39, at 63. See generally Houston Contractors Ass’n v. Metro. Transit Auth., 993 F. Supp. 545, 552 (S.D. Tex. 1997) (noting that the “Asian” category includes “a Catholic Hispanic from Manila and a Hindu from Bombay, both of whom are Caucasian and each of whom has entirely different social histories”).

49. See Christopher Edley, Jr., Not All Black and White: AFFIRMATIVE ACTION AND AMERICAN VALUES, at xviii (1996) (pointing out that various Asian American subgroups “defy generalization”); Pager, supra note 38, at 313 (wondering how Samoans can “be said to be ethnically ‘like’ Chinese? Or Vietnamese ‘related to’ Pakistanis? These groups come from vastly different cultures and look almost nothing alike. How then do we justify grouping them together?”).

50. See Paul Brest & Miranda Oshige, Affirmative Action for Whom?, 47 STAN. L. REV. 855, 895 (1995) (“Some groups, such as the Japanese and Koreans, harbor mutual animosities rooted in historical conflicts that pitted their countries of origin against each other.”); Wright, supra note 3, at 50 (pointing out that the groups encompassed in the Asian category have “little or nothing in common, and [that] many . . . were . . . traditional enemies”).

51. For these and other reasons, “people categorized racially as Asian often do not view themselves as such, nor do they necessarily feel a sense of identity or kinship with others categorized as Asian.” McGowan, supra note 44, at 133; see also Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy, 1850-1990, at 171 (1994) (suggesting that the diversity of Asian backgrounds and experiences calls into question the utility of the “Asian American” category); George R. La Noue & John C. Sullivan, Deconstructing Affirmative Action Categories, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 71, 83 (John David Skenet ed., 2001) (“Enormous economic and cultural differences exist, for example, between Asian Americans of Laotian, Indian, Japanese, and Pacific Islander ancestry. . . . But for the peculiarities of Asian affirmative action politics, the very idea of a single Asian American category, seeing these diverse peoples through a single lens, might be considered a Eurocentric bias.”). See generally Randall Kennedy, For Discrimination: Race, AFFIRMATIVE ACTION, AND THE LAW 142 (2013) (noting criticism of the “Asian American” category as rendering “invisible discrete and vulnerable subgroups”).


53. William M. Leiter & Samuel Leiter, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW
excludes people from the Western part of Asia, such as Muslim Americans of Yemeni origin, who may face discrimination based on skin color (often dark), religion, and Arab ethnicity. Only a minority of people in the Asian category identify with the “Asian” or “Asian-American” labels.

Under most federal rules, the Native American category includes someone of remote Indian ancestry who has inherited tribal membership, while excluding some people with much closer genetic and cultural connections to the Native American community who are not tribal members. The question of whether the category of African American should sometimes be limited to descendants of American slaves or include African and Caribbean immigrants and their descendants is increasingly debated, as is the question of whether multi-racial individuals with a non-Black-identified parent should be included in the African American category.

Classification rules generally were not made by Congress or state legislatures, where they would have been subject to public discussion and debate, but by administrative agencies. These agencies have used their authority to determine which groups are covered by classification rules, as well as how to prove membership in those groups. The modern history of racial and ethnic categorization by the government is therefore an example

AND POLICY 21 (2d ed. 2011).

54. Indeed, as late as 1942, a federal court held that a dark-skinned Yemeni Muslim petitioner was not white and thus not eligible for naturalization. In re Hassan, 48 F. Supp. 843, 846 (E.D. Mich. 1942).

55. Janelle Wong, S. Karthick Ramakrishnan, Taeku Lee & Jane Junn, Asian American Political Participation: Emerging Constituents and Their Political Identities 162 (2011) (finding that 33% of Indian respondents, 37% of Chinese respondents, and 30% of Filipino respondents identified as “Asian” or “Asian-American”).

56. See supra note 23 and accompanying text.

57. See Brest & Oshige, supra note 50, at 883 (“Under some criteria, persons who intermarry with members of other tribes lose their membership, while persons who are lineally descended from early members of a tribe but have no contact with a reservation are considered members.”).

of, among other things, administrative constitutionalism,\(^{59}\) with the bureaucracy creating important baseline rules for society with little input from elected officials and negligible public debate.

Part I of this Article addresses the origins and development of modern racial categorizations in the United States. These categories arose from categories used for federal antidiscrimination enforcement and affirmative action policies. The federal government has never provided a coherent or comprehensive explanation for why some minorities are deemed to be "official" minority groups and others are not, or for why the various categories have the precise, and often seemingly arbitrary, boundaries that they do.

As documented in Part I of this Article, the scope and contours of official minority status have arisen from a combination of groups being deemed analogous to African Americans in facing race discrimination; bureaucratic inertia; lobbying campaigns; political calculations by government officials; a failure to anticipate future immigration patterns; and happenstance. It was far from inevitable, for example, that Americans with ancestry in the Indian subcontinent or the Iberian peninsula would gain official minority status, but that Arab, Greek, Iranian, Italian, Jewish, and Polish Americans would not.

Part II discusses state variations on the scope of the standard ethnic categories, in particular in the states’ Minority Business Enterprise ("MBE") programs. Federal law requires states that accept federal transportation funds—that is, all states—to have rules for certifying firms owned by members of designated minority groups as MBEs. MBEs are eligible for presumptive status as Disadvantaged Business Enterprises ("DBEs") for federally funded contracts. States are permitted to use federal standards for this purpose, but may also create and enforce their own standards, both for participation in federally funded projects and for state purposes. Various states’ rules diverge from federal law in determining who is deemed African American, Asian, Hispanic, or Native American. For example, unlike under federal law, some states exclude persons with Portuguese and Spanish

ancestry from the Hispanic category. Other states delegate authority to the NMSDC to use its own idiosyncratic standards to certify minority status.

This Article next turns to the question of what evidence individuals must provide to demonstrate membership in these categories. Conventional wisdom is that these categories are a matter of self-definition based on informal norms. For federal purposes, this is largely true. Most federal programs require only a signed affidavit attesting that the petitioner for minority status is a member of the claimed group and holds himself or herself out as such.60

States, however, often require documentation before granting minority status. This documentation requirement can be met by providing an official document listing one’s race, providing letters of support from ethnic organizations, or relying on certification by the NMSDC. Part III of this Article discusses the evidence various states demand to support a claim that a petitioner is a member of a designated group.

Perhaps surprisingly, challenges to the under- or overinclusiveness of a governmental definition of the scope of particular racial or ethnic categories are rare. Part IV of this Article discusses the only four such cases this author found. In the first case, the Eleventh Circuit Court of Appeals held that, judged by the rational basis standard, a city’s Hispanic category was neither over- nor underinclusive for equal protection purposes.61 In the second case, the Second Circuit, also applying the rational basis test, held that it was not unconstitutionally arbitrary for New York State to exclude companies owned by people from Spain from its Hispanic MBE category, even though the federal government includes such companies.62 In the third case, the Seventh Circuit held that it was unconstitutionally overinclusive to include immigrants from Spain and Portugal and their descendants in the Hispanic category in Cook County, Illinois’ MBE Program.63 In the fourth case, the Sixth Circuit held that Ohio’s MBE law was both overinclusive in including groups that had not been victims of longstanding discrimination in Ohio, and underinclusive in not including groups that had been.64

Conventional wisdom is that there has been only one case in which an individual’s claim to minority status has been adjudicated in an affirmative action context. The case involved white firefighter brothers named Malone

63. Builders Ass’n of Greater Chi. v. County of Cook, 256 F.3d 642, 647 (7th Cir. 2001).
who claimed African American status based on dubious evidence that they had an African American great-grandmother. It turns out, however, that the Malone case is the tip of a (small) iceberg.

Part V of this Article reviews cases in which the minority status of a petitioner seeking MBE status for his or her company has been adjudicated. Most of the cases discussed in Part V involve the question of Hispanic status, the boundaries of which have proved especially vexing to administrators and courts. Part VI of this Article turns from racial categorization in the MBE context to adjudication of claims of minority status by individuals seeking to benefit from affirmative action in employment.

Part VII of this Article notes the existence of laws governing racial identity that are beyond the scope of this Article, in particular laws defining whom the federal government classifies as being an “Indian.”

This Article concludes by noting that laws dictating ethnic and racial categories were designed primarily to assist African Americans overcome the legacy of slavery, Jim Crow, and discrimination. As the United States has become more demographically diverse, however, African Americans are now a shrinking minority of those officially classified as members of racial and ethnic minority groups. Given high rates of interracial marriage among other minority groups and the reality that mixed-race and mixed-ethnicity individuals can check whichever box most benefits them in a given circumstance, the percentage of non-African American individuals eligible for minority status for affirmative action purposes will continue to grow, putting increasing strains on the current method of categorization. The Conclusion suggests several ways to handle these strains.

65. See KENNEDY, supra note 51, at 139; see also Beydoun & Wilson, supra note 36, at 345 (making the overly broad assertion that “[t]he law enables individuals to elect whatever race they so choose”); Charlie Gerstein, *What Can the Brothers Malone Teach Us About Fisher v. University of Texas*, 111 Mich. L. Rev. First Impressions 97, 98 (2012) (referring to the adjudication of the Malone case as “the only such instance to be readily found in legal databases”).


67. As of July 2019, the Census Bureau estimates that 60.1% of the U.S. population is non-Hispanic white. Of the remaining 39.9%, 13.4% are African American. Quick Facts, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/DAH3-BUCZ].

I. THE MODERN HISTORY OF FEDERAL RACIAL AND ETHNIC CATEGORIES

The history of how the categories of African American, Asian American, Hispanic, and Native American came to be the “official” minority categories in the United States is poorly documented and has received scant attention in the law review literature. This Part of this Article presents a comprehensive history of how and why the categories formed as they did.

A. PRE-1964: OFFICIAL MINORITY CATEGORIES EMERGE

President Harry Truman appointed a President’s Committee on Human Rights in 1946, which issued a report on the state of civil rights in the United States in 1947. Religious discrimination against Catholics, as well as religious or ethnic discrimination against Jews—and, to a lesser extent, Italians—had until then been a significant concern of pioneering state and local civil rights agencies, especially in New York. The President’s Committee, however, focused its examples on discrimination based on race. The report argued that “[g]roups whose color makes them more easily identified are set apart from the ‘dominant majority’ much more than are the Caucasian minorities.” While the Committee had only an advisory role, its report suggested an emerging consensus in civil rights circles that government antidiscrimination efforts should emphasize combatting racial discrimination.

President Dwight Eisenhower, like his two predecessors, signed an executive order prohibiting government contractors from discriminating based on race, national origin, or religion. Eisenhower’s order created the President’s Committee on Government Contracts (“PCGC”) to effectuate the

69. GRAHAM, supra note 38, at 133–34 (noting that extant histories of civil rights and affirmative action contain almost no discussion of why certain groups were included and others excluded from official minority status).

70. To Secure These Rights, TRUMAN LIBR., https://www.trumanlibrary.gov/library/to-secure-these-rights [https://perma.cc/49F7-NKG4].


72. See To Secure These Rights, supra note 70.

73. Id.


order. In 1958, the President’s Committee published compliance guidelines “requiring contractors to count their ‘Negro,’ ‘other minority,’ and ‘total employees.’” The number of “Negro” employees were to be counted on the primary form. The guidelines added that, if an employer has a substantial number of employees in the “other minority” category, “the contractor may be able to furnish employment statistics for such groups” as “Spanish-Americans [a euphemism for Mexican Americans], Orientals, Indians, Jews, Puerto Ricans, etc.”

Unlike in later eras of civil rights enforcement, religious discrimination was still a significant portion of the PCGC’s docket at this time. From 1953 to 1958, the PCGC received 717 complaints, of which 217 were complaints of religion-based discrimination. The PCGC also received 29 complaints based on national origin, presumably from what later became known as “white ethnics.” In addition to groups focused on the rights of African Americans and Hispanics, the PCGC worked with the American Jewish Congress, American Jewish Committee, Anti-Defamation League of B’nai B’rith, Bureau of Jewish Employment Problems, Catholic Interracial Council, Jewish Labor Committee, and the National Conference of Christians and Jews.

Previously, when non-white legal status presented only disadvantages, the most influential Mexican American group, the League of United Latin American Citizens (“LULAC”), lobbied to have Mexican Americans classified as Caucasians/Whites in government data collection, especially the census. The Mexican government, like LULAC, protested in 1930 when, for the first time, the U.S. census included a separate non-white “racial” category for “Mexicans.”

78. Id.
79. Id. The Southern California Law Review and I emphasize that the use of such terminology, wherever such terms are used in this Article, to reflect racial or ethnic categories as they were defined in prior eras rests entirely on a commitment to historical accuracy and in no way constitutes acceptance or validation of any abusive, disparaging, or offensive implications that such terms carry if used today.
81. Id. at 35.
82. HATTAM, supra note 41, at 105.
83. Id. The Census Bureau removed the “Mexican” category from the 1940 census, and from then through 1970, census takers were instructed with regard to Mexican Americans to either rely on self-identification, or to classify them as “white” unless they were obviously by appearance of another race. Id. In five Southwestern states, the Bureau created a special category for people with Spanish surnames. Id. at 105–06.
By the 1950s, however, LULAC and other, smaller Mexican American lobbying groups worked with Mexican American legislators to urge that Mexican Americans be given equal status with Black Americans on the government contracting form. The groups argued that Mexican Americans suffered a similar amount of discrimination as Black Americans, and for a similar reason—their race—as many Mexican Americans had substantial Indian heritage and brown skin. In response, the President’s Committee added a “Spanish-Americans” category to the main form, as an “ethnic” category rather than a racial one.84

President John F. Kennedy established a new, more active committee to monitor compliance with nondiscrimination norms by federal contractors: the President’s Committee on Equal Employment Opportunity.85 Japanese and Chinese civil rights advocates, assisted by the congressional delegation of the new State of Hawaii, successfully lobbied to add the category of “Oriental” to the main equal opportunity form.86 Perhaps because the Chinese and Japanese populations were small, this addition did not attract attention or controversy.87

The Committee also added an American Indian classification to the form.88 Meanwhile, African American groups objected to the inclusion of Jews, arguing that Jews had not suffered economic deprivation as a group. Jewish groups were quiescent in the face of this opposition. The result was that a Jewish classification was no longer listed in federal contractor surveys and forms monitoring contractor compliance with equal opportunity rules.89

Thus, contractors were required to report on “Negro,” “Oriental,” “Spanish-American,” and “Indian” employment.90 While we now generally call these groups, respectively, African American, Asian American, Hispanic (or Latino), and Native American, the Kennedy-era precedent established the United States’ “official” minority categories with very little

84. See id. The Supreme Court had noted in 1954 that in some parts of the United States, Mexican Americans were treated as a group distinct from whites. Hernandez v. Texas, 347 U.S. 475, 479–81 (1954).
87. As of 1960, there were only 473,000 Japanese Americans and 236,000 Chinese Americans in the United States, less than 0.5% of the country’s population. By contrast, the African American population was nearly 19,000,000. 1960 Census of Population, U.S. CENSUS BUREAU (1960), https://www.census.gov/library/publications/decennial/1960/population-volume-241927938v2pla-lech07.pdf [https://perma.cc/TNQ8-PGFK].
88. According to the 1960 census, the population of American Indians was 546,000. Id.
90. Skrentny, supra note 89, at 101–02.
public debate about, or explicit justification for, the categories included and excluded.91

B. THE 1964 CIVIL RIGHTS ACT AND ITS AFTERMATH

When the 1964 Civil Rights Act was enacted, informed observers commonly assumed that the Equal Employment Opportunity Commission (“EEOC”) would use race reporting forms akin to those discussed above to monitor compliance with the employment provisions of the Act. The focus in the legislative history was squarely on the plight of African Americans; virtually no attention was paid to which other groups, if any, would be a focus of EEOC compliance efforts.92 Although the Act banned discrimination based on religion as well as race, the EEOC focused on race discrimination. It included African Americans (“Negroes”), Hispanics (“Spanish-Americans”), and Native Americans (“American Indians”) on its reporting forms because those groups were thought to face the worst employment discrimination. It also included Asian Americans (“Orientals”) for no documented reason beyond that they had previously been included on federal forms.93

A representative of a Polish American organization requested that the EEOC add a category of “Polonians” to what became known as the EEO-1 form, but that request was rebuffed.94 As Hugh Davis Graham explains, the “EEO-1 form, by isolating four minority groups that corresponded to the racial color-coding of American popular culture—black, yellow, red, and brown—reified a cluster of assumptions about American society that agency officials, shielded from public debate by their closed process, simply took for granted.”95 In particular, EEOC officials assumed that European and Middle Eastern and North African ethnic groups would assimilate into mainstream white society, but that the designated groups would perpetually be disadvantaged by their origins, each group to more or less the same degree.

The EEOC also had to grapple with the question of how employers obligated to report workforce statistics to the agency should identify which of their employees belong to which racial/ethnic category. One possibility was to have employees self-identify. The NAACP and other civil rights groups, however, were vigorously opposed to that option and their support

91. Id. at 102.
92. Id. at 105.
93. Id. at 107.
94. Id. at 108.
95. Graham, supra note 71, at 296.
for the enforcement of the new civil rights law was crucial.\textsuperscript{96}

The EEOC instead decided to rely on visual identification by the employer of its employees. In practice, this meant that if an employee “looked black” to any degree, they would be reported as “Negro.” The same seems to have been intended for Asian Americans, even though they, unlike African Americans, had high rates of interracial marriage. Employers were implicitly expected to rely on surnames to determine whether someone qualified for the “Spanish-American” category,\textsuperscript{97} and to rely on whatever criteria they came up with to identify “Indian” employees.

With attention focused primarily on the plight of African Americans,\textsuperscript{98} no one considered whether an immigrant from Spain or a refugee of European descent from Castro’s Cuba should share a classification with a dark-skinned Mexican of primarily indigenous origin or with a Puerto Rican of mixed indigenous and African origin. Nor did anyone consider whether it made sense to lump people of Asian descent into a single category, regardless of differences in appearance, religion, culture, and indicia of group socioeconomic success. Nor did anyone consider whether African or Caribbean immigrants and their descendants should be deemed the equivalent for antidiscrimination or affirmative action purposes as descendants of American slaves.\textsuperscript{99} Nor, given the demographic dominance of African Americans of the non-white population at the time, was much consideration given to the possibility that giving other groups equivalent status to African Americans on EEO forms would water down the benefits the law would provide to African Americans. The EEOC avoided the latter issue by initially ignoring groups other than African Americans in its enforcement activities.\textsuperscript{100} It helped that few Hispanics filed discrimination complaints in the early years of the Act.\textsuperscript{101}

\textsuperscript{96} SKRENTNY, supra note 89, at 108; see also JONATHAN J. BEAN, BIG GOVERNMENT AND AFFIRMATIVE ACTION: THE SCANDALOUS HISTORY OF THE SMALL BUSINESS ADMINISTRATION 43–44 (2001) (noting the hostility of civil rights groups to asking people to self-identify by race or ethnicity).

\textsuperscript{97} This was hardly an infallible way of identifying people. See Hearings Before the United States Equal Emp’t Opportunity Comm’n on Utilization of Minority and Women Workers in Certain Major Industries 130 (1969) (statement of Anthony J. Frederick, Vice President, Universal Studios) (“I couldn’t tell you a Mexican American, if I were to look at him. We are not permitted to ask a person his nationality, his national origin, in this state, and we don’t, and you cannot tell by the surname.”).

\textsuperscript{98} Cunningham et al., supra note 77, at 864 (“These sorts of issues were invisible in 1965 because massive discrimination against African-Americans was such an obvious and urgent priority.”).

\textsuperscript{99} As a result of EEOC guidance, “a white Cuban would be grouped with a dark brown Mexican \textit{indio} as Spanish-Americans, a Japanese-American would be grouped with a Laotian, and an immigrant from Jamaica or Kenya would be grouped with an American descendant of slaves.” \textit{Id}.

\textsuperscript{100} See SKRENTNY, supra note 89, at 110.

\textsuperscript{101} \textit{Id}. at 119.
In 1967, Herbert Hammerman, the first chief of the reports unit at the EEOC, proposed removing the “Oriental” and “Indian” categories from two new government reporting forms that covered apprenticeships and unions that operated by referring their members to employers. He argued that both groups were very small; that the statistics for Asians did not show that they faced discrimination that affected their economic status; and that American Indians living on reservations were excluded from Title VII of the 1964 Civil Rights Act while many of those who lived off reservations were the product of intermarriage and were not readily identifiable by their employers. According to Hammerman, no one at the EEOC disagreed with his analysis, but the chairman declined to follow his suggestion for fear of political backlash. The result was that the “official” minority groups could rely on government-gathered statistics to provide evidence of discrimination against them for litigation or settlement purposes, while other ethnic and religious minorities could not.


In 1969, the Nixon Administration promulgated the “Philadelphia Plan,” an attempt to break the stranglehold that racially exclusionary white-dominated unions had on construction employment. The Plan required federal contractors to use “goals and timetables” to achieve progress in the employment of minority workers. Though the Plan was almost exclusively motivated by a desire to aid African American workers, the enforcement guidance Assistant Secretary of Labor Arthur Fletcher sent to agency officials encompassed “Negroes,” “American Indians,” and “Spanish Surnamed American[s].” The last of these groups was defined to include all people of Mexican, Puerto Rican, Cuban, and Spanish origin or ancestry.

103. Id.
104. Id.
105. SKRENTNY, supra note 89, at 129. As of the late 1960s, however, federal officials focused on contractor compliance with civil rights guidelines focused almost exclusively on treatment of African Americans. GRAHAM, supra note 38, at 33.
106. GRAHAM, supra note 38, at 138.
Previous efforts by the Johnson administration to encourage minority employment on federal construction projects included only “Negroes,” and the Nixon Administration never explained why the additional groups were included. Fletcher suggested that Mexican and Puerto Rican employment was a priority for the Labor Department, but that does not explain the inclusion of Asians, nor why the tiny population of Mexican Americans and Native Americans in Philadelphia were of sufficient concern to be included. One high-level Nixon administration official later recalled that non-Black minorities were included in the Philadelphia Plan because the administration thought that doing so might win political support from those groups.

Meanwhile, the Nixon Administration’s EEOC added Cuban Americans to a form that had previously required reporting on the hiring of Mexican American and Puerto Ricans. Adding Cubans was meant to reward the Republican partisan leanings of refugees from Castro’s regime. Nixon also believed that creating a pan-ethnic category for those of Spanish-speaking heritage would moderate demands emanating from radical Mexican American and Puerto Rican activists. Once Cuban Americans, who were then of primarily European heritage and overwhelmingly considered themselves to be white, were specified in government statistics as part of an official minority group, it became almost inevitable that the category would eventually include virtually anyone of Spanish-speaking heritage.

Mexican American activists, meanwhile, thought it politically prudent to cast what was once a regional, Mexican-specific “Chicano” movement as a panethnic movement that included Mexican Americans, Puerto Ricans, and Cuban Americans in the same category. This jibed with the interests of

109. Id.
110. See id. at 1788 (alluding to “the near nonexistence of Philadelphia Latinos, American Indians, and Asian Americans” at the time).
111. Id. at 1775.
112. La Noue & Sullivan, supra note 51, at 83.
114. Mora, supra note 113, at 106 (noting that Cuban Americans were especially likely to check the “white” box on census forms, even when not prompted to do so).
115. Id. at 159.
media executives who were eager to create a national media market for Spanish-speakers. Over time, government agencies that had previously limited their concern to Mexican Americans and Puerto Ricans due to the history of racial discrimination against these groups and their below-average socioeconomic indicators expanded the category to various broader categories, such as Spanish-speakers and people with Spanish surnames. Eventually, the government settled on the category of “Hispanic,” a term that had been little used, and which primarily referred to people from the Iberian Peninsula. For federal affirmative action purposes, the latter category came to include people whose families came to the United States directly from Spain and Portugal. Activists persuaded state governments to follow

116. Id.


118. On March 31, 1980, the Department of Transportation published a final rule for participation in its MBE program that defined “Hispanic” as being “a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race.” 45 Fed. Reg. 21,185 (Jan. 2, 1980). The Hispanic American Contractors Association of McLean, Virginia requested that this rule be replaced with an earlier, draft version of the rule from the Department of Transportation’s Notice of Proposed Rulemaking that defined “Hispanic” as “[a] person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race,” which would include people from Spain. Request for Comment on Petition to Amend 49 C.F.R. Part 23, 46 Fed. Reg. 969 (Jan. 5, 1981) (requesting comments in response to the petition); Definition of “Hispanic” in Department of Transportation Minority Business Enterprise Regulation, 46 Fed. Reg. 60,458 (Dec. 10, 1981) (issuing a final rule amending the definition of “Hispanic”). The U.S. Department of Transportation found that “[t]he most important rationale for such a change was that discrimination against Hispanics occurs regardless of their place of origin.” 46 Fed. Reg. 60,459 (Dec. 10, 1981). According to Robert Ashby, a Department of Transportation official at the time, 97 of the 101 comments received on the proposed change were favorable, and “[t]he opposition wasn’t particularly strong or strident,” and “so we then decided to go along with that change.” However, using the earlier definition of Hispanic would have excluded Brazilians, whom the Department of Transportation had already decided to include. So the Department of Transportation adopted the original draft rule, but added the “or Portuguese” from the final rule, which meant that the rule now encompassed people with direct origins in Portugal as well as Spain. Tom Brune, Minority Status Not So Simple—Politics, Agency Quirks Often Shape Definition, SEATTLE TIMES, Oct. 5, 1998.

In 1983, Congress enacted legislation that created uniform definitions for all federal minority business programs, and that required all departments and agencies to follow the definition used by the Small Business Administration. Id. This definition did not include Portuguese, so they were excluded from the Department of Transportation program for several years. Id. In 1986, however, the Small Business Administration determined that Portuguese were “Hispanics” under the prevailing law, so the Department of Transportation added Portuguese back in. Both in excluding and including Portuguese, the Department of Transportation ignored the notice and comment process. Id.
the federal lead in recognizing the Hispanic category, and by 1993, all fifty states had such a category on the forms used for reporting births.\footnote{119}

In 1971, President Richard Nixon issued Executive Order No. 11625, which stated that “[m]inority business enterprise’ means a business . . . that is owned or controlled by . . . Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts.”\footnote{120} This was the first presidential order to specify which groups “counted” for MBE purposes.

The Department of Labor’s Office of Federal Contract Compliance issued proposed regulations in December 1971 that would have required federal contractors to take action to remedy the “underutilization” of Catholics, Jews, and “members of certain ethnic groups, primarily of Eastern, Middle, and Southern European ancestry, such as Italians, Greeks, and Slavic groups.”\footnote{121} The proposal was met with significant resistance within the Nixon administration. Officials argued that unlike “visible” minority groups, white minority groups were not analogous to African Americans in the level of discrimination they faced. Opponents also claimed that the proposed regulations would create invasions of privacy and encourage vexatious litigation, and that it was a step in the wrong direction to single out groups that were successfully assimilating into American life.\footnote{122}

By the time the regulations were published and implemented in revised form in 1973, the language of “underutilization” of white ethnic groups had been dropped, and contractors were left to police themselves with regard to employment of members of such groups.\footnote{123} Later efforts in the 1970s by groups representing Polish Americans, Italian Americans, and other white

\footnote{119} MORA, supra note 113. Meanwhile, “Hispanic” survey respondents overwhelmingly prefer to be labeled by their country of origin rather than by pan-national labels such as Latino and Hispanic, though most have adopted Hispanic/Latino as a secondary identity. Id. at 7–8.


\footnote{122} Skrentny, supra note 108, at 1782–84.

ethnics to have the federal government specifically address discrimination against members of their groups or include them in affirmative action programs were unsuccessful.\textsuperscript{124}

In 1973, the Small Business Administration (“SBA”) issued regulations under its Section 8(a) program for disadvantaged businesses. The regulations defined presumptively socially or economically DBEs as including businesses owned and controlled by “[B]lack Americans, American Indians, Spanish-Americans, [O]riental Americans, Eskimos, and Aleuts.”\textsuperscript{125} This was the first time that the SBA had specified which racial or ethnic groups it deemed presumptively disadvantaged.\textsuperscript{126} No records of hearings or findings leading up to this decision are available. The SBA provided no explanation as to why the 8(a) program, tasked by President Johnson’s Kerner Commission to encourage African American involvement in economic activity,\textsuperscript{127} extended benefits to the other groups,\textsuperscript{128} let alone the Asian groups that had higher median family incomes than whites.\textsuperscript{129} The SBA had gathered no data on the education levels or economic status or history of discrimination of each group.\textsuperscript{130} Despite the inclusion of other minority groups in the 1973 regulations, A. Vernon Weaver, who served as Administrator of the SBA during the Carter Administration, later reported that when he arrived at the SBA Section 8(a), it “had been operating largely as an African American program.”\textsuperscript{131}

In 1973, the Federal Interagency Commission on Education’s (“FICE”)
Subcommittee on Minority Education issued a report on Higher Education for Chicanos, Puerto Ricans, and American Indians.\textsuperscript{132} Secretary of Health, Education, and Welfare Caspar Weinberger noted that the report identified a lack of useful data on racial and ethnic groups.\textsuperscript{133} He therefore asked the Commission to “(1) coordinate development of common definitions for racial and ethnic groups; (2) instruct the Federal agencies to collect racial and ethnic enrollment and other educational data on a compatible and nonduplicative basis.”\textsuperscript{134} In turn, the FICE created an Ad Hoc Committee on Racial and Ethnic Definitions.\textsuperscript{135} Although the report that spurred the existence of the Ad Hoc Committee had focused on Chicanos, Puerto Ricans, and American Indians, the Committee decided that it would make recommendations for racial and ethnic categorizations for the entire American population.\textsuperscript{136}

Despite the massive influence the Committee had on American law and culture, it has been almost entirely ignored in the scholarly legal literature.\textsuperscript{137} Because of this neglect, and because the document is difficult to find, it is worth reprinting the Committee’s recommendations and related commentary in full:

Recommended Categories
1. American Indian or Alaskan Native
   A person having origins in any of the original peoples of North America.
   Some Ad Hoc Committee members felt that the definition should refer to “original peoples of the Western Hemisphere” to provide for the inclusion in this category of South American Indians. The Committee eventually agreed, however, that the number of South American Indians in this country is small, and to include them might present data problems for agencies concerned with “Federal Indians,” or those eligible for U.S. Government benefits.
   Members agreed that the category may, at the option of the user, include a provision for responses indicating tribal affiliation of American Indians. In Alaska, the category may provide for identification of Aleuts and Eskimos as well as specific American Indian tribes.

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 1–2.
\textsuperscript{137} As of this writing, Westlaw shows only five citations to the report, of which only one is in what most scholars would consider a “major” law review.
2. Asian or Pacific Islander
A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa. This category presented a major problem to the Ad Hoc Committee in terms of where to draw the geographic line—east or west of the Indian subcontinent. The decision was east, which limits this category to peoples with origins formerly called “Oriental” and to natives of the Pacific Islands.

3. Black/“Negro”
A person having origins in any of the black racial groups of Africa. Midway through its deliberations, the Ad Hoc Committee agreed that the definition for this category should be “A person having origins in any of the black racial groups.” The majority thinking eventually changed for two reasons: (1) The other racial categories are based on the premise that each race originated in a particular area of the world; to be compatible, this category should also specify an area. (2) Adding a reference to Africa in the definition was a compromise for dropping such a reference from the heading. Although some members felt an alternative heading such as “Afro-American” should be added for this category, most thought that headings should not reflect nationality.

4. Caucasian/White
A person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent. The major problem associated with this category, as with the “Asian . . . ” category (above) was how to deal with persons from the Indian subcontinent. The question at issue was whether to include them in the minority category “Asian . . . ” because they come from Asia and some are victims of discrimination in this country, or to include them in this category because they are Caucasians, though frequently of darker skin than other Caucasians. The final decision favored the latter. While evidence of discrimination against Asian Indians exists, it appears to be concentrated in specific geographical and occupational areas. Such persons can be identified in these areas through the use of a subcategory for their ethnic subgroup.

Many members feel that this category calls for use of the term “White” either in conjunction with or instead of “Caucasian” in the heading because it will be more readily understood by survey respondents and the general public than “Caucasian” alone.

A minority position, expressed by members working in the civil rights area, is that the other four categories are for the principal minority groups in the United States, so this category should be for all persons who are not
members of those minority groups. Their view is that the heading should be “Persons not included in the other four categories.”

5. Hispanic

A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

Once members agreed that it would be inappropriate to refer to Spanish language or surname for purposes of identifying people to be counted in this category, they decided not to use the term “Spanish” in the heading at all. The term “Hispanic” was selected because it was thought to be descriptive of and generally acceptable to the groups to which it is intended to apply. Representatives of one agency, however, still prefer “Spanish” to “Hispanic.”

The minority view concerning the “Hispanic” category concerns its relationship to all the other categories. Some Ad Hoc Committee members feel that the “Caucasian . . .” and “Black . . .” category headings should contain the modifier “not of Hispanic origin” to ensure that all Hispanics are reported in the “Hispanic” (ethnic) category rather than any other (racial) category. Since this is basically a procedural, rather than definitional, matter, it is discussed in the “Suggested Applications . . .” section below.

The Committee noted that for data collection purposes, each of these categories could be divided into subcategories. Thus, after an individual responds that individual is “Asian,” the individual could then be asked whether he or she is Chinese, Japanese, etc. The Committee added that when an individual’s ethnicity could not otherwise be discerned, an “observer’s determination of an individual’s racial or ethnic heritage must be accepted.”

The Office of Management and Budget (“OMB”), the General Accounting Office, the Health, Education, and Welfare’s (“HEW”) Office for Civil Rights, and the EEOC adopted these categories for a one-year trial period. FICE then made minor revisions to its definitions based on feedback

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138. See Darryl Fears, The Roots of ‘Hispanic,’ WASH. POST (Oct. 15, 2003), https://www.washingtonpost.com/archive/politics/2003/10/15/the-roots-of-hispanic/3d914863-95bc-40f3-9950-cebc25939046 [https://perma.cc/9TD9-5NX5] (interviewing Grace Flores-Hughes, a member of the Committee, about the role she played in choosing “Hispanic” over alternatives such as “Spanish-surname,” “Latino,” and “Hispano”); Grace Flores-Hughes, Is It Latino or Hispanic? Here’s Why It Matters, VOXXI (Sept. 19, 2013), https://web.archive.org/web/20140328105636/https://voxxi.com/2013/09/19/latino-or-hispanic [https://perma.cc/CW26-GETP] (revealing that the Committee was broken up into task forces by ethnicity/race, and that she, a Mexican American, along with two other civil servants, a Puerto Rican and a Cuban, met for six months to hammer out the Hispanic category and its scope).

139. FED. INTERAGENCY COMM. ON EDUC., supra note 132, at 2–6.

140. Id. at 10.

141. Id. at 6.
and circulated a final draft. The relevant categories became effective for all racial and ethnic reporting required by the federal agencies represented on the Ad Hoc Committee.

D. THE CARTER ADMINISTRATION: THE CATEGORIES HARDEN

In 1977, the OMB issued “Race and Ethnic Standards for Federal Statistics and Administrative Reporting,” known as Statistical Policy Directive 15. The Directive created uniform standards for all federal agencies charged with collecting racial and ethnic data. The Directive cautioned that the “classifications should not be interpreted as being scientific or anthropological in nature.” Also, they should not “be viewed as determinants of eligibility for participation in any Federal program.” This meant that the classifications were not intended to dictate the scope and contours of affirmative action programs. Nevertheless, the categories the Directive delineated became “the de facto standard for state and local agencies, the private and nonprofit sectors, and the research community.” With minor revisions, these categories “remain the operative ethno-racial taxonomy in the United States today.”


According to a contemporary Indian American source:

In January 1976 . . . board members of the Association of Indians in America (AIA) and their legal counsel met with the Federal Interagency Committee's representatives in Washington

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143. Id.


145. 43 Fed. Reg. at 19,269.

146. Id.

147. JOSÉ ENRIQUE IDLER, OFFICIALLY HISPANIC: CLASSIFICATION POLICY AND IDENTITY 16 (2007).

148. OMI & WINANT, supra note 41, at 122.

149. HATTAM, supra note 41, at 3.

150. According to a contemporary Indian American source:
Americans with origins in the Indian subcontinent were moved from the “Caucasian/white” category to the “Asian or Pacific Islander” category.\textsuperscript{151} The basic racial and ethnic categories for federal statistics and program administrative reporting were defined as follows, and continue, with minor modification,\textsuperscript{152} to govern most government and government-mandated data collection today:

D.C. with the purpose of effecting a change in the Indian classification from the “White” category into the “Asian or Pacific Islander” category. Dr. Manoranjan Dutta, president of the AIA, said that his organization began its campaign for the reclassification in the wake of numerous complaints by Indians of alleged discrimination. According to Dr. Dutta, Indians were not getting equal opportunity in jobs, for example, and any discrimination which they faced was being covered up under the guise of their “White” classification - a sort of “hidden” discrimination. Only if they were classified in the “correct” category of “Asian” could they seek immediate legal redress in cases of discrimination. Furthermore, the Asian category appeared to be more appropriate due to geographical reasons - India is a part of Asia . . .

In August 1976, a review of the five categories was indeed made, and the Federal Interagency Committee agreed by consensus to move the Indian immigrants from the “White” category to the “Asian and Pacific Islander” category. . . Dr. Dutta announced later in November of 1976 the finalization of the classification change to the Indian media, but it tended to be largely ignored by the American press. Another group of Indians, who disagreed with this change, and who preferred that Indians be classified as “White” in this context, later approached Hall’s office to lobby for a return to the “status quo,” but the effort was in vain, as the group had no data to back up their cause.


The initial categorization of Asian Indians as whites may have been influenced by the census. While in the early twentieth century Asian Indians were put into one or another non-white category, they were categorized as “white” in the 1970 census. Susan Koshy, \textit{Category Crisis: South Asian Americans and Questions of Race and Ethnicity}, 7 DIASPORA 285, 294 (1998).

151. As a result, the EEOC immediately did the same for its purposes in order to keep federal statistical categories consistent. Government-Wide Standard Race/Ethnic Categories, 42 Fed. Reg. 17,900 (Apr. 4, 1977).

152. Changes adopted by the OMB in 1997 are documented in Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997). One change was that individuals were now permitted to be in more than one racial category, though they were not permitted to define themselves as “mixed-race.” The OMB also separated “Native Hawaiian or Other Pacific Islander” from the “Asian” category and rejected pleas to add “Arab” and “Cape Verdean” as races. For a history of how Native Hawaiians and Pacific Islanders came to be its own category, see Michael Omi, \textit{Counting in the Dark: Michael Omi Shows that the Census Has Become a Critical Racial Battleground, COLORLINES}, Apr. 30, 2001, at 12. The basic thrust is that Native Hawaiians wanted to be eligible for affirmative action in college admissions, unlike Asians. But the government did not want to classify them with Native Americans for fear of stirring sovereignty claims akin to Native American claims. Hence, the government compromised, and a new category was born. \textit{Id.}

In 2000, the OMB provided guidance for civil rights monitoring enforcement regarding individuals who check off more than one racial category as follows:

- Responses that combine one minority race and white are allocated to the minority race.
- Responses that include two or more minority races are allocated as follows:
  - If the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on.
  - If the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations to each of the minority groups.

American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

Black. A person having origins in any of the black racial groups of Africa.

Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. ¹⁵³

White. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

To provide flexibility, it is preferable to collect data on race and ethnicity separately. If separate race and ethnic categories are used, the minimum designations are:

**Race:**
- American Indian or Alaskan Native
- Asian or Pacific Islander
- Black
- White

**Ethnicity:**
- Hispanic origin
- Not of Hispanic origin

When race and ethnicity are collected separately, the number of White and Black persons who are Hispanic must be identifiable, and capable of being reported in that category.

If a combined format is used to collect racial and ethnic data, the minimum acceptable categories are:
- American Indian or Alaskan Native
- Asian or Pacific Islander
- Black, not of Hispanic origin
- Hispanic
- White, not of Hispanic origin.

¹⁵³ Before this directive, many government agencies used the category “Spanish-surname” rather than Hispanic. For example, the committee formed to recommend the relevant categories included Grace Flores, who was identified as being from the Office for Spanish Surnamed Americans, HEW. FED. INTERAGENCY COMM. ON EDUC., supra note 132, at iv.
The category which most closely reflects the individual’s recognition in his community should be used for purposes of reporting on persons who are of mixed racial and/or ethnic origins.\textsuperscript{154}

In contrast to future affirmative action rules for MBE preferences in federal contracting, the “American Indian” category was not limited to registered members of tribes, and the “Hispanic” category did not include those of Portuguese origin or culture. In 1997, the government decided that individuals should first be asked whether they are of Hispanic origin, and then asked for their race.\textsuperscript{155}

While all categories refer to “origin[s],” there is no symmetry in how the categories are defined. A person qualifies as “American Indian” only if he or she maintains an (undefined) “cultural identification.”\textsuperscript{156} A person qualifies as “Black” regardless of cultural identification so long as he or she has origins in a “black racial group[] of Africa.” “Black” is thus defined racially; people of Asian or European descent who were born and raised in Africa do not count, nor do the Arab and Berber populations of northern Africa. By contrast, the Directive defines “[w]hite[s]” by geographic origin, not race.

“Asian” is also defined solely by the geographic region of one’s distant ancestors. A person of European heritage whose family spent many generations living in Japan would not count as “Asian,” but a person whose ancestors immigrated to South America from Japan in the early nineteenth century would count.

“Hispanic” is defined as someone of “Spanish culture or origin, regardless of race,”\textsuperscript{157} basically creating an ethnic category based on a common linguistic heritage. Taken literally, those with any Spanish ancestry qualifies as “Hispanic,” regardless of whether they maintain a cultural identification as Hispanic, consider themself Hispanic, “look” Hispanic, have a Spanish surname, or have any other indicia of Hispanic heredity beyond Spanish ancestry. Members of other ethnic groups, including Arabs, Armenians, Greeks, and most Jews, are lumped into the “[w]hite”


\textsuperscript{155} Id.; Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997) (noting that “[w]hen self-identification is used, the two question format should be used, with the race question allowing the reporting of more than one race,” with “the Hispanic origin question . . . proceed[ing] the race question”). The OMB further changed the “Hispanic” category to “Hispanic or Latino.” Id. at 58,572.

\textsuperscript{156} Id.

\textsuperscript{157} Id.
These legal/bureaucratic categories had broad effects on Americans’ self-perception. As Lawrence Wright notes:

By attempting to provide a way for Americans to describe themselves, the categories actually began to shape those identities. The categories became political entities, with their own constituencies, lobbies, and vested interests. What was even more significant, they caused people to think of themselves in new ways—as members of “races” that were little more than statistical devices.

The first instance of Congress itself, rather than agency bureaucrats, specifying certain minority groups for affirmative action purposes came in 1977. The Public Works Employment Act set aside 10% of certain government contracts for minority-owned businesses. The Act defined members of eligible minority groups as “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”

Congress passed the Small Business Investment Act in 1978, belatedly authorizing the SBA Section 8(a) program that provided benefits for businesses owned by economically and socially disadvantaged individuals. After some wrangling over whether the law should be race-neutral, Congress ultimately specified that individuals who were “Black Americans, Hispanic Americans, Native Americans, and other minorities” were presumptively “socially and economically disadvantaged.”

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158. A National Academy of Sciences Report points out several anomalies in the categories: “There is no race category that includes persons native to Central and South America. There is no race category for blacks who come from areas in the world other than Africa, and there is uncertainty about many persons from northern parts of Africa.” SPOTLIGHT ON HETEROGENEITY: THE FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION, supra note 144, at 25. Additionally, “It [the current classification] does not cover persons of Australian or New Zealand origin. . . . It allows no place for American Indians whose cultural identity is not recognized by a tribe, but who are nonetheless descendants of the original peoples of North America. It leaves ambiguous or confused the status of many groups, including people from Brazil, Madagascar, and Cape Verde.” Id. at 37–38.

159. Wright, supra note 3, at 52–53.


161. Id. § 103(c)(2), 91 Stat. 117.


163. See S. REP. No. 95-1070, at 14 (1978) (“One of the underlying reasons for the failure of this effort is that the program has no legislative basis.”); H.R. REP. No. 95-949, at 4 (1978) (“Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations . . . . [The] program is not as successful as it could be.”).


House Committee report reflects that the SBA was to be given “sufficient discretion” in identifying other minority groups to be given preferences.\textsuperscript{166}

In contrast to the earlier SBA rule, “Spanish-speaking” and “Spanish-Americans” were replaced with “Hispanics.” Asians were omitted. Representative Parren Mitchell, the leading congressional policy maker for MBE programs, likely excluded them intentionally,\textsuperscript{167} though Mitchell later claimed it was an “oversight.”\textsuperscript{168} Following an outcry from Asian American groups\textsuperscript{169} and their allies in Congress, the SBA published an interim rule one year later, without any formal hearings or public rationale, decreeing that “other minorities” included “Asian Pacific Americans.”\textsuperscript{170} In 1980, Congress added “Asian Pacific Americans” to the official list of socially disadvantaged groups.\textsuperscript{171}

In contrast to previous administrative practice limiting the category of “Orientals” to the major pre-1924 Asian immigrant groups—Filipinos, Chinese, and Japanese—\textsuperscript{172} the new SBA rule included people with roots in Vietnam, Korea, Samoa, Guam, U.S. territories in the Pacific, the Northern Mariana Islands, Laos, Cambodia, and Taiwan.\textsuperscript{173} Over the next decades, the SBA rejected petitions for inclusion as presumptively disadvantaged minorities from Hasidic Jews (due to opposition from African American

\textsuperscript{166} La Noue & Sullivan, supra note 126, at 122–23.

\textsuperscript{167} Hugh Davis Graham, A Child's Life in the Majority: The Unintended Consequences of Reform,\textit{ in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA} 53, 61–62 (John David Skrentny ed., 2001); La Noue & Sullivan, supra note 126, at 124–25; \textit{see} Press Release, News from Congressman Parren J. Mitchell: President Carter Signs Major Legislation Affecting Minority Business Enterprise (Oct. 26, 1978) (“The legislation, at the outset, was designed to positively assist Blacks, Hispanics and other notable racial groupings . . . .” (quoting Rep. Parren J. Mitchell)). The language seems to have been written to ensure that African Americans and Hispanics would be covered, but also to leave the coverage of additional groups to further developments.

\textsuperscript{168} Representative Mitchell supported an amendment adding Asian Americans to the list, stating that the omission of Asian Americans in the original statute “was simply an oversight in the drafting of the legislation.” 125 CONG. REC. 12083 (daily ed. May 22, 1979) (statement of Rep. Mitchell).

\textsuperscript{169} Diane Wong, Exciting and Frustrating: Consultation on Asian Problems,\textit{ INT'L EXAMINER}, June 30, 1979, at 8; \textit{see also} Minutes Push for Contracts at White House Caucus, SKANNER, Jan. 23, 1980 (discussing lobbying efforts).

\textsuperscript{170} Minority Group Consideration, 44 Fed. Reg. 31,055 (May 30, 1979); Designation of Eligibility Asian Pacific Americans Under Section 8(a) and 8(d) of the Small Business Act, 44 Fed. Reg. 42,832 (July 20, 1979).


\textsuperscript{172} Graham, supra note 38, at 144.

groups and Parren Mitchell), Iranians, and Afghans.

The National Association of Americans of Indian Descent and a few Indian businesspeople petitioned the SBA to include people from India within the Asian/presumptively disadvantaged category. The SBA found that Indians owned fewer businesses than the Asian Pacific American groups that had already been included, and that their businesses performed worse than said groups. The SBA therefore added Indian Americans to its list of presumptively disadvantaged groups, even though Indian Americans had a much higher median income than Americans of European descent.

E. THE REAGAN ADMINISTRATION AND BEYOND

There have been no significant changes since the 1980s as to which racial and ethnic groups are “minorities” for statistical purposes for federal civil rights enforcement, nor which groups receive preferences for federal contracts or in federal programs. The SBA added ethnic groups to the Asian Pacific Americans and Subcontinent Asian Americans categories based on these groups’ similar cultures and physical characteristics to people who were already included. These groups included individuals with

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174. BEAN, supra note 96, at 104; GRAHAM, supra note 38, at 147–48; George R. La Noue & John C. Sullivan, Presumptions for Preferences: The Small Business Administration’s Decisions on Groups Entitled to Affirmative Action, 6 J. POL’Y HIST. 439, 445–49 (1994); Memorandum to Stu Eizenstat from Harry Schwartz and Bob Malson, Application of Hasidic Jews for Designation as a Socially Disadvantaged Group Entitled to Minority Procurement Set–Aside and Minority Subcontractor Benefits (Feb. 21, 1980) (noting the opposition of Rep. Mitchell and African American contractors to the inclusion of Hasidim) (on file with author). This defeat was not expected, given that the SBA had already deemed Hasidim eligible for the Minority Enterprise Small Business Investment Company program, and Hasidic-owned firms had received funds under a predecessor to the Section 8(a) program. See La Noue & Sullivan, supra, at 445; Roy Betts & Lewis Giles, Jr., Kestenbaum Discusses the Opportunity Development Association’s Assistance to the Hasidic Community, 4 MINORITY BUS. TODAY 13, 13–16 (1985).

175. La Noue & Sullivan, supra note 174, at 457–59.

176. GRAHAM, supra note 38, at 62. However, Hasidic Jews were among the groups qualified as socially or economically disadvantaged for the Department of Commerce’s Minority Business Development Agency assistance. 15 C.F.R. § 1400.1(c) (1984); see Myron Struck, Rights Chief Erred About Eligibility of Hasidic Jews, WASH. POST (July 6, 1984), https://www.washingtonpost.com/archive/politics/1984/07/06/rights-chief-erred-about-eligibility-of-hasidic-jews/479a7679-2127-4d03-b735-57d04fc1aaff [https://perma.cc/9SWQ-WSAZ] (reporting criticism of the Reagan administration for including Hasidic Jews in this assistance, but explaining that Hasidic Jews were already eligible and that the administration including them was a mere formality).

177. Id. at 148; La Noue & Sullivan, supra note 174, at 449–51.

178. La Noue & Sullivan, supra note 126, at 105–06.

origins in Tonga, Indonesia, Nauru, and Tuvalu.

The SBA declined, however, to add Americans with origins in the Middle East. Rejecting Iranians specifically, the SBA reasoned that “[a]nimosity toward a group of persons based on political events cannot constitute ‘ethnic or racial prejudice or cultural bias’ within the meaning of the law.” Why hostility to individual Iranian Americans based on political hostility to their country of origin cannot constitute ethnic prejudice or cultural bias was left unclear.

Documents from discovery in a few federal cases provide a broader look into either bureaucratic amnesia or the concealment of information regarding how the SBA decided which groups were included as “other minorities,” and how the SBA in practice defined each group. In the mid-1990s, plaintiffs challenging SBA minority preferences deposed a former Associate Director of the SBA’s Minority Enterprise Program and a former Associate Administrator of the SBA’s Office of Minority Enterprise Development. Neither was able to answer questions about why certain groups were included or excluded as presumptively disadvantaged, or how membership in the groups was defined. Of the few definitive answers that were given, the most revealing information included: (1) that the SBA had no procedure for reviewing whether a group that had previously been socially disadvantaged should retain that status, (2) that no inquiry was ever made as to whether an individual was a member of the group they claimed to be a part of, and (3) that the SBA had no procedures for determining what a multi-racial person needs to show to qualify as a member of a presumptively disadvantaged group.

The SBA denied that it was required to investigate the history of discrimination against a group before designating the group as presumptively disadvantaged. The SBA admitted that it was unaware of any federal study conducted to help determine which—if any—ethnic or national groups from the Asian continent should be designated as disadvantaged, and that it was unaware of any Congressional findings on whether the Hispanic category should include immigrants from Spain and Portugal and their descendants.

181. La Noue & Sullivan, supra note 126, at 126.
184. La Noue & Sullivan, supra note 126, at 119.
185. Id. at 137.
186. Id. at 145–52. This, as we shall see, was false, as the SBA did occasionally reject claims of minority status. See infra Section V.B.
188. Id.
The SBA acknowledged that it “has not independently made or sponsored,” nor was it “legally required to make or sponsor, any specific studies regarding the history of discrimination suffered by groups in America in making decisions to designate and identify, or deny such designation and identification to racial and ethnic groups as presumptively eligible for ‘social disadvantage.’”

SBA classifications became the template for a host of other preferences and set-asides for “socially disadvantaged” businesses ordered by Congress, including agriculture, communications, defense, education, public works, transportation, foreign relations, energy and water development banking, scientific research, and space exploration. In 2016, decades after the SBA 8(a) program began, the SBA published its first formal regulations delineating how a group can become eligible for presumptive disadvantaged status. It should be noted, however, that the rules do not provide a mechanism for decertifying a group whose members were previously recognized as presumptively disadvantaged.

Meanwhile, the most far-reaching federal status-based contracting program is the U.S. Department of Transportation’s (“DOT”) DBE program. Congress established the federal DBE program in the early 1980s, setting a goal that at least 10% of federal funds authorized to be spent on highway and transit programs be expended through “small business concerns [that are] owned and controlled by socially and economically disadvantaged individuals.” This goal was reiterated in legislation passed in 2012 and in 2015.

Under DOT regulations, individuals are presumed to be “socially and economically disadvantaged” if they belong to one of the following groups:

(i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;

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189. Id. at 153.
192. Id.
(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
(iii) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati [sic], Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.\(^{197}\)

While Part I of this Article has shown that racial and ethnic categorization in the United States has been driven by federal agencies, the scope of the relevant categories is not uniform; states and localities have their own definitions of what makes someone African American, Hispanic, Asian American, or Native American. Part II of this Article documents state definitions of racial and ethnic minorities that differ from federal definitions.

II. STATE RULES ON RACIAL AND ETHNIC CATEGORIZATION

The most significant state rules concerning race and ethnicity involve eligibility for MBE status (and thus presumptive DBE status) to participate in federally funded, state-administered transportation projects. The current and former statutes that created the federal transportation DBE program do “not establish a uniform national affirmative action program. Each state that receives federal funds must implement a preference program that complies with federal regulations.”\(^{198}\) The regulations permit state and local recipients of federal funds to use federal DOT standards to certify firms as eligible to participate as DBEs in accordance with the federal regulations.\(^{199}\) Some states do so. Other states, however, create and enforce their own standards as to which groups qualify for DBE status. This Part of this Article documents state racial and ethnic definitions that diverge from federal definitions.

\(^{198}\) Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal Dep’t of Transp., 713 F.3d 1187, 1190 (9th Cir. 2013).
A. States with Definitions of “Hispanic” that Diverge from the Federal Definition

Many states have definitions for Hispanic Americans or Latinos for DBE purposes that diverge from the federal definition of Hispanic. Delaware, Massachusetts, Virginia, West Virginia, California, Illinois, Rhode Island, and Tennessee exclude people of Portuguese descent or culture from their definitions of Hispanic. New Jersey, North Carolina, and Ohio include people with origins in the Americas of Spanish or Portuguese culture, but exclude people with origins in Spain and Portugal but not the Western Hemisphere. New York defines Hispanic as persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Native American or Latin American origin. Iowa uses the category “Latino” instead of “Hispanic.”

Several states include people of Portuguese origin in their MBE rules as a separate category from Hispanics. Connecticut includes a category of people with origins in the Iberian Peninsula, including Portugal, regardless of race. Massachusetts includes people having Portuguese origin, but only if that category is specified in programs funded by state transportation bond statutes. Rhode Island has a category for people of “Portuguese, Brazilian

203. R.I. Dep’t of Admin., Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises (2016), https://risos-apa-production-public.s3.amazonaws.com/DOA/8380.pdf [https://perma.cc/43LJ-2WVS]; see also Dep’t of Admin., Office of Diversity, Equity & Opportunity, State Equal Opportunity Office, Policies, Procedures and Guidelines for Affirmative Action Plans in Rhode Island State Government 19 (2016) (“Persons from Brazil, Guyana, Surinam or Trinidad, for example, would be classified according to their race and would not necessarily be included in the Hispanic classification. In addition, this classification does not include persons from Portugal who should be classified according to race.”).
209. 45 Mass. Code. Regs. § 2.02(1) (2006). In 2007, state officials acting on their own volition started generally including Portuguese-owned businesses as MBEs for affirmative action purposes. A
or other Portuguese culture or origin regardless of race.”

B. STATES WITH DEFINITIONS OF “ASIAN” THAT DIVERGE FROM THE FEDERAL DEFINITION

States that define Asian-Pacific and Subcontinental Asian Americans more broadly than the federal DOT definition (for example, by not limiting the definition to the specific countries listed in the DOT’s DBE definition) include California, Delaware (although only its definition of Asian Pacific American is more broadly defined), Florida (its definition includes people having origins in the Hawaiian Islands before 1778), Illinois, Maryland, Massachusetts, Mississippi, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, Virginia, and West Virginia.

Other states have less inclusive definitions of Asian-Pacific or Subcontinental Asian Americans than does the federal DOT. For example, Delaware’s definition of Subcontinental Asian Americans only includes people whose ancestors originated in India, Pakistan, or Bangladesh.

C. STATES WITH DEFINITIONS OF “AFRICAN AMERICAN” THAT DIVERGE FROM THE FEDERAL DEFINITION

Several states have idiosyncratic definitions for African or Black Americans. Connecticut excludes people of Hispanic origin. Delaware state court found that this was illegal and enjoined the state from including Portuguese unless and until a proper disparity study showed that Portuguese-owned businesses were victims of discrimination. Fed. Concrete, Inc. v. Exec. Office for Admin. & Fin., No. 2016-0627, 2018 Mass. Super. LEXIS 39 (Super. Ct. Feb. 27, 2018).

201. R.I. DEP’T OF ADMIN., supra note 203.
210. MWBE Certification Eligibility Requirements, supra note 206.
213. R.I. Dep’t of Admin, supra note 203.
214. Program Eligibility, supra note 204.
and Massachusetts include people having origins in any of the original peoples of the Cape Verde Islands.\(^\text{228}\)

Florida states that African Americans may be of any cultural origin but must have origins in any of the Black racial groups of the African Diaspora.\(^\text{229}\) Virginia and West Virginia include people having origins in any of the original peoples of Africa,\(^\text{230}\) as opposed to the Black racial groups of Africa as is standard in federal law.\(^\text{231}\)

**D. STATES WITH DEFINITIONS OF “NATIVE AMERICAN” THAT DIVERGE FROM THE FEDERAL DEFINITION**

Under federal DOT rules, Native American status is defined by membership in a federal- or state-recognized tribe.\(^\text{232}\) The law in several states, however, provides that showing community identification is sufficient.\(^\text{233}\) On August 26, 2019, the Director of the Federal DOT’s Office of Civil Rights sent a memorandum to all government recipients of federal transportation funds stating that, under federal rules enacted in 2014, for federal DBE purposes, states and localities must limit membership in the Native American category to registered members of a federally recognized Indian tribe or a state tribe recognized by the state in which the business is applying for status.\(^\text{234}\) The letter added that, to the extent businesses have been recognized previously as Native American-owned DBEs because of an owner who is not a registered member of a tribe, the businesses’ DBE status must be revoked unless the owner can now show membership.\(^\text{235}\)

In Florida, an applicant must show origins in Indian Tribes of North America before 1835 and present proper documentation.\(^\text{236}\) Illinois includes people having origins in any of the original peoples of North and South America.
America, including Central America. For purely state purposes, maintaining community attachment is sufficient and showing tribal membership is unnecessary. Maryland, Massachusetts, Mississippi, New Jersey, New York, North Carolina, Rhode Island, Tennessee, Virginia, and West Virginia define Native American to include people having origins in any of the original peoples of North America. Maryland excludes individuals of Eskimo or Aleut origin. Texas includes people who are American Indians, Eskimos, Aleuts, or Native Hawaiians. Massachusetts includes Eskimos or Aleuts, defined as people having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia.

E. OTHER STATE DEFINITIONS THAT DIVERGE FROM FEDERAL DEFINITIONS

Indiana, Missouri, and Montana use the SBA Section 8(a) program’s definition for “socially and economically disadvantaged individual(s)” or include other minorities recognized by the SBA but not the DOT. Alabama, Arkansas, Iowa, Kentucky, South Dakota, and Wisconsin do not define the relevant groups beyond the categories of African American, Hispanic American, Asian American, and Native American.

237. 30 ILL. COMP. STAT. § 575/2 (2020).
238. Id.
239. MD. CODE ANN., STATE FIN. & PROC. § 14-301 (LexisNexis 2016); 45 MASS. CODE REGS. § 2.02(1) (2006); MISS. CODE ANN. § 57-69-3 (2006); N.J. ADMIN. CODE § 17:46-1.2 (2009); N.C. GEN. STAT. § 143-128.4(b) (2009); VA. CODE ANN. § 2.2-1604 (2016); R.I. DEPT’Y OF ADMIN., supra note 203, at 7; MBWE Certification Eligibility Requirements, supra note 206; Program Eligibility, supra note 204; Minority Business Information, supra note 26.
240. MD. CODE ANN., STATE FIN. & PROC. § 14-301 (LexisNexis 2016).
does not define “Asian Pacific Americans and Pacific islanders.”

A few states’ definitions include a requirement that a person claiming to be a minority be regarded as such by the community of which the person claims to be a part. Maryland’s requirement applies to those claiming to be Asian or Hispanic, but not African American or Native American. Virginia and West Virginia’s requirements apply to those claiming to be African American, Asian American, Hispanic American, or Native American.

States also often diverge from the federal government in how a petitioner proves that they are eligible for minority status. Such divergence is the subject of the next Part of this Article.

III. STATE REQUIREMENTS FOR PROOF OF RACIAL OR ETHNIC STATUS

Federal law permits individuals to presumptively prove minority status for DOT and other programs by providing a signed affidavit. The DOT program allows states to presume that someone is a member of the group they claim and evidence does not need to be shown unless that presumption is rebutted. However, unlike the federal government, most states with MBE or other programs require proof of ethnicity as part of their certification applications.

Alabama, Arkansas, California, Florida, Iowa, Maryland, Minnesota, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, Texas, Virginia, and Wisconsin provide that minority status can be proven by the race or ethnicity listed on one’s passport, birth certificate, naturalization papers, green card, or tribal card. Alabama, Iowa, Maryland, New Jersey, Oregon, California, Minnesota, New Jersey, Ohio, Oregon, Rhode Island, Texas, Virginia, and Wisconsin provide that minority status can be proven by the race or ethnicity listed on one’s passport, birth certificate, naturalization papers, green card, or tribal card.

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245. CONN. GEN. STAT § 32-9n (2012).
247. VA. CODE. ANN. § 2.2-1604 (2016); Minority Business Information, supra note 26.
and Virginia allow an applicant to rely on the race listed on their driver’s license.\(^{250}\) Arkansas, Florida (SBA Section 8(a) only), and Pennsylvania allow an applicant to rely on a copy of a certification from a qualifying organization such as the NMSDC.\(^{251}\) California, Delaware, and Ohio allow applicants to rely on their parents’ birth certificates.\(^{252}\) Mississippi requires an affidavit of ethnicity,\(^{253}\) while North Carolina requires this only if one’s passport, green card, and birth certificate do not prove minority ethnicity.\(^{254}\) Ohio requires an Affidavit Verifying Certification.\(^{255}\) Florida requires a personal statement of ethnic designation.\(^{256}\)

California allows three declarations from “recognized minority or ethnic community organizations” that the applicant is a member of their


\(^{251}\) Office of Minority Business Enterprise, supra note 244; IOWA ECON. DEV., supra note 249; N.J. DEP’T OF TREASURY, supra note 249; OFFICE OF MINORITY, WOMEN & EMERGING SMALL BUS., supra note 249, at 4; MD. DEP’T OF TRANSP., supra note 249; VA. DEP’T OF SMALL BUS. & SUPPLIER DIVERSITY, supra note 249, at 1. The Virginia rule appears to be outdated as my Virginia driver’s license does not list race. Similarly, while some states allow applicants for MBE status to rely on birth certificates, contemporary birth certificates do not list race.


\(^{253}\) Apply for Certification, supra note 17; DEL. OFFICE OF SUPPLIER DIVERSITY, supra note 200, at 13; Business Certification: Minority Business Enterprise (MBE) Program, supra note 249.


\(^{256}\) Business Certification: Minority Business Enterprise (MBE) Program, supra note 249.
community as an alternative to birth certificates specifying race.\footnote{257}{See Apply for Certification, supra note 17; Set-Asides Are Unconstitutional, MANHATTAN INST. (Dec. 2, 2020), https://www.scribd.com/article/486785835/Set-Asides-Are-Unconstitutional [https://perma.cc/FNE3-JMC4].} California allows Native American applicants to submit letters from Tribal Chairmen and the Bureau of Indian Affairs attesting to their status as Native Americans.\footnote{258}{PUB. UTILS. COMM’N OF THE STATE OF CAL., supra note 17; Apply for Certification, supra note 17.}

The Delaware Office of Supplier Diversity (“OSD”) instructs applicants not to provide any documentation of ethnicity unless specifically requested. The OSD also gives the following instruction for birth certificates:

If applicant’s birth certificate does not identify ethnicity then also provide birth and/or death certificates of applicant’s parent(s) as named on applicant’s birth certificate. If parent(s)’s documentation does not identify ethnicity, continue in parental lineage with birth or death certificates. If the document identifies “colored” or any other mark that is not specifically naming an ethnicity, the applicant will inform OSD which ethnicities apply.\footnote{259}{DEL. OFFICE OF SUPPLIER DIVERSITY, supra note 200, at 13.}

Kentucky’s program requires “proof of racial/ethnic minority . . . status” but little definition is provided as to what that entails.\footnote{260}{KY. FIN. & ADMIN. CABINET, OFFICE OF EEO & CONTRACT COMPLIANCE, supra note 244, at 6 (accepting as proof of racial/ethnic minority status, “birth certificate, passport, tribal record/card, or driver’s license”).} South Dakota allows contractors to rely on written representations by subcontractors regarding their status as MBEs in lieu of independent investigation.\footnote{261}{S.D. BUREAU OF ADMIN., supra note 244, at 15.}

Until 2019, Washington’s MBE program uniquely had different requirements for applicants who were “visibly identifiable as a minority” and those who were not.\footnote{262}{WASH. ADMIN. CODE § 326-20-030 (2003) (repealed 2019).} Applicants who were visibly identifiable only needed to submit a photograph of themselves or a copy of an official document with their photograph.\footnote{263}{Id.} Applicants who were not visibly identifiable were required to “submit a copy of . . . [their] birth certificate, tribal enrollment papers, or other document[s] which shows that the owner meets the definition of ‘minority.’”\footnote{264}{Id.}

Among states that require multiple types of documentation, Alabama
requires an ID card, tribal card, or naturalization papers that identify an applicant’s identity, plus a picture ID, such as a driver’s license. Indiana requires a birth certificate, driver’s license, and a membership letter or certificate of an ethnic organization, tribal certificate, Bureau of Indian Affairs card, passport, armed services discharge papers, or any other document that provides evidence of ethnicity. Ohio requires a passport and a birth certificate (on which race must be identified) or certificate of naturalization and an affidavit verifying certification eligibility; parents’ birth certificates (on which race must be identified); or tribal membership certificate or card. Virginia requires a driver’s license and passport, permanent resident card, certificate of naturalization, or birth certificate.

Arkansas and Pennsylvania allow for applicants for minority certification to rely on copies of certifying documents from the NMSDC. The NMSDC is a private corporate membership organization that matches more than 12,000 certified MBEs to a network of corporate members seeking to purchase products and services. Certification is conducted through the NMSDC Network and its twenty-three Regional Affiliates.

The NMSDC considers minority group members to be individuals with at least one-quarter Asian, Black, Hispanic, or Native American ancestry. The NMSDC requires petitioners for minority status to be U.S. citizens; the DOT, by contrast, allows lawfully admitted permanent residents to claim DBE status. The NMSDC’s definitions for each minority group are also generally narrower than DBE definitions. Asian-Indian excludes those with origins from Bhutan, the Maldives Islands, Nepal, and Sri Lanka.

265. Office of Minority Business Enterprise, supra note 244.
269. Minority and Women-Owned Business Enterprise, supra note 244; Small Diverse Businesses, supra note 251.
272. MBE Certification, supra note 14. How this works in practice is not specified. For example, if an applicant had a grandfather who was half-Mexican and half-Irish, but was known as Mexican American in his community, would that make the applicant one-quarter Hispanic or one-eighth Hispanic?
273. Id.
Asian-Pacific excludes those with origins from Burma, Brunei, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, and Hong Kong.\textsuperscript{277} Unlike federal law, NMSDC excludes people of direct Spanish or Portuguese heritage from its definition of Hispanic, and Brazilians, defined as “Afro-Brazilian, [or] indigenous/Indian only,” are listed as Hispanic “for review and certification purposes.”\textsuperscript{278} Unlike the federal DOT’s MBE, the NMSDC also limits its definition of Hispanic to those of “true-born Hispanic heritage” without further defining what that means.\textsuperscript{279} The NMSDC’s definition of Hispanic is broader than the federal one, in that it includes the entire Caribbean Basin, whereas the federal DBE definition is limited to Puerto Ricans, Cubans, and Dominicans.\textsuperscript{280}

Under NMSDC rules, minority group membership is established by “a combination of screenings, interviews and site visits.”\textsuperscript{281} The NMSDC requires applicants to provide copies of driver’s licenses and either birth certificates or U.S. passports.\textsuperscript{282} Unlike the DBE policy, the NMSDC has no presumption of social and economic disadvantage that an applicant can obtain by simply signing an affidavit.\textsuperscript{283} Applicants are permitted to submit letters of appeal if their applications are denied.\textsuperscript{284}

IV. CONSTITUTIONAL CHALLENGES TO THE SCOPE OF MINORITY CLASSIFICATIONS

There have been very few constitutional challenges to the scope of the minority MBE categories dictated by federal and state law.

In \textit{Peightal v. Metropolitan Dade County},\textsuperscript{285} the plaintiff claimed that a program in Dade County, Florida offering preferences in employment was both over- and underinclusive in its preferential treatment of Hispanics. Peightal argued that the program was overinclusive because it favored “white European Spaniards with no significant cultural or linguistic discernability from non-Hispanic white persons.”\textsuperscript{286} He also argued that the program was underinclusive because it failed to give preferences to other national and

\textsuperscript{277} Id.

\textsuperscript{278} Id.

\textsuperscript{279} Id.

\textsuperscript{280} 49 C.F.R. § 26.5(2) (2010); \textit{What Is a MBE?}, supra note 275.

\textsuperscript{281} \textit{MBE Certification}, supra note 14.

\textsuperscript{282} Id.

\textsuperscript{283} Id.; 49 C.F.R. § 26.61(c) (1999).

\textsuperscript{284} \textit{MBE Certification}, supra note 14.

\textsuperscript{285} Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991).

\textsuperscript{286} Id. at 1408.
ethnic groups that are susceptible to the same discrimination as Hispanics. The plaintiff added that the program arbitrarily gave preferences to individuals of Spanish heritage, no matter how remote their ties to Spanish language and culture, but not to individuals of Portuguese heritage, regardless of the closeness of their ties to Portuguese language and culture.

He contended that once the program included Spaniards, it was arbitrary to exclude other Caucasian groups that were also susceptible to ethnic and cultural discrimination, including Greeks, Italians, Portuguese, Jews, Israelis, and Iranians.

The Eleventh Circuit rejected the plaintiff’s arguments. First, the court stated that “[w]hile it may seem anomalous to grant employment preferences to a light-skinned descendant of Spanish grandparents who speaks no Spanish and has no individual cultural ties to an American Spanish community or to Spain, (while denying such preferences to the Portuguese-speaking offspring of Portuguese parents),” the Dade County program required a “strong visible indication that the person culturally and linguistically identifies with the group he or she claims.” Beyond that, the court rejected the contention that strict scrutiny applies to the scope of affirmative action categories, and applied rational basis review instead.

The court concluded that the Dade program was constitutionally permissible because when implementing “an affirmative action plan an employer may rationally limit its application to those minority groups in the local work force that are most in need of remedial efforts.”

Jana-Rock Construction, Inc. v. New York State Department of Economic Development raised the issue of whether a state may use different definitions of minority groups for affirmative action purposes than those used by the federal government. In 1989, the New York State DOT erroneously certified Jana-Rock Construction, 75% of which was owned by Rocco Luiere, Jr., as a Hispanic-owned company eligible for state MBE status and recertified him thereafter.

In 2003, however, state officials notified Jana-Rock that it was revoking its MBE status because Luiere was not within the state’s statutory definition.

287. Id. at 1409.
288. Id.
289. Id.
290. Id. at 1409–10.
291. Id. at 1409
292. Id. at 1409–10.
293. Id. at 1409.
294. Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev., 438 F.3d 195 (2d Cir. 2006).
295. Id. at 199, 202.
Unlike federal law, New York law defined Hispanic as “Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race.” This excluded people of direct Spanish origin, like Luiere, whose mother was Spanish.

A state administrative law judge (“ALJ”) recommended that Jana-Rock’s state certification be renewed and that the state waive its definition of Hispanic given that Jana-Rock lawfully held certification in the federal DBE program. State officials rejected the ALJ’s recommendation, noting that the Supreme Court’s decision in Richmond v. J.A. Croson Co. required New York to narrowly tailor its MBE program to those groups that had faced discrimination in New York’s construction market and that they had no reason to believe that Spanish Americans had suffered such discrimination.

Jana-Rock sued in federal court, alleging that people of Spanish descent were a suspect class. New York, the company argued, could only exclude them from its MBE program if the state had a compelling interest backed by data showing that other Hispanics, but not Spanish Americans, were subject to the sorts of discrimination that motivated the MBE program. The district court, however, found that Spanish Americans were not a suspect class, and that New York only had to show a rational basis for the distinction it drew between people directly descended from Spain and Hispanics from the Americas.

The court found that European Hispanics generally do not have many of the “visibly discernible ‘Hispanic’ characteristics’ such as skin color, language or a Spanish sur-name,” nor any “strong visible indications of cultural and linguistic identification with the group,” which would lead to stereotyping. It was therefore rational for the state to believe that Europeans of Spanish descent were not subject to the sort of discrimination that could justify a preference.

296. Id. at 202–03.
297. Id. at 202.
298. Id. at 203.
299. Id. at 203, 207, 214.
303. Id. at *51.
304. Id. at *51–52.
The court added that its conclusion was strengthened by the fact that Luiere’s claim to Hispanic status was “based upon a rather attenuated third-generation relationship—his maternal grandparents were born in Spain.” He presented no evidence that he was dark-skinned, spoke Spanish, or had a Spanish surname. In the absence of “visibly discernible ‘Hispanic characteristics,’ ” it was “obvious[ly]” rational for New York to deny him Hispanic status.

On appeal, the Second Circuit affirmed, agreeing with the lower court that the proper standard of review was rational basis, not strict scrutiny. Given that standard, the court found that it was not irrational for New York State to focus its remedial efforts on Latinos who, as a class, are more likely to have characteristics that identify them as “Hispanic” and subject them to discrimination, rather than include all people who could claim Spanish origins.

In *Builders Ass’n of Greater Chicago v. County of Cook*, the Seventh Circuit held that Cook County, Illinois’ MBE program was unconstitutional for a variety of reasons, including that it was overinclusive by including Portuguese and Spanish immigrants and their descendants within the scope of its Hispanic category. According to the court, “the concern with discrimination on the basis of Hispanic ethnicity is limited to discrimination against people of South or Central American origin, who often are racially distinct from persons of direct European origin because their ancestors include [B]lacks or Indians or both.” By contrast, concern with race discrimination does not extend to people of purely European origin, and “there is nothing to differentiate immigrants from Spain or Portugal from immigrants from Italy, Greece, or other southern European countries so far as a history of discrimination in the United States is concerned.” In short, the court concluded that Americans of Spanish and Portuguese descent should be treated the same as non-Hispanic whites for affirmative action purposes. The court did not address the fact that federal affirmative action

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305. *Id.* at *52.
306. *Id.*
307. *Id.*
308. *Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 205–06 (2d Cir. 2006).
309. *Id.* at 213.
310. *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001).
312. *Builders Ass’n of Greater Chi.*, 256 F.3d at 647. *But cf.* *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1185–86 (10th Cir. 2000) (endorsing the constitutionality of the use of broad racial/ethnic categories for affirmative action purposes, even if they are less than precise).
programs explicitly include Spanish and Portuguese Americans.\textsuperscript{313}

In \textit{Associated General Contractors of Ohio, Inc. v. Drabik},\textsuperscript{314} the Sixth Circuit affirmed the district court’s invalidation of Ohio’s minority-contracting preference program as overinclusive. The court ruled that the law “suffers from defects both of over and underinclusiveness.”\textsuperscript{315} By “lumping” together “Blacks, Native Americans, Hispanics, and Orientals (and leaving unclear the exact extent of the last two designations), the [Minority Business Enterprise Act] may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven.”\textsuperscript{316} The law would be satisfied if, for example, contractors of “Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none.”\textsuperscript{317}

V. ADJUDICATIONS OF MINORITY STATUS FOR DBE PURPOSES

With regard to DBE (or “HUB,” meaning historically underutilized business) designation, the relevant definitions raise the question of what it means to “have origins” in a group or from a country.\textsuperscript{318} Except for the Native American category, which under federal DBE law is limited to enrolled members of government-recognized tribes,\textsuperscript{319} all that an applicant has to do to be recognized as a member of a socially and economically disadvantaged group by relevant federal agencies is submit a signed, notarized statement certifying that they are a member of one of these groups.\textsuperscript{320} Relevant information can be requested from an individual claiming membership in one of these groups if there is a “reasonable basis” to believe they are not actually a member.\textsuperscript{321} Under DOT rules, if a petitioner’s race or ethnicity is questioned, the examiner “must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community” and “may require the applicant to produce appropriate documentation of group membership.”\textsuperscript{322}

\begin{footnotesize}
313. Builders Ass’n of Greater Chi., 256 F.3d at 647.
315. Id. at 737.
316. Id.
317. Id.
\end{footnotesize}
 membership.”

In practice, being certified as a “minority” to get presumptive status as the owner of a disadvantaged business eligible for preferences primarily operates on the honor code, as the information is rarely verified. The vast majority of challenges that arise relating to petitions for MBE certifications concern the “control” aspect of certification: whether the minority group member applying for certification is truly the majority owner of the business.

Nevertheless, applicants for minority status are occasionally denied such status, and that denial is sometimes appealed. Locating these cases is challenging; appeals to the DOT are archived in a database maintained by the DOT, but the decisions often provide limited one-line rationales, such as “failure to cooperate with recipient requests for information.” Even when an appeals decision is published, the underlying facts are often obscure. This database leaves anyone trying to determine the meaning of the DBE program’s vaguely worded definitions and evidentiary requirements without any answers, at least from the DOT.

Locating information about denials of petitions for DBE status for federal purposes by state agencies deputized to make such determinations is even more challenging. This author was nevertheless able to find one relevant case, discussed below, in which a petitioner applied to Washington State for federal DBE status based on the owner’s purported African ancestry and mixed-race identity and was denied; the denial was upheld by a federal ALJ, a federal district court, and the Ninth Circuit.

SBA cases are somewhat more transparent than DOT cases. This Part discusses three cases in which an SBA examiner’s denial of Hispanic status was challenged in administrative appeals. The ALJs reached contradictory conclusions on whether Hispanic status is solely a matter of ancestry, or whether it may also depend on appearance, affiliation with the Hispanic community, Spanish-language skills, and other factors.

Next, this Part discusses two state cases involving challenges to denials

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322. 49 C.F.R. § 26.63(b) (2019).
323. La Noue & Sullivan, supra note 126, at 145–52.
325. Search Decertified DBEs, Denials and DBE Appeal Decisions, supra note 326.
of MBE status. In the first case, a New York court upheld a ruling that a man of Argentine descent was not “Hispanic” because he had no ancestry in Spain. In the second, the Ohio Supreme Court upheld a ruling that a man of Lebanese descent was not “Oriental” within the meaning of a state statute.

Finally, this Part discusses three cases in which the Hispanic status of radio station owners—a status necessary for statutory benefits geared to encourage minority ownership and control of licensed media—was disputed. In the first case, the Federal Communications Commission (“FCC”) declined to rely on a literal interpretation of “Spanish-surnamed” and held that two non-Hispanic-surnamed licensees were Hispanic for purposes of minority preferences. In the second case, the FCC gave partial credit to a business that was owned by an individual of partly Hispanic descent. In the third, the FCC determined that a company owned by an individual who was one-eighth Mexican, but otherwise unable to provide evidence of Hispanic identity, did not qualify as a minority-owned business.

A. DOES A DNA TEST SHOWING BLACK AFRICAN AND NATIVE AMERICAN ORIGIN QUALIFY A BUSINESS OWNER AS A MINORITY?

The advent of cheap and widely available DNA testing allows people to discover information about their genetic origins that may lead them to adopt a new ethnic or racial identity, whether sincerely or to benefit from affirmative action programs. Most programs define African Americans as anyone with origins in the Black racial groups of Africa. Read literally, this implies that anyone with any discernable African origin can claim minority status. In the only case in which someone based this African American identity on a DNA test, however, authorities, after accepting the applicant’s initial claim to minority status, rejected his subsequent claim.

Ralph Taylor, a Washington State resident, owned Orion Insurance Company. Taylor is of Caucasian appearance and considered himself to be white for most of his life. Apparently inspired by competitors that received certification as MBEs based on distant minority ancestry, Taylor took a DNA test that concluded that he had 6% Indigenous American origin and 4% Sub-Saharan African origin. The test had a 3.3% margin of error,
rendering the significance of the result unclear.\textsuperscript{330} Based on those results, Orion applied for MBE status for state contracting purposes with the Washington State Office of Minority & Women’s Business Enterprises ("OMWBE") based on Taylor’s African ancestry.\textsuperscript{331}

As discussed previously, when determining MBE status, Washington law, since amended, decreed that a state official first look at the picture submitted with an application.\textsuperscript{332} An OMWBE official determined that Taylor did not look African American and requested further information from him documenting his minority status. Taylor submitted his DNA results and some additional information, and Orion was certified as an MBE.\textsuperscript{333}

Having been so certified, Orion applied with the state for DBE status for federally funded contracts based on Orion’s certification for DBE status for state contracts.\textsuperscript{334} A state official responded that the finding of state MBE status was not binding for federal DBE purposes and requested further information documenting Taylor’s minority status.\textsuperscript{335} Orion responded with Taylor’s DNA test results, along with the other evidence.\textsuperscript{336} OMWBE ruled that Orion failed to show that Taylor was a member of a minority group, or that others considered him to be a member of such a group.\textsuperscript{337}

As federal DOT rules permit, Orion appealed the decision.\textsuperscript{338} The DOT, in turn, upheld the state denial of DBE status.\textsuperscript{339} The DOT reasoned that minority status is only meant for people who “have been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members [sic] of groups and without regard to his or her individual qualities,” and that this did not include Taylor.\textsuperscript{340} Orion appealed to federal district court. The court, like the DOT, found that there was substantial evidence supporting the OMWBE’s decision.\textsuperscript{341}

Orion then appealed to the Ninth Circuit.\textsuperscript{342} Considering the statutory

\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{334} Id. at *7.
\textsuperscript{335} Id. at *9–10, *27.
\textsuperscript{336} Id. at *26–27.
\textsuperscript{337} Id. at *11.
\textsuperscript{338} Id.
\textsuperscript{339} Id. at *13–14.
\textsuperscript{340} Id. at *35–36.
\textsuperscript{341} Id. at *14.
\textsuperscript{342} See Orion Ins. Grp. v. Wash. State Off. of Minority & Women’s Bus. Enter., 754 F. App’x 556 (9th Cir. 2018).
and constitutional issues the case raises, the Ninth Circuit’s affirmation of
the district court was surprisingly conclusory: “OMWBE did not act in an
arbitrary and capricious manner when it determined it had a ‘well founded
reason’ to question Taylor’s membership claims and, after requesting
additional documentation from Taylor, determined that Taylor did not
qualify as a ‘socially and economically disadvantaged individual.’”

B. WHO QUALIFIES AS “HISPANIC” UNDER SBA RULES?

While the DOT’s DBE decisions and appeals database does not have
any discernable rulings on the issue of social and economic disadvantage,
the SBA’s database of hearings and appeals decisions does. The main
takeaway from the relevant cases is that different judges have interpreted
the SBA’s definitions and eligibility determination criteria for Hispanics in
contradictory ways.

In DCS Electronics, Inc., an ALJ upheld a hearing officer’s ruling
that a blonde-haired, light-skinned business owner who had undisputed
Hispanic (Spanish) ancestry and spoke Spanish was not Hispanic for the
purposes for SBA regulations. The hearing officer had found that she did
not identify as Hispanic, nor, given her non-Spanish maiden and married last
names, appearance, and accent, did others identify her as such. The ALJ
found that the hearing officer’s conclusion that she had not been denied
business opportunities as a “Hispanic” and therefore did not qualify for the
8(a) program was not arbitrary and capricious.

In a footnote in the decision, the judge noted that “the [SBA’s] regulations are not clear as to the
intended meaning of the term ‘Hispanic American,’ i.e., whether it includes
only Hispanics from this Continent.”

By contrast, in Rothschild-Lynn Legal & Financial Service, an ALJ
overturned a hearing officer’s ruling that a Sephardic Jew whose ancestors
had fled Spain centuries earlier was ineligible for certification as a Hispanic. The judge stated that the relevant statute presume

343. Id. at 558.
cy/office-hearings-appeals/oha-decisions [https://perma.cc/KW7E-PJGZ].
346. Id. at *4.
347. Id.
348. Id. at *4, *6.
349. Id. at *5 n.7.
351. Id. at *2, *5; see also Storer Broad. Co., 87 F.C.C.2d 190 (1981) (FCC accepting Sephardic
heritage as evidence of Hispanic status, though it was paired with much other evidence).
discrimination based on Hispanic status, so given that the applicant showed that he was of Spanish ancestry, the hearing officer erred in requiring him to also provide evidence that he had been discriminated against because of that ancestry.352

In *Garza Telecommunications, Inc.*,353 a hearing officer found two siblings whose mother is Hispanic to be white because their birth certificates stated that their color or race is white.354 On appeal, the ALJ reversed, chiding the SBA for erroneously assuming that someone in the white racial category could not belong to the Hispanic ethnic category.355 The judge concluded that “whether an individual is white, black, or any other race bears no relationship to his or her ethnicity.”356 The judge also ruled that because the SBA had found that the siblings’ mother was Hispanic, it should have necessarily found that they were also Hispanic.357

In 2016, the SBA issued new internal guidance regarding who qualifies as a member of a presumptively disadvantaged group. The guidance specifies that if the agency “has reason to question whether an individual holds himself or herself out as a member of a designated group,” it “may require the individual to provide credible evidence that the individual, in fact, holds himself or herself out as a member of the group and that others identify him or her as belonging to that group.”358 For example, the guidance states: (1) Individuals who claim disadvantaged status as Hispanic may establish their membership in that designated group by providing birth certificate showing race, membership cards to exclusive Hispanic groups, or other evidence. . . . An individual is not a member of a designated group merely because he or she was born in the particular region typically associated with members of that group.359

354. *Id.* at *7–8.
355. *Id.* at *6–8.
356. *Id.* at *7.
357. *Id.* at *8.
359. *Id.*
C. The Scope of “Hispanic” and “Oriental” Status Under State MBE Law

In *Marinelli Construction Corp. v. State*, an applicant for MBE certification in New York State appealed a denial of its application based on the owner’s asserted Hispanic origin. The owner’s father was born in Argentina and spoke Spanish, but the father’s birth certificate showed that the owner’s paternal grandparents were born in Italy. New York’s MBE certification program officer assumed that the applicant was of Hispanic descent. The relevant statute, however, required that he be of Hispanic “origin,” not descent. The program officer found that the applicant’s parents’ birthplace alone was not determinative of minority group membership. The New York Supreme Court (New York’s trial-level court) affirmed the program officer’s decision.

On appeal, an Appellate Division panel agreed that the state’s definition of Hispanic did not include those of European but not Spanish origin who had adopted Spanish culture. The court found that the applicant’s father’s birth certificate permitted the MBE certification program to reasonably infer that his grandparents were not Hispanics, but Italians living in Argentina. The court therefore affirmed the MBE certification program’s dismissal of the application.

In *Major Concrete Construction, Inc. v. County of Erie*, a New York appellate court upheld an administrative ruling that Vincent Ferraraccio, an applicant for MBE certification with the Erie/Buffalo Joint Certification Committee who was 25% Mexican, 25% Irish, and 50% Italian by descent, did not qualify as Hispanic. The local rule for “Hispanic status” was that an applicant must be “[a] person of Mexican, Puerto Rican, Central or South American or other Spanish culture, regardless of race.” The applicant claimed that he qualified as Hispanic because his grandmother was 100%...
Mexican. An administrative committee denied his application for Hispanic status because: (1) he was only 25% Mexican, (2) he kept no contact with the Hispanic community or its culture, and (3) neither he nor members of his family identified as Hispanic. A trial court reversed, but the appellate court reinstated the denial, finding that the decision was supported by a rational basis, which was all that was required under the relevant administrative law.

Ritchey Produce Co. v. State of Ohio Department of Administrative Services involved the Ritchey Produce Company, Inc., a company owned by Nadim F. Ritchey, a naturalized American citizen from Lebanon. Ohio had an MBE program that required that a certain percentage of contracts be set aside for “Blacks, American Indians, Hispanics and Orientals.” Ritchey applied his company for MBE certification as an “[O]riental-owned” company, while disclosing his place of birth as Lebanon and reporting that he was Lebanese. The state granted Ritchey MBE certification as an “[O]riental-owned” company and then recertified the company as “[O]riental-owned” for an additional three years.

In 1995, however, the state rejected further recertification of Ritchey Produce because, as a Lebanese-owned company, it did not qualify as “[O]riental-owned.” Ritchey requested a hearing, which resulted in a determination that he was not “Oriental” and that his company did not qualify as an “[O]riental-owned” company for purposes of Ohio’s MBE program. The director of the Department of Administrative services adopted the hearing examiner’s report and recommendation and refused to recertify the company. The company then appealed to a trial court.

The trial court found that Ritchey qualified as “Oriental” and that distinguishing between different parts of Asia in defining that term is...
arbitrary. The court concluded that it
can think of few things more repugnant to our constitutional system of
government than the construction of a statute that would exclude a group
of United States [sic] citizens and residents of Ohio from a State program,
the sole criterion for exclusion being the side of a river, a mountain range,
or a desert their ancestor decided to settle.385

On appeal to the Ohio Court of Appeals, the court found that, as applied,
Ohio’s law unconstitutionally excluded Ritchey Produce from qualifying
based on economic disadvantage, and the court did not reach the issue of
whether the company was “Oriental-owned.”386 A concurring judge argued
that Mr. Ritchey qualified as “[O]riental” and would have ruled in the
company’s favor on that basis.387

The state appealed to the Ohio Supreme Court, which reversed the
lower court’s ruling.388 The court acknowledged that the statute did not define the term “Oriental.”389 However, the court noted that the Ohio
administrative code defined “Orientals” to mean “all persons having origins
in any of the original people of the Far East, including China, Japan and
Southeast Asia.”390 The court added that the official who had denied the
company “Oriental” status had looked to a previous Ohio case that consulted
various dictionaries, and found that the geographic scope of the term
“Oriental” is limited to the Far East.391 The court therefore found that the
state was justified in excluding Ritchey from the class of “Orientals.”

An Ohio federal court later overturned the same state law racial
preferences upheld by the Ohio Supreme Court in Ritchey. The court
reasoned in part that “[t]he plaintiff in Ritchey Produce may be yet another
example of this kind of arbitrary concentration of set-aside selections...[H]e
could have kept that contract if he had been born in India
instead of Lebanon.”392

385. Ritchey Produce, 707 N.E.2d at 877–78 (quoting the magistrate).
387. He wrote,
The concept of “Orient” and “oriental” dates at least as far back as ancient Greece. The area to
the east of the Greek city-states was the “Orient.” The people who occupied that area were, by
definition, “oriental.” Since modern Lebanon is to the east of Greece, modern Lebanon is
situated in the area which traditionally was considered the Orient. Mr. Ritchey's ancestry would,
therefore, be from the Orient, qualifying him and his business for consideration as a Minority
Business Enterprise.
Id. at *8–9 (Tyack, J., concurring).
388. See Ritchey Produce, 707 N.E.2d at 871.
389. Id. at 926.
390. Id.
391. Id. at 926–27.
D. FCC INTERPRETATION OF “HISPANIC”393

Until the Supreme Court declared the policy unconstitutional, the FCC gave various preferences to potential licensees owned by minority groups. In several cases, the agency struggled with the scope of the category “Hispanic Surnamed” (the agency’s original category for those of Spanish descent) and later struggled with the scope of “Hispanic.”394

_In re Applications of Storer Broadcasting Co._395 involved the adjudication of claims that sellers of radio stations were entitled to tax credits for selling their stations to minority owners.396 In both cases, the buyers were asserted to be Hispanic but did not have Spanish surnames.

The first claim involved the Liberman family.397 Though the patriarch of the family, Adolfo Liberman, was born in Poland, the Libermsans claimed they were Hispanic because their ancestors were Spanish Jews who were expelled from Spain in 1492.398 Adolfo alleged that, in Poland, his family spoke “Castillian Spanish,” by which he presumably meant Ladino, the Castilian-based language of Sephardic Jews, at home.399

The family had an alternative claim to Hispanic status. Adolfo immigrated to Mexico in 1921 and then to Guatemala and Costa Rica.400 In each country, he and his wife had a son.401 Eventually, they all moved to the United States and became citizens, but continued to use Spanish in everyday conversation.402 The Libermsans also submitted letters from local businessmen and local government leaders supporting their representation that the community regarded the Liberman family as Hispanic.403

The second case involved the sale of a radio station to Oscar Luis Kramer, a Cuban-born American citizen.404 Kramer submitted evidence that he identified himself as Hispanic, and that he worked as the general manager of a “Hispanic-oriented radio station,” served as the president of the Hispanic

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395. _Id._ at 190–92.
396. _Id._ at 191–92.
397. _Id._
398. _Id._
399. _Id._ at 191–92.
400. _Id._
401. _Id._
402. _Id._
403. _Id._
404. _Id._ at 192.
division of the local Chamber of Commerce, and received the Seventh Day Adventist Church Award as Hispanic Citizen of the Year in 1979.\footnote{405}

As the controversy over the Libernans’ and Kramer’s Hispanic status was pending, the FCC announced that the agency’s “Spanish Surnamed” category was to be changed to “Hispanic” to reflect the standard classifications developed by the OMB.\footnote{406} In light of that change, the FCC concluded that the “Hispanic Surnamed” category includes anyone of Hispanic origin or culture and identification, regardless of surname.\footnote{407} This, the FCC found, included the Libernans and Kramer.

In \textit{In re Applications of Kist Corp.},\footnote{408} the FCC was faced with the question of whether hiring an employee of partial Hispanic descent qualified a radio station for a “minority enhancement credit.”\footnote{409} The person of interest in this case was W. Carlos O. Fox, whose claim to Hispanic status was that one of his grandparents was born in Cuba.\footnote{410}

Initially, an ALJ denied minority credit, finding that Fox (1) was not presumptively Hispanic because he did not have a Spanish surname, nor did his Cuban grandfather; (2) was not a fluent speaker of Spanish; (3) had only heard Spanish spoken occasionally in his home growing up; (4) had no connection with the local Riverside Hispanic community; (5) had a non-Hispanic mother; (6) was born in the United States, as were his parents; and (7) had no immediate relatives living outside of this country. Moreover, Mr. Fox did not belong to any Hispanic organizations in his community.\footnote{411}

On appeal, the FCC oddly neither affirmed nor denied Fox’s claim to Hispanic identity. The review panel decided to grant the station “a very slight enhancement for Fox’s (8.33\%) interest; the ALJ reasons for denying Fox’s claimed [Hispanic] status are not necessarily determinative.”\footnote{412} It’s hard to make heads or tails of this ruling beyond that the FCC seemed to conclude that Fox was sort of Hispanic—enough to get partial, but not full, credit.\footnote{413}

\footnote{405}{\textit{Id}.}
\footnote{406}{\textit{Id}.}
\footnote{407}{\textit{Id}.}
\footnote{408}{\textit{In re Kist Corp.}, 99 F.C.C.2d 201 (1983).}
\footnote{409}{\textit{Id}. at 248.}
\footnote{410}{\textit{Id}. at 216.}
\footnote{411}{\textit{Id}. at 248.}
\footnote{412}{\textit{Kist Corp.}, 99 F.C.C.2d 173, 193 (1984).}
\footnote{413}{\textit{Cf. Hispanic Keys Broad. Corp.}, 3 FCC Red. 3584, 3584 (1988) (offhandedly noting that two parties claimed Hispanic credit based on the Cuban origin of their mother and paternal grandmother, respectively).}
In *In re Applications of Lone Cypress Radio Associates, Inc.*, Highlands Broadcasting Co. sought credit as a minority broadcaster based on the claim that its owner, Gilbert F. Wisdom, qualified as Hispanic. According to Highlands’ filings with the FCC, Wisdom (1) was of one-eighth Mexican heritage by blood; (2) had functional (but not fluent) knowledge of the Spanish language; (3) co-owned a vacation home in Tijuana, Mexico with his ex-wife; and (4) had contributed to Mexican civic activities.

At a hearing on his claim to Hispanic status, Wisdom’s claim was rejected by an ALJ. The judge noted that Wisdom testified that his surname was not Hispanic, his Hispanic heritage was not evident from his appearance, he had no present affiliation with any Hispanic group or activity, and he did not read Hispanic periodicals or other such publications. Highlands also did not present any documentation to support Wisdom’s claim of Mexican Hispanic ancestry.

On appeal, the FCC review board affirmed. The board concluded that merely claiming Hispanic heritage and having marginal ties to Mexico and to the Spanish language is insufficient to prove Hispanic identity for FCC minority credit purposes. The FCC added that the result would be unchanged even if it credited Wisdom’s claim to be one-eighth Mexican, as while the Review Board “has credited proposals based on one-quarter Hispanic ancestry, we are unwilling, sua sponte, to extend this precedent to a much remoter one-eighth relation claim.”

The FCC also had occasion to reject a claim for a positive “minority enhancement credit” based on the Portuguese ancestry of one of the principals of a media company. “Portuguese descent is not the same as Hispanic,” the FCC ruled, “and persons of Portuguese descent are not entitled to any minority enhancement credit.” The FCC noted that it followed EEOC definitions in its employment rules, and the EEOC, following OMB Directive 15 guidelines, does not include people of

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415. *Id.* at 4406.
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* at 4407.
421. *Id.*
423. *Id.*
Portuguese descent in its definition of Hispanic.424

VI. ALLEGED ETHNIC FRAUD IN CLAIMING MINORITY STATUS FOR AFFIRMATIVE ACTION BENEFITS IN EMPLOYMENT

In addition to the MBE cases, administrators and judges have had to decide whether an individual is properly categorized as a member of an official minority group when that individual has claimed minority status to benefit from affirmative action preferences in employment. The most famous case is Malone v. Haley.425

Paul and Philip Malone were twin brothers from Milton, Massachusetts, who applied to be firefighters in Boston in 1975.426 On their employment application, they declared their race to be white.427 They did not achieve passing scores on the civil service exam and were rejected.428 That same year, the Boston fire department entered into a consent decree that provided a hiring preference for African Americans as part of a settlement of discrimination claims.429 In 1977, the Malone brothers again took the civil service exam, this time listing their race as Black. Their scores were too low to be accepted as firefighters if they had been white but met a lower threshold for Black applicants under the consent decree.430

In 1988, the fire department’s Commissioner, Leo Stapleton, informed the personnel administrator that he had reason to believe that the Malones had falsely claimed minority status.431 Stapleton noticed that Philip Malone

424. Id.
427. Id. at 151 n.3.
428. Id.
429. Id. at 152.
430. Id. at 151 n.3.
431. Id. at 151.
was listed as a Black candidate in his promotion to Lieutenant.\textsuperscript{432} Stapleton, having interacted with the brothers and always perceived them to be white, called each one into his office individually.\textsuperscript{433} Paul told Stapleton that his father was Black while Philip replied that someone in the family was Black but he didn’t remember who.\textsuperscript{434} As a result of this discrepancy in their stories, Boston undertook a citywide investigation of possible identity fraud in the fire department, the police force, and the school system.\textsuperscript{435} Claims of Hispanic status received particular scrutiny.\textsuperscript{436} Ultimately, several firefighters and teachers were penalized for falsely representing their race or ethnicity to benefit from affirmative action policies.\textsuperscript{437}

Meanwhile, the personnel administrator commenced proceedings against the Malones, accusing them of knowingly making a material false statement in their application for their positions when they listed themselves as Black.\textsuperscript{438} It was undisputed that, at the time the Malones claimed minority status, the Department of Personnel Administration had no published or public criteria for determining racial identification.\textsuperscript{439} The brothers argued that the designation of ethnic status at the time was made by self-identification and that no one independently verified ethnic status.\textsuperscript{440} Given that, the Malones could have, but did not, argue that in the absence of a statutory or regulatory definition of race, they did not make a false statement; the form only asked them how they self-identified, and they chose to identify themselves as Black. Instead, the Malones argued that the relevant standard was whether they had a good faith belief that they were entitled to claim Black ethnic status.\textsuperscript{441}

The hearing examiner applied a more liberal standard.\textsuperscript{442} The Malones could defeat the racial fraud charge and keep their jobs if they could establish either (1) that they met one of three objective criteria for being Black or

\begin{itemize}
\item \textsuperscript{433} Id. at 1016.
\item \textsuperscript{434} Id. at 1034–35.
\item \textsuperscript{435} Catherine R. Squires, Dispatches from the Color Line: The Press and Multiracial America 83–84 (2007).
\item \textsuperscript{436} Id.
\item \textsuperscript{437} Id.
\item \textsuperscript{439} Id.
\item \textsuperscript{440} Id. at 1028.
\item \textsuperscript{441} Id.
\item \textsuperscript{442} Id.
\end{itemize}
(2) that they had a good faith belief that they could claim Black status. The administrator applied the following three criteria to determine whether the Malones were objectively Black: (1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, that established Black ancestry; or (3) by evidence that they or their families held themselves out to be Black or were considered to be Black by the community.

The hearing examiner found that both men had fair skin, fair hair coloring, and Caucasian facial features, and concluded that “they do not appear to be black.” At the hearing, Philip Malone acknowledged that he was light-skinned and didn’t look Black. The examiner also concluded that the birth certificates presented as evidence showed that the Malones, their parents, and both sets of grandparents had been identified as white. The Malones’ only contrary evidence was an unauthenticated photograph of a Black woman whom they claimed to be their great-grandmother and whose existence they discovered only in 1976. The hearing officer did not credit their claim that this was their great-grandmother and also found that the race of the woman in the photograph was not clear. Finally, the hearing officer found that there was no evidence that the Malones had identified themselves or were identified by others as Black, except in the context of their job application. Among other things, neither Malone had joined the Vulcan Society, an organization for minority firefighters.

In rejecting the brothers’ claim to good faith, the hearing officer found that even if one credited their story about discovering a possibly Black ancestor in 1976, the brothers made no effort to verify their ancestry. They also never inquired as to what standards existed for asserting minority status. When Philip filled out the department’s personnel survey form the day he started work, he left the part of the form that inquired as to the source of a claim of minority status blank. When Paul filled out the form, he indicated that his father was Black.

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443. Id. at 1028–29.
444. Id.
445. Id. at 1030.
446. Id. at 1030–31.
447. Id. at 1031.
448. Id. at 1032.
449. Id.
450. Id. at 1032–33.
451. Id. at 1033–34.
452. Id.
453. Id. at 1034.
454. Id. at 1035.
Based on this evidence, the hearing officer found that the Malone brothers were neither objectively Black nor did they have a good-faith belief that they were entitled to claim status as Black people.\(^{455}\) He therefore ruled against them, and the Malone brothers lost their jobs.\(^{456}\) The brothers appealed to the Superior Court, which found that there was substantial evidence to support the administrator’s finding that they did not “claim to be Black in good faith and with a reasonable basis.”\(^{457}\) The court accepted the administrator’s test of Blackness as “a workable one for determining a claim of racial identity.”\(^{458}\)

As the Malone brothers’ case gained publicity, “David Cortiella, the policy director for [Boston] Mayor Raymond L. Flynn, said he thought affirmative action ‘should embrace all poor people—black, Hispanic, Asian and white.’ ‘But the courts don’t,’ he added.’”\(^{459}\) Boston’s affirmative action plan, which Mr. Cortiella drew up in 1986, applied to Black and Hispanic civil service applicants.\(^{460}\) It provided a similar standard to that applied by the hearing examiner in *Malone*: whether someone was Black was determined by “visual observation,” “community recognition,” or documentary evidence, “such as a birth certificate.”\(^{461}\) A person was designated Hispanic if he or she was born in a Spanish-speaking country or raised in a Spanish-speaking household.\(^{462}\) Meanwhile, city officials, acting on tips from city workers, undertook fraud investigations of thirteen firefighters who had self-identified as “Hispanic.”\(^{463}\) Five of the thirteen were determined to be non-Hispanic whites and were fired, including Edward P. Kenney, the son of the Deputy Fire Chief.\(^{464}\)

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455. *Id.* at 1036.
456. *Id.*
457. *Id.* at 1035.
458. *Id.* at 1029. An oddity of the *Malone* case is that no one cited the official Massachusetts state personnel guide, which listed the following definition for “Black”: “[a]ll persons having origins in any of the Black racial groups of Africa.” BUREAU OF LOCAL GOV’T SERVS., THE COMMONWEALTH OF MASS., DEP’T OF PERS. ADMIN. DIV. OF INFO. SERVS., A GUIDE TO CIVIL SERVICE PERSONNEL TRANSACTIONS app. § 35, at 22 (1988). https://archive.org/details/guidetocivilserv00mass [https://perma.cc/T66Y-WP26]. There was no requirement that a person needed to hold himself or herself out as Black to be considered Black under state policy; the state had instead adopted what appears to be the equivalent of a one-drop rule: that any African ancestry was sufficient to make one “Black” for personnel purposes. For unknown reasons, this was ignored throughout the case and its appeals, with the administrator’s idiosyncratic definition of Blackness relied upon instead.
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.*
A similar controversy to the Malone saga erupted in the San Francisco Fire Department. Around 1975, Thomas Santoro, known to his friends and colleagues as an Italian American, changed his ethnic designation with the Fire Department to Hispanic. In the summer of 1990, a Mexican American colleague, Peter Roybal, overheard fire department captains talking about how Santoro, who was taking an exam to qualify for battalion chief, was listed as Hispanic. According to Roybal’s account, he thought to himself, “Bull, this man has been a proud, loud Genoese Italian with no connection to the Hispanic community. . . . I had to do something.” Roybal tracked down Santoro’s birth certificate, which said that his father was born in Italy and his mother in Hayward, California.

When fire department officials inquired, Santoro told them that his mother was born in Mexico. He did not have her birth certificate, but produced a baptismal certificate stating that his mother, Josephine Ann Colla, had been born in Mexico and baptized a few days later in Hayward. The persistent Roybal, however, located a birth certificate stating that she was born in Hayward. At a Civil Service Commission hearing, Santoro claimed that the California birth certificate was not his mother’s. The Commission was not persuaded and ruled that his ethnicity would be changed from Hispanic to white. The Commission also launched an investigation to see if he had engaged in fraud, though no further action seems to have been taken. Some of his colleagues started referring to him as Tom Sancholo—“cholo being Spanish slang for a stereotypical low-rider Latin street dude.”

465. Charles McCoy, Taking Advantage: Some Pose as Members of Minority Groups to Promote Careers, WALL ST. J., Feb. 12, 1991, at A3. Less information is available about a related controversy in New York City. The New York Times reported that some police officers who had checked the “white” box when hired sought to change their status to Hispanic because it improved their prospects for promotion. The police department refused to divulge how it would adjudicate the change requests, but stated that the officers needed to present proof of ethnicity that met federal EEOC standards and that birth certificates and parents’ birth records would be among the evidence considered. Elizabeth Kolbert, White Officers Seek Minority Status, N.Y. TIMES, Dec. 6, 1985, at B16.

466. McCoy, supra note 465.
467. Id.
468. Id.
469. Id.
470. Id.
471. Id.
472. Id.
473. Id.
474. Id.
475. Id.
476. Id.
Roybal also complained about another firefighter, Lawrence Giovacchini, a lieutenant who, after seventeen years in the department, petitioned to change his official ethnic status to Hispanic.\footnote{477}{Id.} Giovacchini’s petition was granted because he proved that while his father’s ancestors were Italian, his mother’s parents were born in Spain.\footnote{478}{Id.} He also noted that his family had a subscription to a Spanish-language monthly.\footnote{479}{Id.} According to Roybal, “Larry Giovacchini, many times, to my face, has called me a ‘beaner.’”\footnote{480}{Id.} Another Mexican American firefighter added, “[a]ll his life he calls himself a proud Italian, he calls us beaners, and suddenly he decides he wants to be a beaner himself.”\footnote{481}{Id.} “For someone to be an Italian for 40 years and then become a Latino in the 41st year is blatant opportunism,” added Roybal.\footnote{482}{Id.} Giovacchini denied using the ethnic slur but was otherwise unapologetic, saying, “[i]f the city wants to give me an advantage for being Hispanic, fine.”\footnote{483}{Id.} An additional controversy in the San Francisco Fire Department involved Captain Alberto Da Cunha, whose parents were white, Portuguese residents of the Portuguese colony of Macao in Asia.\footnote{484}{Id.} San Francisco did not recognize people of Portuguese descent as Hispanic, so Da Cunha was classified as white.\footnote{485}{Id.} In 1988, he applied to have his ethnic status switched to Asian.\footnote{486}{Id.} After initial acceptance by his superiors, the Civil Service Commission rejected the application.\footnote{487}{Id.} According to Da Cunha, “At the time, there were few minorities at the top . . . I figured I’d let somebody else decide if I was a minority or not.”\footnote{488}{Id.} He claimed that his peers and bosses encouraged him because claiming minority status would “make the ethnic balance of the captains look better.”\footnote{489}{Id.}

Meanwhile, firefighter Jim Quinones alleged he was mistakenly
classified as white instead of Latino and should have received a boost when he took the lieutenant’s exam. Another firefighter, Frank Martin, discovered after he took the exam that he was registered as white, even though he had identified himself as Hispanic and was of Salvadoran and Costa Rican heritage.

Another affirmative action case, Lagrua v. Ward, involved the question of whether an individual with Gibraltarian ancestry could claim Hispanic status. Lagrua involved a New York police officer who, to benefit from affirmative action, sought to change his ethnic classification with the police department from white to Hispanic. To substantiate his claim of Hispanic identity, Lagrua asserted that his mother was born in Gibraltar and that her parents’ grandparents were of Spanish origin. He also noted that he had joined the Police Department’s Hispanic Society. The officer in charge of such things could not substantiate that Lagrua had ever been a member of the society. Moreover, though originally part of Spain, “Gibraltar is and has been under British rule since 1718; the culture there is mixed, the official language is English and the law is based on English common law. Although Spanish is widely spoken, the Gibraltarian way of life is predominantly British.” The Department therefore determined that Lagrua was not Hispanic, a conclusion accepted by the police department’s equal opportunity office. On appeal to the New York Supreme Court, the court concluded that this decision was not erroneous, and therefore ruled that Lagrua would remain classified as white.

Blake v. Sanchez involved a New York City police officer, George Sanchez, who had classified himself as Hispanic when hired by the police department. His parents were Black Jamaicans who had moved to Costa Rica before his birth. He spoke fluent Spanish and was a member of both the Hispanic and Black police officer organizations. He took an exam for

491. Id.
493. Id. at 99.
494. See id.
495. Id.
496. Id.
497. Id.
498. Id.
499. Id.
501. Id. at 332.
502. Id. at 333.
503. Id.
promotion and scored high enough to be promoted if he were classified as Black, but not Hispanic. The Deputy Police Commissioner for Equal Opportunity denied this request because “no mistake in his current (self) classification” had been found, and he appealed.

The court found that when a police officer is a member of two different racial/ethnic groups, the department allows the officer to choose his classification when hired. The court declined to rule on the merits of the department’s policy of requiring that the initial self-classification be retained by an officer because, the court ruled, Sanchez’s petition would need to be rejected under the specific facts of this case.

United States v. Brennan involved a settlement of a class action discrimination claim. As part of the settlement, the defendants agreed to give preferential benefits to members of certain minority groups, including Hispanics. An intervenor objected on various grounds, including the argument that four of the “Hispanic” beneficiaries, despite having Hispanic ancestry, did not qualify as Hispanic because of a lack of cultural ties to the Hispanic community.

When the dispute reached the federal courts, a district court judge, relying on the EEOC’s definition of national-origin discrimination, held that “an ancestral place of origin is sufficient to establish membership in a protected class.” Given that each of the four beneficiaries had ancestors from Spanish-speaking countries, they qualified as Hispanics.

504. Id.
505. Id.
506. Id. at 333.
507. Id.
508. Id. (“Petitioner repeated the Hispanic self-classification ten years after his initial designation and such was in connection with the very promotional test from which he now seeks to derive benefit. Under the provisions of the settlement agreement approved by the Federal Court, the designations of those taking the promotional tests were utilized to determine the ratio of additional black and Hispanic applicants to be promoted and therefore, the respective eligibility cutoff scores. Thus, petitioner’s 1983 self-classification as Hispanic was part of the very process whose result he now seeks to avoid. In these circumstances, respondents’ refusal to grant reclassification was necessary to protect the integrity of the administrative process, including the implementation of the Court-approved settlement with respect to the promotional tests.”).
510. Id. at 70.
511. Id.
512. Id. at 134.
513. Id. at 84 (quoting U.S. v. N.Y. City Bd. of Educ., 448 F. Supp. 2d 397, 422 (E.D.N.Y. 2006)).
514. N.Y. City Bd. of Educ., 448 F. Supp. 2d at 422–23 (“LaFaye, Lopez and the Pantelides brothers—do qualify because LaFaye’s father and the Pantelides’ mother were born in Puerto Rico, and
The intervenor appealed that decision, but only concerning two sibling beneficiaries whose mother was born in Puerto Rico. The Second Circuit upheld the district court ruling, finding that the siblings’ Puerto Rican ancestry was sufficient to deem them Hispanic and thus allow them to benefit from the settlement.515

VII. OTHER RACE DETERMINATION CASES

Another major category of race determination cases involves the question of who is an “Indian” under various federal laws for which Native American status is relevant.516 This complicated topic deserves more attention than can be provided in this Article. The author plans to address it in a forthcoming book.

CONCLUSION

As this Article has shown, most of the official decisions surrounding the construction of racial and ethnic groups for data collection and affirmative action purposes were made behind closed doors in the federal bureaucracy.517 The few records that exist suggest that (1) even the bureaucrats who made the decisions were unable to articulate why certain groups were included and others were not, or why they included or excluded groups with particular cultural backgrounds or countries of origin.518

Lopez’s grandfather was born in Mexico."

515. Brennan, 650 F.3d at 134.
516. The general rule is that one must be a member of a federally recognized tribe, but there are many exceptions to that rule. See, e.g., supra note 24. Courts have deemed tribal membership to be a political, but not racial, category, yet many statutes rely implicitly or explicitly on the extent of “Indian” “blood” or ancestry that one has to determine such membership, making the category racial.
517. La Noue & Sullivan, supra note 51, at 71.
518. The starkest criticism in a judicial opinion of government officials’ inability to articulate the criteria for their classification scheme came from the district court in the Grutter case that eventually reached the Supreme Court:

[T]here is no logical basis for the law school to have chosen the particular racial groups which receive special attention under the current admissions policy. . . . Certainly, other groups have also been subjected to discrimination, such as Arabs and southern and eastern Europeans to name but a few, yet the court heard nothing to suggest that the law school has concerned itself as to whether members of these groups are represented “in meaningful numbers.” No satisfactory explanation was offered for distinguishing between Puerto Ricans who were raised on the U.S. mainland from Puerto Ricans who were raised in Puerto Rico or elsewhere. No satisfactory explanation was offered for singling out Mexican Americans but, by implication, excluding from special consideration Hispanics who originate from countries other than Mexico. A special “commitment” is made to African Americans, but apparently none is made to blacks from other parts of the world. . . . If the law school may single out these racial groups for a special commitment today, there is nothing to prevent it from enlarging, reducing, or shifting its list of preferred groups tomorrow without any reasoned basis or logical stopping point.

(2) political forces, including the lobbying efforts of ethnic or cultural groups, as well as politicians’ desires to gain support from those groups, and political opposition to including non-Hispanic white ethnic groups, influenced which groups were included and excluded;\(^5\) (3) the sordid past of racial classifications in the United States influenced the formation of these categories (for example, the scope of the “Asian” category mimics the distinctions made in U.S. immigration and naturalization law throughout the 1950s, in which Arabs, Persians, and Armenians—all from Asia—were deemed white, but anyone from India and eastwards in Asia was deemed non-white);\(^6\) and (4) groups deemed minorities for data collection purposes were also later deemed minorities for affirmative-action-in-contracting purposes, with little or no consideration given to whether the categories should be identical.\(^7\)

The racial and ethnic categories used by the government for both civil rights enforcement and affirmative action purposes grew from programs and policies established primarily—though not exclusively—to assist African Americans overcome the legacy of slavery, Jim Crow, and persistent segregation and discrimination. Other groups, including Asians, Hispanics, and Native Americans, were included in the relevant rules haphazardly—primarily by analogy to the racial discrimination faced by African Americans.\(^8\)

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\(^5\) La Noue & Sullivan, supra note 126, at 125–52; Pager, supra note 38, at 316 (“Categories concocted without much thought were politically manipulated and expanded through dubious exercises in armchair ethnography, then blindly replicated and defended by entrenched interest groups.”).


\(^7\) Graham, supra note 71, at 289 (“[N]one of the career civil servants and appointed officials who shaped the outcomes had any awareness that they were sorting out winners and losers in a process that, by the end of the century, would grant preference in jobs, government contracts, and university admissions to government-designated official minorities . . . .”).

There was also no consideration given in the context of diversity to the possibility that “[a]n individual who has every right to protection against discrimination on the basis of his or her involuntary classification as a member of a historically disadvantaged color group may have no interest whatsoever in the culture popularly associated with the group.” DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 180 (2d ed. 2000).

\(^8\) Graham, supra note 71, at 289 (“The way official minorities were designated is one shaped not only by the country’s history of past discrimination but also by the vagaries of chance, historical accident, logical contradiction, and inadvertence.”).

Victoria Hattam has a somewhat more sanguine take, arguing that “federal bureaucrats codified prevailing social expectations as to who had suffered during the history of American racial domination.” Victoria Hattam, The 1964 Civil Rights Act: Narrating the Past, Authorizing the Future, 18 STUD. AM. POL. DEV. 60, 68 (2004). A counterpoint is that it’s far from clear that certain Hispanic subgroups suffered more historically than certain “white” ethnic groups. Also, the categories have not adjusted with immigration, with certain groups being mostly composed of post-1965 immigrants and their descendants,
When these other groups were small, their inclusion received little notice and attracted little controversy. Today, however, African American descendants of enslaved Americans, the original primary intended beneficiaries of the relevant laws and regulations, are a decreasing minority of those covered by the relevant rules, dwarfed demographically by the combined population of Hispanics, Asian Americans, Native Americans, and Black immigrants from Africa and the Caribbean and their descendants.523

Interracial marriage rates among the former three groups, meanwhile, are much higher than among African Americans. Given that under current rules, anyone with Asian or Hispanic ancestry or inherited tribal membership can claim membership in a designated minority group, the percentage of non-African Americans who will be the beneficiaries of programs created primarily to assist African Americans will continue to grow. This raises the question, avoided in almost all of the literature on affirmative action, of whether making groups other than African Americans eligible for affirmative action programs is diluting their benefits to the original intended beneficiaries.524 It also raises the question as to whether affirmative action would be more popular if it were more narrowly focused; Americans who

whose ancestors weren’t around to have “suffered during the history of American racial domination.” See Graham, supra note 71; John D. Skrentny, Affirmative Action and New Demographic Realities, CHRON. HIGHER EDUC. (Feb. 16, 2001), https://www.chronicle.com/article/affirmative-action-and-new-demo graphic-realities/?cid=gen_login_refresh&cid=gen_sign_in (noting that the recompense-for-historical-discrimination argument “has new challenges when applied to people who arrived in the United States after passage of the Civil Rights Act of 1964 — Sri Lankans, Vietnamese, Colombians, to name only a few”).

523. Cf. Peter Skerry, Borders and Quotas: Immigration and the Affirmative-Action State, 96 PUB. INT. 86, 88 (1989) (“It is a historical accident that the groups that received distinctive protection under civil-rights legislation and judicial rulings were shortly to expand greatly through immigration . . . .”).

524. A few authors have addressed the issue. See Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? Assimilation and the Mexican-American Experience, 10 LA RAZA L.J. 173, 212 (1998) (“[I]nequities arguably result when Latino immigrants are eligible for affirmative action programs designed to remedy pervasive systemic discrimination against African-Americans.”); Skrentny, supra note 522 (“[E]ven while most Americans believe that affirmative action is designed to compensate black people for years of slavery and segregation, it is increasingly becoming a policy for immigrants and the children of immigrants.”); Nathan Glazer, Debate on Aliens Flares Beyond the Melting Pot, N.Y. TIMES, Apr. 23, 1995, at 3 (“One thing that might be done immediately, however the affirmative action debate comes out, is to remove immigrants from affirmative action protection. . . . Affirmative action was intended for our own native racial problem, not for immigrants, who now make up a large share of those entitled to its benefits.”).

To take one particularly stark example, companies owned by the Rodriguez brothers, who were immigrants from Portugal, won 80% of the District of Columbia’s minority set-aside contracts from 1986 to 1990 at a time when a majority of the District’s population was African American. Howard Schneider & James Ragland, 4 Dominated D.C. Minority Contracting: 80% of Street Work Won in Four Years, WASH. POST, June 1, 1992, at A1. See generally Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 737 (6th Cir. 2000) (criticizing Ohio for lumping together in its MBE program African Americans and other minority groups that did not have a similar history of discrimination in Ohio).
might be sympathetic to affirmative action for African Americans given their unique history may be nonplussed when they see a white Spaniard receive a contracting or university admissions preference.  

On that point, even if one believes that affirmative action should apply to all “people of color,” migrating the Hispanic category from antidiscrimination enforcement to ethnic preferences is problematic. If “Hispanic” people are often subject to employment discrimination because people perceive them to be non-white, then it makes sense to collect general statistics that could help shed light on such discrimination, even if a minority of Hispanics will typically be perceived as white and thus not subject to that discrimination, or at least subject to much less of it. Using the same category for affirmative action purposes, however, means that “white Hispanics”—fair-skinned Latin Americans of primarily European descent, Portuguese and Spanish immigrants, Ashkenazic Jews, and others of European origin—will get a hugely disproportionate share of the benefits of affirmative action, because they will be best-placed, economically and culturally, to take advantage of educational and economic opportunities. Thus initiatives meant to increase the representation of “people of color” will give an arbitrary advantage to white people who happen to have Spanish- or Portuguese-speaking ancestry. There is a special irony in the fact that Latin American societies have more than their fair share of racism and racial inequality, but white Latinos become “disadvantaged minorities” eligible for affirmative action when they move to the United States—even if they were members of the social and economic European-descended elite that enforces a racial hierarchy in their home countries.

Meanwhile, the boundaries of the relevant racial/ethnic categories, and their policing by administrative agencies and the courts, raise interesting questions regarding identity. Americans rarely police, or desire to police, their fellow citizens who self-identify as members of a racial or ethnic minority group. That does not, however, resolve the question as to whether, as a legal matter, with a limited pool of affirmative action benefits at stake, it makes sense to deem anyone with any Hispanic, African, or Asian heritage, or with inherited tribal membership, to be a member of a “minority” group if that person so self-identifies, even if they have a Caucasian appearance, have a European-sounding last name, and in many cases consider themselves


to be white in contexts other than the minority certification process.\textsuperscript{527}

This raises the related constitutional question as to whether some or all governmental designations of minority status for affirmative action purposes are consistent with equal protection principles, or whether they constitute arbitrary classifications that may fail whatever test the courts choose to apply to the imposition of such standards.\textsuperscript{528} Courts thus far have been quite deferential in allowing government entities to dictate the scope and content of racial and ethnic categories. However, the Supreme Court and almost all state supreme courts have yet to weigh in on whether, for example, the government may, consistent with the Constitution, include Filipinos and Mongolians in the same category despite their vast differences, or include members of a particular ethnic group in the “Asian” category if they happen to have been born in Pakistan, but exclude their cousins born across the border in Afghanistan.\textsuperscript{529} Courts might be especially troubled that the Asian American category seems to match the pseudo-racial and pseudo-anthropological categories used to exclude Asians from immigration and citizenship earlier in United States history.

Similarly, the question of whether there is a non-arbitrary way of defining “Hispanic” is unresolved.\textsuperscript{530} Is there a non-arbitrary, constitutionally acceptable reason why people of purely European origin who happen to have Spanish-speaking ancestry should be members of an official minority category benefitting from affirmative action programs?\textsuperscript{531}


\textsuperscript{528} See Peter H. Schuck, \textit{Diversity in America: Keeping Government at a Safe Distance} 164 (2003) (stating that the judgments made in determining affirmative action categories are, by their nature, “almost comically arbitrary”); Michael Omi, \textit{Racial Identity and the State: The Dilemmas of Classification}, 15 Law & Ineq. 7, 16 (1997) (“From birth to death, current systems of racial classification are arbitrary and inconsistent.”).


\textsuperscript{530} See Concrete Works of Colo., Inc. v. City & County of Denver, 86 F. Supp. 2d 1042, 1069 (D. Colo. 2000) (“[T]here 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.”), rev’d, 321 F.3d 950 (10th Cir. 2003).

\textsuperscript{531} See David E. Hayes-Bautista, \textit{Identifying “Hispanic” Populations: The Influence of Research Methodology upon Public Policy}, 70 Am. J. Pub. Health 353, 355 (1980) (“Spain is a European country and its inhabitants are white people of European stock. No Spaniard has ever suffered undue discrimination, either in Latin America or in the United States. Raza, be they Chicanos, Mexicans, Puerto Ricans, etc., have not been denied access to social benefits because they might have had a distant Spanish ancestor [sic]: discrimination has been suffered because Raza are of Indian descent.”); Forbes, \textit{supra} note 42, at 66 (“[I]t serves no useful purpose whatsoever to include European (white) Spaniards as a part of a target population whose economic conditions supposedly need improvement.”).
The scope of this category raises both constitutional and policy questions. Are Argentines of Italian descent properly included? Descendants of German refugees from Nazism whose ancestors stopped off for a generation in Cuba on their ultimate path to the United States? Descendants of German Nazis whose ancestors fled Germany after World War II for South America on their ultimate path to the United States? Sephardic Jews whose ancestors spoke Ladino generations ago, but whose families have not lived in a Spanish-speaking country for as many as five hundred and twenty-eight years?

Relatedly, courts have yet to coherently deal with the practical and constitutional questions surrounding government policing of racial and ethnic identification. For example, government regulations typically define African Americans as being individuals of Black African origin. With the rise of DNA testing, can an individual claim an African American identity based on newly discovered African ancestry? To the extent that the Hispanic category is defined by ancestry, is there any limit to how many generations back an individual can go to find a Spanish or Portuguese ancestor to claim such an identity for legal purposes? Is it proper for states to delegate such decisions to a private organization such as the NMSDC? For that matter, is it constitutional for the government to dictate whether someone is or is not a member of a particular racial or ethnic group, given the widespread belief that such categories are artificially constructed and arbitrary, and given the inherent dangers involved in having the government make official racial and ethnic designations that confer or deny benefits?

There are three possible general ways of dealing with such questions. One possibility is to almost entirely ignore them, accept the current categories and their scope as a given, and rely primarily on individuals’ self-identification in policing membership. That is the status quo. This seems

532. See supra notes 360–69 and accompanying text (discussing a case in which a court held that such individuals are not “Hispanic” for purposes of New York State MBE law).

533. See CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE 174 (2003); Skrentny, supra note 522 (“How can it be clear exactly how much minority ancestry one has to have to contribute to ‘diversity’ or otherwise qualify for affirmative-action preferences?”).

One can also question why Portuguese are sometimes included in the “Hispanic” category to begin with, given that only 3% of immigrants from Brazil and 1% of immigrants from Portugal self-identify as Hispanic, compared to, for example, 99% of immigrants from Mexico. Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, Who Is Hispanic?, PEW RES. CTR. (Sep. 15, 2020), https://www.pewresearch.org/fact-tank/2019/11/11/who-is-hispanic [https://perma.cc/RR82-78SN].

534. Christopher A. Ford, Administering Identity: The Determination of “Race” in Race-Conscious Law, 82 CALIF. L. REV. 1231, 1283–84 (1994) (“[R]ace classification is a type of necessary decisionmaking that is most conveniently done in the shadows, so as to allow us more easily to pretend it really isn’t happening.”); Randall Kennedy, Racial Passing, 62 OHIO ST. L.J. 1145, 1191–93 (2001)
unsustainable, given that the percentage of Americans who can legitimately claim “minority” status under current rules\textsuperscript{535} will soon be well over a majority of the population, rendering the promised benefits of such status increasingly moot.\textsuperscript{536}

The second possibility is to eliminate official racial and ethnic categories, with only narrow exceptions for matters like health research. The late Justice Antonin Scalia, for one, was inclined toward this position.\textsuperscript{537} Any such move by the courts would meet with strong resistance from the political, legal, and business establishments, which are institutionally committed to retaining something resembling the status quo, and in particular are committed to using affirmative action to redress discrimination against African Americans.

A third possibility is to limit minority status to members of recognized Native American tribes who live on reservations and to documented descendants of American slaves who identify as African American.\textsuperscript{538} This option has several advantages. First, these are the two groups that by far have suffered the most from state and private violence and exclusion. Limiting the benefits of official minority status to these groups is most consistent with the original remedial purpose of affirmative action programs and is the easiest

(agreeing that individuals’ self-identification should be respected by the government).

\textsuperscript{535} As Judge Danny Boggs has noted, “race and ethnicity are [typically] considered on an ‘all or nothing’ basis.” Grutter v. Bollinger, 288 F.3d 732, 793 (6th Cir. 2002) (Boggs, J., dissenting), aff’d, 539 U.S. 306 (2003). Someone who is only one-eighth Asian but identifies as Asian is counted the same as someone whose known ancestry is entirely of Asian descent.

\textsuperscript{536} Ford, supra note 533, at 1284 (“If we are serious about writing laws and regulations tying benefits to racial or ethnic categorization, it may no longer be possible to avoid taking a hard look at the processes by which we define groups and draw lines between rival claimants.”).

\textsuperscript{537} “In the eyes of government, we are just one race here. It is American.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); see also Metro Broad., Inc. v. FCC, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (“I agree that ‘the very attempt to define with precision a beneficiary’s qualifying racial characteristics is repugnant to our constitutional ideals.’ ”) (quoting Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting)); DeFunis v. Odegaard, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting) (“There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.”).

\textsuperscript{538} Along similar lines, it has very recently become fashionable in progressive political circles to use the acronym BIPOC, which stands for either Black [or] Indigenous People of Color or Black, Indigenous, [or other] People of Color. The former version excludes Hispanics and Asians; the latter version includes all “people of color,” but prioritizes African Americans and Native Americans as the most significant groups in terms of a history of oppression with modern ramifications. It has also recently become common for activists to speak of anti-Blackness, rather than racism, again to prioritize the African American experience, as the Black Lives Matter movement also does.
to justify from a moral and political perspective. Second, each category has objective, definable boundaries, thereby limiting the arbitrariness and other problems noted above. Third, to the extent that the government defining people by race or ethnicity raises constitutional, ethical, or practical concerns, neither descent from American slaves nor membership in a Native American tribe and residence on a Native American reservation is a racial category, as such. Rather, each category is defined by specific, historical legal status, and relying on these categories would get the government out of the troubling practice of determining individuals’ racial identity. This solution seems unlikely to be implemented, however, as experience around the world shows that affirmative action categories almost always expand rather than contract.

The purpose of this Article is to raise, not resolve, such issues in the mind of the reader. Despite the incredible amount of ink—and bytes—that have been spent on discussions of race and ethnicity in the United States in general, particularly in the context of antidiscrimination and affirmative action policies, there is almost no discussion of how the official categories we use arose, whether those categories are coherent and useful, and how membership in those categories is defined and enforced. With the percentage of Americans who can claim membership in one of the minority categories soon to be over 50% and growing dramatically, it would be better for

539. See KENNETH PREWITT, WHAT IS YOUR RACE?: THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS 102 (2013) (“Obscured under the people-of-color construction were the unique circumstances of two unique groups: African Americans—a people who experienced two centuries of enslavement and then another century of apartheid and one-drop laws carried out under explicit constitutional authority; and American Indians, victims of genocidal wars and the forced removal from their homelands.”); Lind, supra note 40 (“Programs like affirmative action and minority business set-asides, originally designed to help the descendants of American slaves, lost all moral credibility when they were opened up to white women and recent Hispanic and Asian immigrants, notwithstanding the feeble ‘diversity’ rationale that America’s white oligarchy invented to rationalize them.”).

540. The Supreme Court has consistently held that the category of “Indian” itself is a political, not racial, classification. See, e.g., United States v. Antelope, 430 U.S. 641, 645 (1977); Morton v. Mancari, 417 U.S. 535, 553–54 (1974).


542. It may be true already. Many Americans have distant African, Native American, or Hispanic heritage, and do not identify as such for census and other purposes, but could claim membership in the relevant group if they chose. One study, for example, shows that only 21.4% of individuals with Mexican ancestry on only one side of their family identify as Hispanic on the census, and only 5.6% of individuals whose most recent ancestor who immigrated from a Spanish-speaking country immigrated five generations ago self-identify as Hispanic. Brian Duncan & Stephan J. Trejo, Ethnic Identification, Intermarriage, and Unmeasured Progress by Mexican Americans, in MEXICAN IMMIGRATION TO THE UNITED STATES 229, 235 (George J. Borjas ed., 2d ed. 2007). Another study suggests that one in twenty
Americans to confront the questions raised by the relevant categories sooner rather than later.